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VOLUME XIX

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VIII

CONTAINING

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REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1854-57. By EDMUND
F. MOORE, Barrister-at-Law. Vol. VI.

SREEMUTTY RABUTTY DOSSEE,—*Appellant*; SIBCHUNDER MULLICK,—
Respondent * [Feb. 11, 14, 1854.]

On appeal from the Supreme Court at Calcutta.

A deed of arrangement and release in the English form, between members of a Hindoo family in respect of certain joint estate, claimed by a childless Hindoo widow of one of the co-heirs, in her character of heiress and legal personal representative of her deceased husband, declared that she was entitled to the sum therein expressed, as the share of her deceased husband, "for her sole absolute use and benefit."

Held (reversing the decree of the Supreme Court at Calcutta, that those words were not to receive the same interpretation as a Court of Equity in England would put upon them, as creating a separate estate in the widow; but that the deed must be construed with reference to the situation of the parties and the rights of the widow by the Hindoo law, and that, as the deed recited that she claimed and received the money as her husband's share in the joint estate in her character as his heiress and legal personal representative, such words must be construed to mean, that it was to be held by her in severalty from the joint estate; and as a Hindoo widow she had only a life estate in the *corpus*, the same at her death devolved as assets of her deceased husband upon his personal representative in succession.

In reversing such decree, the Judicial Committee directed that interest, at the usual rate allowed by the Supreme Court, should be allowed from the death of the widow.

Appellant's costs in the Court below allowed, and suit referred back to the Master of the Supreme Court to tax the same.

The Appellant was the mother and, as such, heiress-at-law and personal representative by the Hindoo law [2] of one Dwarkanauth Sain, a Hindoo inhabitant of Calcutta, deceased; she was also the widow of Bheemchurn Sain, the father of Dwarkanauth Sain. Bheemchurn Sain at his decease left Radanauth Sain, his

* Present: Members of the Judicial Committee,—The Right Hon. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

grandson, and Ohhoychurn Sain, Sreenauth Sain and Dwarkanauth Sain, his sons, his joint heirs and legal personal representatives by the Hindoo law, him surviving.

Bheemchurn Sain was in his lifetime, and up to within a short period before his death, jointly seised in estate with his only brother, Bissumber Sain, since deceased. These two brothers mutually agreed to make a partition and division of all their joint, real and personal estate, property and effects, the particulars of which partition and division were then fully agreed upon and defined. The share of Bheemchurn Sain in the personal estate to be so held by him in severalty, amounted to Rs. 180,000, and in addition certain parcels of the joint real estate were at the same time apportioned to him, to be also held in severalty.

Before receiving actual possession in severalty of such real and personal estate, Bheemchurn Sain died, having first made his Will, whereof he appointed Bissumber Sain, his brother, sole executor; where-[3]-upon the Appellant, as the widow of Bheemchurn Sain, by the Hindoo law became entitled to maintenance out of and as a charge on the whole of the share apportioned to him of the joint estate and effects, and also, on a partition of such shares among the grandson and sons of Bheemchurn Sain, to a share, equal to the share of each of them as such heirs and personal representatives of Bheemchurn Sain, subject only to the provisions contained in the Will.

Bissumber Sain, in whose possession such share of the joint, real and personal estate had continued, paid to Radanauth Sain, Ohhoychurn Sain, and Sreenauth Sain respectively, as three of the heirs and personal representatives of Bheemchurn Sain deceased, one-fourth share each of the estate so apportioned to Bheemchurn Sain: but the payment and delivery of the remaining one-fourth, constituting the share of Dwarkanauth Sain, was postponed in consequence of his minority.

In 1841, Dwarkanauth Sain died intestate, without issue, and still a minor, leaving Zoahra Jeebun Dossee, his sole widow and immediate heiress-at-law and personal representative, him surviving. Some time in the year 1843, Bissumber Sain died intestate, leaving Gooroochurn Sain (who was also a son of Bheemchurn Sain) his adopted son, and as such his sole heir and personal representative. On his death, Gooroochurn Sain took possession of the whole of the estate, property and effects, including the share of Dwarkanauth Sain, which had remained in the possession of Bissumber Sain up to the time of his decease.

Some time after this event, Zoahra Jeebun Dossee, [4] as the widow and heiress of Dwarkanauth Sain, applied to Gooroochurn Sain for payment and delivery of the share and proportion to which she, in right of her deceased husband, was entitled to out of the share and proportion belonging to Bheemchurn Sain. Disputes and differences took place between them as to the exact value of her share and proportion in right of her deceased husband in the joint estate, and she threatened to institute legal proceedings for the recovery thereof. With the view to avoid the expense and delay of legal proceedings, it was agreed by her and Gooroochurn Sain that it should be taken and admitted that she should be considered as entitled to the sum of Rs. 59,000 in full payment and discharge of all demands, legal and equitable, which she then had or could have against Gooroochurn Sain in respect of the joint estate, or her share therein in right of her deceased husband, and in consideration of such sum she agreed to waive the taking an account of the joint estate, and to forego all legal proceedings.

Accordingly, and in order to carry out and give effect to this agreement, an indenture of compromise and release in the English form, dated the 24th of April, 1849, was made by Zoahra Jeebun Dossee and Gooroochurn Sain, and in that indenture the representatives, immediate and in reversion of the several shares of Bheemchurn Sain and Bissumber Sain deceased, with the exception of the Appellant, joined as releasing and executing parties.

This deed, after reciting to the effect before mentioned, went on to recite, that Zoahra Jeebun Dossee, as the widow and heiress of Dwarkanauth Sain de-[5]-ceased, had applied to and requested Gooroochurn Sain to pay and deliver to her the share and proportion to which she in right of her deceased husband Dwarkanauth Sain was entitled to out of the share and proportion belonging to Bheemchurn Sain as aforesaid: that disputes and differences had taken place between Zoahra Jeebun Dossee and Gooroochurn Sain as to the exact amount in value of her share and

proportion in right of her deceased husband, and she had threatened to institute legal proceedings for the recovery of her rights and interests in the premises; that with the view to avoid the expenses and delay of legal proceedings, it had been mutually proposed and agreed by and between Zoahra Jeebun Dossee and Gooroochurn Sain, that it should be taken and admitted on both sides respectively, that Zoahra Jeebun Dossee should be considered as entitled to the sum of Rs. 59,000 in full payment and discharge of all demands, legal and equitable, which she, Zoahra Jeebun Dossee, then had, or could, should or might have against Gooroochurn Sain in respect of the joint estate, or her part and share or interest therein in right of her deceased husband; that in consideration of such sum of Company's Rs. 59,000, to be paid to her by Gooroochurn Sain as thereafter mentioned, she, Zoahra Jeebun Dossee, had agreed to waive the taking of a full and general account of the joint estate, and to forego all legal proceedings; and it then went on to declare that Gooroochurn Sain, previously to the execution of these presents, had paid into the hands of Zoahra Jeebun Dossee the full sum of Rs. 59,000, which sum was thereby mutually declared and agreed by and between all the parties respectively to those presents to be [6] the sole and exclusive property of Zoahra Jeebun Dossee, "for her own absolute and separate use"; and in consideration thereof she had agreed to execute such release, which was in the usual form of a mutual and general release of all claims.

The sum of Rs. 59,000 was paid to Zoahra Jeebun Dossee by Gooroochurn Sain.

On the 3rd of January 1850, Zoahra Jeebun Dossee died without issue, leaving the Respondent, her father, her heir and personal representative, who possessed himself of this sum of Rs. 59,000, claiming to be entitled thereto under a deed of gift made in his favour by Zoahra Jeebun Dossee.

In consequence of the claim of the Respondent, the Appellant, as the heiress-at-law and representative of Dwarkanauth Sain, filed a Bill against him in the Supreme Court at Calcutta, alleging that the sum of Rs. 59,000 was received by Zoahra Jeebun Dossee, as a Hindoo widow, to be held by her in such capacity, and not otherwise; that upon her death the Respondent claimed the same under a deed of gift from her, and wrongfully treating it as her absolute property, appropriated the same, and the securities upon which the same was invested; and the Bill prayed, that the Appellant might be declared to be entitled, as the mother and heir in reversion upon the death of Zoahra Jeebun Dossee, to the sum of Rs. 59,000, and the Respondent decreed to account to her for the same.

The Respondent, by his answer, admitted possession of the sum in question, which he submitted was the absolute property of Zoahra Jeebun Dossee in her lifetime, under the deed of compromise and release, and formed no part of her deceased husband's estate, [7] and that the same had been assigned by her to him by a deed of gift, dated the 4th of December, 1849.

The suit came on for hearing on the 14th of January, 1852, together with another suit, in which the Respondent was the Plaintiff, and Sreemutty Rabutty Dossee, Gooroochurn Sain, Sreenauth Sain, and Radanauth Sain, were Defendants, and in which the Respondent, in the event of the money not being treated as being paid for her sole use and benefit, impeached the whole transaction as a fraud upon his daughter, and sought to re-open the accounts, when the Supreme Court dismissed both suits respectively, with costs.

A rehearing of the two suits was afterwards ordered. The suit of the Appellant was alone re-heard on the 14th of April, 1852, when the Supreme Court amended the decree of the 14th of January, and decreed separately in that suit.

The judgment of the Court upon the rehearing was delivered by the Chief Justice (Sir Lawrence Peel). The material part was in these terms: "It is insisted, that according to the Hindoo law, as laid down in this Court, and affirmed on appeal to the Privy Council, Zoahra Jeebun Dossee was competent to come to an account with the persons accountable for her husband's estate, and to receive and retain during her life, possession of that estate, and that the Plaintiff as reversioner is entitled to follow those assets in the hands of one claiming as done under, or as the representative of, Zoahra Jeebun Dossee. We do not dispute these general propositions, or deny that if, upon the construction of the deed and the other evidence in the cause, it appeared that the funds had come to the hands of Zoahra Jeebun Dos-

[8]-see, upon a fair accounting, or even upon a compromise which the Plaintiff saw fit to adopt, as assets of her husband, to be enjoyed by her as his widow and representative, this Bill might be rightly conceived, and the Plaintiff entitled to follow the funds in the hands of the Defendant. But if, upon the true construction of the deed and evidence, the monies must be taken to have been paid as the price of a compromise to and for the absolute use and benefit of Zoahra Jeebun Dossee, then the further questions arise, whether the transaction be impeachable at all, and, if impeachable, whether the Plaintiff can impeach it in a suit constituted as this is. We are clearly of opinion that she cannot affirm the transaction for one purpose and impeach it for another. The construction of this deed is, therefore, the principal, if not the only, substantial question in the cause. The deed is made between Zoahra Jeebun Dossee, described as the sole widow, heiress and legal personal representative of Dwarkanauth Sain of the first part, the other co-heirs of Bheemchurn Sain of the second part, and Gooroochurn Sain of the third part. After reciting the circumstances of the family, and the devolution of the property according to the facts above stated, it recites, that disputes and differences had taken place between Zoahra Jeebun Dossee and Gooroochurn Sain, touching the amount in value of her share and proportion in right of her husband; that she had threatened legal proceedings for the recovery of her rights and interest in the premises; that to avoid the expense and delay of legal proceedings, it had been agreed that she should be considered as entitled to Rs. 59,000, in full payment and discharge of all demands, legal and equitable, " which [9] she then had or might have against Gooroochurn Sain in respect of the said joint estate, or her part or share or interest therein, in right of her husband "; that in consideration of that sum she had agreed to waive all accounts, and that Gooroochurn Sain had paid to her the Rs. 59,000, which it was agreed, not only by him but also by the parties to the deed of the second part, should be the sole and exclusive property of Zoahra Jeebun Dossee, for her own absolute use and benefit; and that in consideration thereof she had agreed to execute the release thereafter contained. Then follows a recital, that the parties of the second part, having also received their respective shares, had agreed to execute the mutual releases thereafter contained; and the witnessing part, which, in the consideration clause, again expresses the agreement of all parties that the money was to be the sole, absolute, and proper monies of Zoahra Jeebun Dossee, to her separate use, and contains the mutual releases of all parties to the deed, and also provisions, both empowering the other parties, jointly and severally, to use the name of Zoahra Jeebun Dossee, as the widow and representative of her husband, in any suit that may be necessary for the recovery of the outstandings of the joint estate, and binding them to indemnify against the consequences of such use of her name. Various arguments, more or less ingenious, have been addressed to us to explain away or control the plain effect of the expressions used in this deed. One of the learned Counsel went so far as to contend, that a declaration that the monies were to be the sole, absolute, and proper monies of the lady to her separate use, might import only something like leave and license to reside and exercise the right of a [10] Hindoo widow in respect of her husband's property out of the house of and apart from her husband's family. It appears to us, however, that if there is to be any certainty of construction—if language is to be understood in its plain and natural sense—if the intention of parties is to be inferred from what they have said, and not from that which it is supposed they ought to have said—the conclusion is irresistible, that all the parties to this instrument intended the Rs. 59,000 to become the absolute property of Zoahra Jeebun Dossee; and that it was not the intention, either of him who paid, or of her who received, or of those who sanctioned the payment, that the money paid should vest in her only as the widow and representative of her husband, and as part of his estate. It was argued that, if this were the understanding, the parties of the second part (some of whom might reasonably expect to be the heirs of Dwarkanauth Sain, next in succession to his widows) would never have joined in releasing Gooroochurn from all that was coming to Dwarkanauth's estate. We, however, can see nothing in this release which is necessarily inconsistent with the construction derived from the plain expression of the other parts of the deed. There is no mention of what these parties as co-sharers in the estate of Bheemchurn had received from Bissumber in his lifetime, or from Gooroo-

churn since his death. They may have been overpaid, and may, therefore, have had a personal interest in preventing the widow of Dwarkanauth from unripping the accounts and asserting the legal rights to their full extent. Again, to what end do they join in declaring that the money is to be the sole and exclusive property of the widow, unless it be to bind, so [11] far as they can, their reversionary interest in it? If the transaction were merely that of a settlement of accounts between Gooroochurn and Dwarkanauth's estate, and payment over to his widow on the usual terms, this stipulation on their part seemed to be quite unnecessary. The power of attorney given by the widow, and the indemnity given to her also, fortify rather than militate against the construction which we put on the deed. These provisions imply that all the other parties were to remain interested in the outstandings (if any) of the joint estate, but she was to receive nothing beyond the sum for which she had sold her rights.

"Upon the whole, therefore, we see no ground whatever for departing from the construction which, upon the former hearing, we put upon this instrument, or from the conclusion that the money must be taken to have been received by the widow with the assent of the male members of her husband's family, to buy off her claims, and as her own absolute property.

"There is certainly far more difficulty in saying, that this is a valid transaction against the Plaintiff, who is not shown to have been a party to it. But the question is, against whom is her remedy? And in what form is she to seek it? An accounting party dealing with a Hindoo female has, without rendering an account, fixed the amount receivable by her in right of her husband at an arbitrary sum, and has paid it to her by way of compromise in a manner inconsistent with the title, by virtue of which alone she could call him to account. Such a settlement of accounts cannot bind; such a payment can hardly avail as between him and a reversioner. We are disposed to go further, and to concede that the whole [12] arrangement being, so far as it impresses a character on the funds other than that which they ought to bear, a fraud on the reversioners. The Plaintiff, if she does not elect to seek her remedy against Gooroochurn alone, treating the payment as one made in his own way, may be entitled to set aside the whole transaction, follow, if necessary, the money into the hands of the widow's representative, and compel a refund of so much of it as may be required to make good the corpus of Dwarkanauth's estate upon a proper adjustment of the accounts. But we are clear that this cannot and ought not to be done in this suit. Unless the accounts of Dwarkanauth's estate be properly taken, it is impossible to say what portion of this money may have been due to the widow in respect of the income of her husband's estate between the years 1841 and 1849, when she appears to have been in a manner excluded from her proper rights.

"The deed, moreover, though it may not be binding upon the Plaintiff in this suit, is unquestionably binding upon all the parties to it, and some of them are those who, upon the death of the Plaintiff, would be entitled to Dwarkanauth's estate. Whatever, then, be the rights of the Plaintiff in respect of this transaction, it is clear that they cannot be enforced with due regard either to the forms of law, or to the substantial justice of the case, except in a suit framed to impeach the transaction, and bringing all the parties to it, or their representatives, before the Court. The petition of rehearing must, therefore, we think, stand dismissed, so far as it seeks to set aside the decree for the dismissal of this suit, without prejudice to such other proceedings as the Appellant may take to impeach the transaction."

[13] Against this decree the present appeal was instituted.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—It is apparent, upon the face of the deed in question, that the late Zoahra Jeebun Dossee was made a party to it solely in her character of widow, and that she received the sum of Rs. 59,000 in her representative character and capacity, as the heiress and legal personal representative of Dwarkanauth Sain, her deceased husband. The money was paid to her as the admitted amount of the share of her husband in the estate of his father, Bheemchurn Sain. The subsequent declaration in the deed, that she was to hold the Rs. 59,000 as her own sole and exclusive property, "for her own absolute and separate use," must be understood only as signifying that she, in her representative character, was to hold that sum absolutely and in severalty, and not as part of the joint estate. Suppose the words, "as such sole widow, heiress, and representative,

according to the Hindoo law," were added, after this declaration, all doubt would be then removed. It was, in fact, the description of character under which she received the money. By the Hindoo law, current in Bengal, a widow is entitled to succeed to property of her deceased husband. She has not, however, an absolute proprietary right, neither can she in strictness be called a tenant for life, for the law provides her successors, and restricts her use of the property to very narrow limits; she can be considered in no other light than a holder in trust for certain uses. 1 W. Mac. Princ. of Hindu Law, pp. 19, 27, *Mussumat Jymunee Dibiah v. Ramoy Choe* [14] *dec* (3 Ben. Sud. Dew. Rep. 289), *Rooder Chunder Choudhry v. Samblon Chunder Choudhry* (3 Ben. Sud. Dew. Rep. 106), *Keerat Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331). So that, even if the construction we have submitted be inadmissible, the rights of the Appellant cannot be in any manner bound by the deed to which she was no party, or affected by such a declaration to the prejudice of her legal rights, which would operate unjustly towards her. The Appellant, as the heiress-at-law and personal representative in succession of Dwarkanauth Sain, is entitled to the Rs. 59,000. The deed of gift under which the Respondent claims was *ultra vires* the widow, as she at most had only a life estate in the corpus, and no power of disposal.

The Solicitor-General (Sir Richard Bethell), Mr. E. J. Lloyd, Q.C., and Mr. T. C. Morton, for the Respondent.—The argument for the Appellant is two-fold—First, she contends that the construction of the deed, according to its real meaning, gave Zoahra Jeebun Dossee a life interest only in the sum of Rs. 59,000, in her representative character of a Hindoo widow, and that she had no power of disposal of that sum; secondly, that the deed ought, at all events, to be so construed to avoid injustice, even if the parties thereto meant it to be the reverse. Now, we submit, that by the clear meaning of the words of the deed, Zoahra Jeebun Dossee took an absolute interest in the sum in question, and that under the deed of gift by her such interest vested in the Respondent. With regard to the intention of the parties, no words can be plainer to show that Zoahra Jeebun Dossee was to have an abso-[15]-lute interest in the Rs. 59,000, and an absolute power of disposal over that sum. The deed recites that such sum was "to be the sole and exclusive property of the said Zoahra Jeebun Dossee, for her own absolute and separate use and benefit." And such deed also contains mutual releases between her and the other parties, one or the other of whom would, in fact, have been heir in reversion to Dwarkanauth Sain's share, had the Appellant predeceased Zoahra Jeebun Dossee: all of which is utterly irreconcilable with the notion that she was intended to take a life interest only. We submit, that the transaction was plainly one of sale by her of her entire interest in her husband's estate for a fixed sum *in solido*.—[Mr. Pemberton Leigh: Must not this sum be treated as assets of the husband's estate? It is not in dispute that, by the Hindoo law, the widow is bound to pay her husband's debts out of his estate.] The deed of gift to the Respondent was an alienation, which required the sanction of the Appellant, the next entitled in succession to give it effect.] The money was the equivalent, not of her husband's estate, but of her share in his estate. Her interest in her husband's estate was an absolute interest in the accumulation or arrears, and a life interest in the corpus. The arrangement and the deed by which it was carried into effect, were consistent with her rights and powers as a Hindoo widow, and were no violation of the Appellant's rights as heir in reversion. A Hindoo widow has full power to dispose of the growing produce of the property. *Dyalehund Addy v. Kishoorie Dossee* (Morton's Dec. 83), *Cossinauth Bysack v. Hurrosoondery Dossee* (*ib.* 85), 2 W. Mac. Princ. of Hindu law, p. 258-9. Assuming that [16] her interest in her husband's estate could not be put higher than a life interest, there is nothing in the Hindoo law to prevent her selling that interest, and if made to a stranger he would have been entitled to the usufruct during her life, and upon her death have to surrender and account for the share to the heir in reversion, who could have no claim with the purchase money received by the widow. The mere circumstance of the sale being to co-sharers already in possession, we submit, makes no difference.

Second. With respect to the argument that the Court ought to put upon the deed the construction contended for, against the expressed words and apparent intention of the parties, in order to square with justice the Appellant's claim as Dwarkanauth

Sain's reversioner; we submit such a mode of dealing with the deed is wholly opposed to precedent and principle. To ascribe to a deed an operation wholly contrary to its plain words and meaning, in order to avoid alleged injustice, is, in effect, to set it aside. A Court of Equity would not so construe a recital which related to the particular matter under the contemplation of the parties. *Cole v. Gibson* (1 Ves. Sen. 507), *Ramsden v. Hylton* (2 Ves. Sen. 310). Even if a case existed for setting aside the deed of arrangement, it could not be done without remitting Zoahra Jeebun Dossee to the full benefit of her original rights, which could not be done after her decease, especially when the party impeaching the deed has had the full benefit of the contingency.

The Right Hon. T. Pemberton Leigh.—We entertain the highest respect for the judgment of the Court which pronounced this decree, and that [17] respect has alone induced us to have any doubt upon the case. We have fully considered the arguments, and the conclusion we come to, is, that we feel it impossible to concur with the judgment of the Court below.

The situation of the parties must be looked at, and the deed must be construed with reference to the situation of the parties and their rights at the time the deed was executed.

Now, Zoahra Jeebun Dossee, the widow of Dwarkanauth Sain, was one of four parties, entitled in her representative character as widow and heiress of her husband, to a certain portion of the property of a person of the name of Bheemchurn Sain, and to which Bheemchurn Sain was jointly entitled with his brother, Bissumber Sain; and it appears that Bissumber Sain agreed to a separation of their joint property, but that separation had not been carried into effect at the time when this deed was made. Dwarkanauth Sain, the husband of Zoahra Jeebun Dossee, and the three brothers being entitled (it may have been, and probably was, a joint family) to share the estate of Bheemchurn Sain amongst them, there were two separations to be completed before the amount, which was payable to each party, was ascertained. First, the separation of the estate of Bissumber Sain from that of Bheemchurn Sain; and secondly, the division of the estate of Bheemchurn Sain which was to be distributed amongst the four parties entitled.

Now, I apprehend that the mere circumstance that some of these parties had received certain sums on account of that property, would not, of itself, amount to a separation. It appears from this deed that some lived after the death of Bissumber Sain, and some lived [18] after the death of Dwarkanauth Sain, and that the widow and representative of Dwarkanauth Sain had been unable to obtain possession of any portion of that share to which she was entitled. Now, in this state of circumstances, the deed was executed, which, when we come to examine its terms, the purpose appears to us to be obviously this: to settle the amount of the shares which each of the four persons was entitled to out of the estate of Bheemchurn Sain, and also as between each other, because, if the estate of Bheemchurn Sain descended as a joint property to four parties, there might be mutual accounts between those four parties, three of whom had received sums on account, as well as against the executors of Bheemchurn Sain, who had possession of the whole, and was liable to account for the whole.

These three brothers, then, having received what they were content to take as the amount of their shares, an arrangement is made, by which it appears to us, Zoahra Jeebun Dossee agreed to take a certain sum as her share, and to take that sum as a discharge, not only against the executors of Bheemchurn Sain, but a discharge also of all that she might be entitled to claim against the other brothers of Bheemchurn Sain. If that be so, let us see whether there is anything in the contents of this deed which is inconsistent with that supposition. In the first place, the deed is made between Zoahra Jeebun Dossee, who is described as the "sole widow, heiress and legal personal representative of Dwarkanauth Sain:" she is made a party only in the character of "sole widow, heiress and legal personal representative of Dwarkanauth Sain." The brothers of Dwarkanauth Sain are made parties, not as having any possible contin-[19]-gent interest in the property of Dwarkanauth Sain after the death of his widow, in the character of heiress of Dwarkanauth Sain, but they are made parties simply as being, as it appears to us from the contents of the

deed, persons who are entitled, together with Dwarkanauth Sain's representatives, to the property of Bheemchurn Sain.

The deed, after referring to the death of Bissumber and the death of Dwarkanauth Sain, goes on to recite that "Whereas, after the death of Bheemchurn Sain, the said Bheemchurn Sain duly paid and transferred to Ohoychurn Sain, Seremauth Sain, and Radanauth Sain respectively, their respective parts and proportions of the share and proportion to which Bheemchurn Sain was entitled, of and in the joint estate; and the said Sreemutty Zoahra Jeebun Dossee, as the widow and heiress of the said Dwarkanauth Sain deceased, has applied to and requested Gooroochurn Sain to pay and deliver to her the share and proportion to which she, in right of her deceased husband, Dwarkanauth Sain, is entitled to out of the share and proportion belonging to the said Bheemchurn Sain as aforesaid." How is it possible upon these words to raise any question as to that which she had been applying for? The three brothers had received their shares, and she applied to receive her share; not to receive her life interest; not to receive a compensation for a life interest, but she was to receive, in her representative character of widow of Dwarkanauth Sain, that which his three brothers had received personally and individually. It then goes on to recite, "And whereas disputes and differences have taken place"—between whom?—between Zoahra Jeebun Dossee the wife of the one part, and the per-[20]sons liable to make payments of the other parts: and with respect to what?—"as to the exact amount in value of her share and proportion in right of her deceased husband,"—the share and proportion which is previously mentioned; the share and proportion which the brothers had received, and the share and proportion which she is to receive; and "she has threatened to institute legal proceedings for recovery of her rights and interests in the premises." What were her rights and interests in the premises in the character in which she is made a party to this deed? They were that which she had claimed, namely, the share and interest of her husband in the estate of Bheemchurn Sain, and she had threatened to institute proceedings for the purpose of recovering those rights. She could have made no claim, and could have instituted no suit to recover her life estate in the property. It then goes on to recite, "And whereas, with the view to avoid the expenses and delay of legal proceedings, it has been mutually proposed and agreed by and between the said Sreemutty Zoahra Jeebun Dossee and the said Gooroochurn Sain, that it shall be taken and admitted on both sides respectively, that the said Sreemutty Zoahra Jeebun Dossee shall be considered as entitled to the sum of Company's Rs. 59,000, in full payment and discharge of all demands, legal and equitable, which she the said Sreemutty Zoahra Jeebun Dossee now has or can, shall, or may have, against the said Gooroochurn Sain in respect of the said joint estate, or her part and share, or interest therein, in right of her deceased husband."

It is absolutely impossible to raise any question as to the nature of the dispute. The nature of the dis-[21]pute was this: she claimed her share, and she was entitled, as I shall show presently, to receive that share; and the dispute was as to the amount of it; and to avoid a suit for the purpose of ascertaining that amount, or other legal proceedings, it was agreed to take it at Rs. 59,000. "And whereas, in consideration of such sum of Company's Rs. 59,000, to be paid to her by the said Gooroochurn Sain as hereinafter mentioned, she the said Sreemutty Zoahra Jeebun Dossee has agreed to waive the taking of a full and general account of the said joint estate, and to forego all legal proceedings. And whereas, the said Gooroochurn Sain, previously to the execution of these presents, hath paid into the hands of Sreemutty Zoahra Jeebun Dossee the full sum of Company's Rs. 59,000, which said sum of Company's Rs. 59,000 is hereby mutually declared and agreed by and between all the parties respectively to these presents, to be the sole and exclusive property of the said Sreemutty Zoahra Jeebun Dossee, for her own absolute and separate use; and in consideration thereof, she the said Sreemutty Zoahra Jeebun Dossee hath agreed to execute such release as hereinafter mentioned." Well, now it is said, that in the ascertainment of this sum, and the agreement to accept such sum, and to give the release, that it is not confined to the agreement of Zoahra Jeebun Dossee and Gooroochurn Sain, but it is extended to the other persons, who are also parties to the release, and that it is a very strong circumstance to show, that they were concurring in this instrument for the purpose of releasing or remising the interest which they might have—a contingent interest as the heirs to this property.

But it is clear that they are not made parties in that cha-[22]-racter: there was only the possibility of their becoming heirs—they might become the heirs of Dwarakanauth Sain, but they are made parties as persons who had an interest in the joint property, which was to be divided: who had interests in the amount of the share which was to be divided; and who had interests in the amount of the share which was to be paid to this lady; because, if the accounts had been all taken, I apprehend the consequences would have been this: that if any of those brothers, in respect of this property, had received more than a fourth part, they might have been held liable to account to the widow for such fourth part; and, if she had consented to take less, and there had been no separation of the joint estate between them, she might have claimed the whole amount of her husband's share; and the principle upon which this agreement is made between the parties is consistent with the view which appears to us must necessarily be taken. Then it goes on—"Now this indenture witnesseth, that in consideration of the sum of Company's Rs. 59,000 in hand, well and truly paid to the said Sreemutty Zoahra Jeebun Dossee, at or before the execution of these presents, the receipt whereof is hereby acknowledged as well by these presents as by the receipt for the same hereupon endorsed, and which said sum of money is hereby declared and agreed by all and every the parties hereto to be the sole, absolute, and proper moneys of Sreemutty Zoahra Jeebun Dossee, to her separate use,"—not "to her separate use" in the sense in which we use that term in a Court of Equity; but to her separate use as distinguished from the joint estate, dividing that which was joint into separate estate, and treating her share as being that which she is to take for her [23] absolute use in her representative character, subject to any claims that may exist upon the same, for "her sole, absolute, and exclusive use" as against the parties to this deed,—“use and benefit” is the term used in the deed put in evidence, but you are to look at the words with reference to the parties who are using them. If it were a deed in which the recitals had reference to the life estate, and the reversioners had been parties, and the reversioners had agreed that she should hold this sum for “her absolute use and benefit,” those words would have had a totally different meaning. You must look at the words of the deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interests of those who make the grant. This is perfectly clear: for if we go a little lower we find, after mutual releases between the parties, there is this recital: “And whereas it has been considered, that although the estate of the said Bissumber Sain and Bheemchurn Sain hath been fully accounted for, divided, and paid as aforesaid, yet that by possibility the name of the said Sreemutty Zoahra Jeebun Dossee may be required to be used either as Plaintiff, Complainant or Defendant in some action or actions, suit or suits, or other proceedings arising out of it, or connected with, the said joint estate and effects.” Here is a distinct statement that the whole estate has been “divided, and paid as aforesaid.”

Now, it certainly does appear to us, upon the construction of this deed (and we agree with the judgment of the Court below upon this), that the parties treat it as being a deed intended to settle all accounts between them, and, as far as the widow could, to discharge and release the estate; for they say this: “The Plaintiff's Counsel insist that, according to the [24] Hindoo law as laid down in this Court, and affirmed on appeal to the Privy Council, Zoahra Jeebun Dossee was competent to come to an account with the persons accountable for her husband's estate, and to receive and retain, during her life, possession of that estate, and that the Plaintiff, as reversioner, is entitled to follow those assets in the hands of one claiming as donee under or as the representative of Zoahra Jeebun Dossee. We do not dispute these general propositions, or deny that, if, upon the construction of the deed, and the other evidence in the cause, it appeared that the funds had come into the hands of Zoahra Jeebun Dossee upon a fair accounting, or even upon a compromise, which the Plaintiff saw fit to adopt, as assets of her husband, to be enjoyed by her as his widow and representative, this Bill might be rightly conceived, and the Plaintiff entitled to follow the funds in the hands of the Defendant.”

Then, if that be admitted, I take it the Court proceeded upon that, and it has not been disputed here that these assets may be followed; the whole question is, whether this sum was paid to this lady as a part of the assets, and for the purpose

of discharging the estate of Bheemchurn Sain as the executor of Bissumber Sain and the representatives of Bheemchurn Sain from all liability. It appears to us impossible to come to any other conclusion: that if these funds were assets, if they were paid as assets, and are assets in the hands of the Defendant, it seems necessarily to follow, that they must be handed over to the person who now represents the estate of Dwarkanauth Sain, subject to whatever claims there may be upon her; that she may hold them subject to the debts of Dwarkanauth Sain, whatever they may be.

Now, I do not understand the Court below to have [25] proceeded upon the notion that this was, as it has been contended at the Bar, a purchase of the life interest of Zoahra Jeebun Dossee. The whole deed is entirely inconsistent with any such interpretation, for there is no reference to her life interest; there is no reference to any accumulations, or anything which was due to her as distinct from capital. There is nothing but a claim to the amount of the assets, to her husband's share of these assets, which is ascertained by the deed: and in respect of those assets, in receiving that sum she discharges the executor from all further claim and demands; and the brothers, who may have claims against her, discharge her from all claims in respect of that sum, and she discharges them from all claims in respect of the sums they have received.

Then it occurred to their Lordships, that inasmuch as this sum was paid in respect of property which consisted also of the accumulations of interest during the interval between the husband's death and the date of the deed, it was possible she might be entitled to some claim in respect of those accumulations. But upon reference to the Hindoo law, and to what was said by the learned Judge in this case, it seems to us extremely doubtful whether any such claim can be maintained. The Court below said, in speaking of her claim to these accumulations, "The construction put by us upon the deed necessarily destroyed whatever 'shadow of a title' Sibchunder Mullick had to institute the suit, and, accordingly, that was also dismissed with costs. We say, 'shadow of a title,' for, adverting to what the Hindoo law says, of the course of devolution of the accumulations, even of her husband's estate on the death of a widow, we cannot but entertain grave doubts whether Sibchunder could make a title to such accumulations, unless by [26] way of charge on them, for moneys advanced for the use of the widow, for purposes recognised by the Hindoo law." But be that as it may, we think we must look to the terms of the deed, and see what it was in discharge of which Rs. 59,000 were agreed to be paid. Now, it does appear to us to be perfectly clear it was paid, as it has been stated, in discharge of the share which Zoahra Jeebun Dossee's husband had in the estate of Bheemchurn Sain; and though it is not necessary to concur in that, it is very difficult for the Respondent to set up any opposition to that construction, because the deed from Zoahra Jeebun Dossee, under which he claims, expressly declares, "That there is no other person more nearly related or affectionately attached to me than yourself; and as you have taken much pains on my account in the matter relative to my late husband's share of the property, and have, after a good deal of strife and contention with your own relatives, recovered that which was sunk, and made it over to me, concerning which I have already entered into an engagement with you, I make a gift of, and hereby absolutely convey unto you, my debts excepted, the whole of my moveable and immoveable property, Company's papers, outstanding dues and demands," and so on.

Upon the whole, therefore, it appears to their Lordships, with very great respect to the different opinion which has been formed in the Court below, that we must advise Her Majesty to reverse the decree, and order payment of this money to the Appellant, with the usual interest according to the course of the Court, together with the costs of the suit in the Court below.

The Order in Council made on the appeal was, [27] that the order and decree of the Supreme Court of Judicature, of the 14th of April, 1852, be reversed, and that the sum of Rs. 59,000 be paid to the Appellant, with interest at the usual rate allowed by the Supreme Court, from the date of the death of the widow, Zoahra Jeebun Dossee, and that the costs of the Appellant in the suit in the Court below be taxed by the Master of the Supreme Court, and paid by the Respondent to the Appellant.

[See *Mussumat Bhagbutti Dace v. Chowdry Bholanath Thakoor*, 1875, L.R. 2 Ind.

App. 261; *Sowdaminee Dossee v. Administrator-General of Bengal*, 1892, L.R. 20 Ind. App. 14.]

MUSADEE MAHOMED CAZUM SHERAZEE,—Appellant; MEERZA ALIY MAHOMED SHOOSTRY, and BEBEE MARIAM BEGUM,—Respondents *
[Feb. 9, 10, 11, 1854].

On Appeal from the Supreme Court at Bombay.

A deed of sale conveying real estate, the property of a Defendant in a suit then pending in the Supreme Court at Bombay. Held, in the absence of satisfactory evidence of a *bona fide* consideration having been paid by the vendee, to be fraudulent and void, as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration.

Held, also, that a party in possession under such a deed was not entitled to any allowance for sums expended by him for improvements upon the estate.

A sequestrator in possession is not to be disturbed by a claimant, without leave of the Court. The usual mode is to apply for permission to bring an action of ejectment, or to examine, *pro interesse suo*.

Under a writ of sequestration the sheriff seized a moiety of an estate in the possession of A.; A. presented a petition to the Court, entitled in a cause then pending, claiming the land under a deed of sale executed by the Defendant, *pendente lite*, praying to be put in possession, and to be allowed to go before the Master and examine witnesses, *pro interesse suo*. Proceedings were taken under this petition before the Master, but afterwards it was agreed by consent, that the matter of the petition should be tried by the Court, and the witnesses examined *viva voce* by the Court at the hearing of the cause in which the petition was entitled. Held, that there was nothing irregular in such a mode of proceeding.

By the constitution of the Supreme Courts in India, the Judges, for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decision of the Judges, in such circumstances, as to the verdict of a jury in this country, in which the Judge who tries the cause makes no objection [6 Moo. Ind. App. 49, 50].

Semble. This Court will not disturb a judgment of a Court in India upon a question of the credibility of witnesses; unless it is manifestly clear from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence.

This was an appeal from an order made in a cause, in which the Respondents were Plaintiffs, and Aga [28] Mahomed Rahim Sherazee and others, Defendants, dismissing a petition of the Appellant, who had petitioned in the cause, and prayed that certain property, seized under a writ of sequestration issued in that cause, as the property of the Defendant, Aga Mahomed Rahim Sherazee, should be relinquished by the sequestrator, or that the Appellant should be examined, *pro interesse suo*.

The principal question raised by the appeal was, whether a deed of sale, dated the 30th of December, 1845, made by Aga Mahomed Rahim Sherazee, conveying to the Appellant a moiety of a dock called Mazagon dock, together with a moiety of the buildings thereto belonging, was a *bona fide* conveyance for a valuable consideration, or whether it was not collusive between the parties, and intended to defraud the creditors of Aga Mahomed Rahim Sherazee.

The facts which gave rise to the appeal were these:—

On the 2nd of February, 1847, a writ of sequestration was issued in the above

* Present: Members of the Judicial Committee,—The Right Hon. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

cause, commanding the Sheriff of Bombay to enter upon and sequester all the houses, lands, tenements, and the rents, issues, [29] and profits thereof, and all the personal estate, debts, and effects of the Defendant, Aga Mahomed Rahim Sherazee, until he should perform an order made on the 7th of January, 1847, in that cause, for the payment of Rs. 100,000, being the amount of the first instalment directed by the decree made in the same cause on the 25th of November, 1846, to be paid by him to the Accountant-General of the Supreme Court. On the 4th of March, 1847, another writ of sequestration was issued in the same terms to enforce the payment of the further sum of Rs. 100,000.

On the 27th of March, 1847, the Sheriff certified to the Court, that he had sequestered the Mazagon docks, by virtue of these two writs of sequestration.

On the 8th of April, 1847, the Appellant filed a petition in the cause, alleging that he had, for many years before and since the year 1840, had commercial dealings with the Defendant, Aga Mahomed Rahim Sherazee, to a large amount, in the course of which balances had been, from time to time, and in the Dewallee of each year, ascertained and stated, and that the last of such annual statements of account occurred on the 30th of October, 1845, on which occasion, Aga Mahomed Rahim Sherazee was found to be indebted to the Appellant in the sum of Rs. 172,900. 2q. 88r., which Aga Mahomed Rahim Sherazee acknowledged, by placing his signature at the foot of such account in the book of the Appellant, and that the Appellant after such adjustment pressed him for payment; but being unable to discharge the same, he proposed to sell and convey to the Appellant one moiety of the ground, buildings, and premises belonging to him, [30] situate at Mazagon, and called the Mazagon docks, which proposal the Appellant entertained, and it was agreed between the Appellant and Aga Mahomed Rahim Sherazee, that the Appellant should purchase a moiety of the premises for the sum of Rs. 324,500; and, accordingly, in the month of December following such last-mentioned adjustment, the Appellant paid, from time to time, large sums of money to Aga Mahomed Rahim Sherazee, which on the 30th day of that month amounted, inclusive of the balance of Rs. 172,900. 2q. 88r. due to the Appellant, to the sum of Rs. 324,500, whereupon Aga Mahomed Rahim Sherazee, pursuant to such agreement, and in consideration of the sum of Rs. 324,500, by an indenture, dated the 30th of December, 1845, and made between Aga Mahomed Rahim Sherazee, of the one part, and the Appellant of the other part, absolutely sold and released to the Appellant, his heirs, executors, administrators, and assigns, an undivided moiety of him, Aga Mahomed Rahim Sherazee, of the property therein described, and called the Mazagon dock, in the Island of Bombay, and that the Appellant entered into possession and became interested in the premises jointly and in equal shares with Aga Mahomed Rahim Sherazee; and the petition prayed that the Sheriff of Bombay might be ordered to withdraw the writs of sequestration, and relinquish one moiety of the dock to the Appellant, and that, if the Court should think fit, the Respondents (the Plaintiffs in the suit) might be directed to exhibit interrogatories in the Office of the Master of the Court, for the examination of the Appellant, and for the discovery of his interest in the dock, or that such other order should be made as [31] might be fit. The Appellant at the same time filed an affidavit of himself, reiterating the allegations contained in his petition.

On the 8th of April, 1847, the petition came on to be heard, when it was ordered, that the Appellant should come in and be examined, *pro interesse suo*, in the moiety of the Mazagon dock, and that the Respondents should file interrogatories for that purpose, before the Master, and if the Respondents should think fit to reply to the examination of the Appellant put in by him in answer to such interrogatories, either party should be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim, and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof, and the Master was to be at liberty to state any special circumstances, and the parties were to be at liberty to apply to the Court as they might be advised.

An interrogatory was accordingly exhibited by the Respondents before the Master, for the examination of the Appellant, and on the 21st of June, 1847, the Appellant filed his answer and examination, stating, amongst other things, that he

was the *bona fide* owner of, and was entitled for his absolute and exclusive use and benefit to, one undivided moiety of the Mazagon dock, and he set forth a long statement of his business transactions with Aga Mahomed Rahim Sherazee, and filed a schedule showing the balance alleged to be due to him.

The Respondents, by leave of the Court, afterwards exhibited a further interrogatory for the examination [32] of the Appellant, and the Appellant filed his answer to the further interrogatory, stating the payments made by him to Aga Mahomed Rahim Sherazee, in the months of March, April, and May, 1843. The Respondents filed a replication to the Appellant's examination, and on the 4th of September, 1848, an order was made, by consent of the Appellant and Respondents, that so much of the order of the 8th of April, 1847, as directed that, if the Respondents should think fit to reply to the examination of the Appellant, put in by him in answer to the interrogatories in that order mentioned, then that either party was to be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim, and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof should be discharged, and that the matter of the Appellant's petition should be set down for hearing on the first day of the then next ensuing November term, and that the witnesses on both sides should be examined, *viva voce*, before the Court at the hearing.

The petition came on to be heard, pursuant to the preceding order, and witnesses were examined on behalf of the Appellant and the Respondents, from whose evidence the following circumstances appeared: that the suit in which the sequestrations issued had been for some years pending against Aga Mahomed Rahim Sherazee, and that he was finally charged by the Master in Equity, to whom the cause had been referred, with the sum of seven or eight lacs of rupees, from which amount he endeavoured to discharge him-[33]-self without success; that on the 9th of April, 1845, he delivered to the Master in Equity a list of items in his discharge, which he abandoned, leaving him liable to a decree for payment of two-thirds of a considerable amount of the charge, which exceeded ten lacs of rupees, with a large arrear of interest thereon. That from the time of this proceeding it became evident, and was known to every one, that Aga Mahomed Rahim Sherazee must ultimately become liable to pay a considerable sum of money, which could not be less than several lacs of rupees. That on the 21st of November, 1846, a final decree was made in the cause against Aga Mahomed Rahim Sherazee, ordering him to pay into Court, to the credit of the cause, 11 lacs of rupees, by instalments. It further appeared that, on the 30th of December, 1845, the deed conveying the moiety of the Mazagon docks to the Appellant was executed by Aga Mahomed Rahim Sherazee, in the presence of Burn, an attorney of the Supreme Court at Bombay, for which he was paid his costs by Aga Mahomed Rahim Sherazee, whom he considered his client; another attorney being employed by Aga Mahomed Rahim Sherazee in the suit. That Aga Mahomed Rahim Sherazee continued in possession of the docks as an ostensible owner, negotiating with persons who were engaged in improving and enlarging them, and superintending the conduct of all business in them, but evidence was adduced by the Appellant to show, that one Hajee Mahomed Ruzza, a nephew of the Appellant, attended at the dock in 1846, and conducted business there, and kept accounts on behalf of the Appellant. It also appeared, that for several years previous to the alleged sale, the Appellant had had commercial dealings with Aga Mahomed [34] Rahim Sherazee to a small extent, on account of which the latter was indebted, at the close of the native year, ending in 1842, in the sum of Rs. 10,947, and in the following year in the sum of Rs. 18,172. No evidence was adduced by the Appellant to explain how his transactions with Aga Mahomed Rahim Sherazee suddenly increased from dealings of comparatively small amount, to the alleged payment by the Appellant to Aga Mahomed Rahim Sherazee, between the 31st of March and the 6th of May, 1845, of several sums amounting to Rs. 127,708, as shown in the schedule to the Appellant's second examination; nor was any proof given of the payment of those sums, beyond the evidence of a native clerk of the Appellant, named Jairam Eswar, who deposed in general terms, (reading from the Appellant's account book,) that the major part of the sums had been paid, some by himself, and some by one Narrow, and some by one Tulseydass, who were not called as witnesses, and chiefly into the hands of Meerza Mootalib, the son-in-

law of Aga Mahomed Rahim Sherazee. Nor was any evidence, except that of Aga Mahomed Rahim Sherazee himself, adduced on behalf of the Appellant to show the payment between the 13th and 29th of December, 1845, of the several sums in cash, amounting to Rs. 149,743. 3 qrs. 9 reas, set forth in the schedule to the Appellant's first examination, and alleged to have been the balance of the consideration money for the purchase of the moiety of the docks claimed by the Appellant. Aga Mahomed Rahim Sherazee, however, in his evidence for the Appellant, stated, that after the bargain for the purchase was completed, the money was gradually paid to Meerza Mootalib, and [35] when the whole consideration was paid, he executed the deed of conveyance to the Appellant: that during December, 1845, Mootalib brought him no money, and that Mootalib was in the habit of receiving it and paying it to different persons to whom he, Aga Mahomed Rahim Sherazee, was indebted. But when cross-examined on behalf of the Respondents respecting Mootalib, he thus replied:—"I saw Meerza Mootalib about a month ago, and I have not seen him since. He never told me when he went away—I had not curiosity to ask my son-in-law where he was going. His family is here (Bombay)—they are all living in Mahomed Jaffer's house. My family is living there also." Several other witnesses were examined on behalf of the Appellant respecting two or three items in the account, of comparatively inconsiderable amount, but without making it clearly appear how Aga Mahomed Rahim Sherazee was *bona fide* indebted to the Appellant in respect of those items.

After a hearing which lasted several days, the Court, on the 14th of November, 1848, ordered that the Appellant's petition should be dismissed with costs. The judgment of the Court was delivered by the Chief Justice (Sir Erskine Perry) as follows (reported, *nom.* Mushedy Kazim's claim. "Oriental Cases," by Perry, p. 35):—

"This trial has lasted so many days, and has made us so familiar with the facts, that the conclusions in our minds are altogether clear and distinct, and it is unnecessary to defer giving judgment in order to put them in better language, or in more logical order. The question to be determined in this case is, whether the conveyance of a moiety of Aga Mahomed Rahim's dockyard, in December, 1845, to Musadee [36] Cazum, was a *bona fide* sale, or whether it was a simulated transaction between the parties for the purpose of defeating Rahim's creditors, and particularly his old opponent, Meerza Ally. In order to be in a condition to form an accurate judgment on this question, it is necessary to have a distinct picture before our eyes of the position of the principal actors in the transaction at the period when it occurred. And for this purpose it is only necessary, so far as the profession here is concerned, before whom this suit has been travelling its slow course during the whole of the career of nearly every practitioner now at the bar, to point out, that in November, 1845, the suit against Aga Rahim had reached its *dénouement*. That in November, 1845, a decree against Aga Mahomed Rahim for very many lacs of rupees was about to be given; that in the same month he was charged before the Court with an attempt to abscond, and to withdraw all his moveable property from the jurisdiction, in order to defeat the decree; that the Court believed the charge and ordered his arrest, although the Aga gave the Court to understand that it was wholly untrue, and that he was a man of very large property, and equal and willing to satisfy the claim of his creditor in the case. It is also necessary to observe that when this decree came on subsequently to be enforced, all the property which the Aga previously had sworn to, disappeared, and when execution issued against the greatest Mogul merchant of Bombay, one who had been the host of previous Governors, Judges, and all the society of the Island, who had been for many years the agent for the great Mussulman princes of Western Asia, and whose large possessions in landed property, in ships, and other sub-[37]-stantial *indicia* of wealth were patent to the eyes of all, not one single rupee was forthcoming, or voluntarily paid by him in satisfaction of the claim of the young man whose property had been in his hands for years, and which had been the foundation of all his prosperity.

"On legal inquiry, it turns out that the landed and other property, which was well known to belong to Aga Mahomed Rahim, has all been conveyed to other parties, and the question, therefore, arises on every such conveyance, whether there was really a *bona fide* transfer of property for good consideration, or whether a deep-laid scheme was concocted, for the purpose of defeating the course of law, for cheating the claimant, whom he had been keeping at arms' length for a course of years by

harassing litigation, and by using those provisions in the English law which are intended for the relief of honest and unfortunate debtors, to withdraw all his property which could be realised from without the jurisdiction of the Court, and himself finally, as soon as he should have got his discharge under the Insolvent Act.

"This being the statement of the question before the Court, it is obvious that any claimant to property, conveyed by Aga Mahomed Rahim at the period of his difficulties, labours under the *onus* of having to maintain a case which is open to the gravest suspicions. The probabilities are all against the genuineness of such a transaction, for it does not require a very long experience in this Court, to be aware that fraudulent conveyances, tortuous courses, skilful deep-laid schemes, and most unblushing perjury, are constantly resorted to by persons in difficulties, whereas the same prudence in *bona fide* trans-[38]-actions, and the same care to make good bargains, and not to part with hard cash till a valid equivalent is obtained, are undoubtedly to be found amongst the natives of India to quite as great an extent as with any nation in the world.

"The conclusion which I desire to draw from this observation is, that as the Plaintiff's case is necessarily tainted with suspicion, it lies upon him, if the transaction be really a genuine one, to bring more than an ordinary amount of evidence to support it, and to rebut, by unimpeachable testimony, the *prima facie* incredibility which accompanies his tale. The large sum of money involved in this case (at least four lacs according to the Plaintiff, but probably not amounting, even with the arrears of rent, to more than two) affords quite sufficient motive to the Plaintiff to make every exertion to bring forward all the evidence which is capable of being given; and I have no doubt whatever in my own mind that the Plaintiff has brought forward all the evidence which was calculated to support his claim.

"Having thus stated the question for inquiry, and the position of the parties at the period of the transaction, and having pointed out how extremely suspicious a case the Plaintiff was coming forward to support, and the consequent burden upon him of furnishing the Court with a mass of irrefragable evidence, I make no hesitation in avowing, that directly I heard the speech of the learned counsel for the Plaintiff, and ascertained that a case, in itself suspicious, was accompanied with the most improbable details, and that these details had absolutely no witnesses at all to prove them, I felt no doubt whatever that the Defendant was entitled to a verdict, and [39] that the conveyance was altogether simulated and fraudulent; indeed, the impression on both our minds was so strong, that if it had not been intimated that an appeal to the Privy Council was intended, we should have probably thought it necessary for the ends of justice to have cut the matter short by pronouncing our conclusions at once, that a tale so improbable, and supported by no evidence, ought not to be allowed to take up any further time of a Court of justice; but as the impressions on our minds were formed on previous facts connected with the suit, the knowledge of which was necessary to enable any tribunal to form an accurate judgment, but which would not appear to the Privy Council unless given in evidence, it was essential to undergo the tedious inquiry of getting these different facts, so well known to all of us, on the records of the Court in this particular suit.

"These facts being now recorded, it is sufficient to say of them, that all those which make for the Plaintiff (except perhaps one) are neutral or irrelevant, or capable of easy explanation; that several facts are proved, which throw the gravest suspicion on the Plaintiff's title, and above all, that proof of those facts which were essential to the Plaintiff's claim is altogether wanting."

No appeal having been made from this judgment, and order of the Supreme Court made thereon, further proceedings were taken by the sequestrator, under the direction of the Court, and the docks were sold.

Musadee Mahomed Cazum Sherazee afterwards presented a petition to the Queen in Council, praying for leave to appeal from the Order of the Supreme [40] Court, dated the 14th of November, 1848, which their Lordships granted upon certain terms (for report of the case upon this petition, see Moore's Ind. App. Cases, vol. v., p. 196).

These terms having been complied with, the appeal now came on for hearing.

Mr. Lloyd, Q. C., and Mr. Forsyth, for the Appellant.—First. The evidence adduced by the Appellant sufficiently established that he was owner of an undivided

moiety of the Mazagon docks and premises. He was in possession as a *bona fide* purchaser for a valuable consideration, under the conveyance executed, in 1845, by Aga Mahomed Rahim Sherazee. The seizure, therefore, by the Sheriff of this property under writs of sequestration against the property of Aga Mahomed Rahim Sherazee, was irregularly executed as against this moiety. The Court below viewed the case as a colourable sale without any consideration money having been paid by the Appellant to the vendor. The evidence, however, disproves such a conclusion. It was proved that he had ample means to effect the purchase by paying the balance, after deducting the debt due to him at that time by Aga Mahomed Rahim Sherazee, and that after the agreement for the purchase had been made, he paid over the balance. It may be true, that, at the time when he purchased the moiety, he was aware of the existence of the suit by the residuary legatees of Mahomed Ally Khan against Aga Mahomed Shoostry, his executor, for an administration of his estate, yet, as he was ignorant of the state of the proceedings therein, whether [41] or not any sum was found due by him to the estate of the testator, it could not affect his title as a *bona fide* purchaser. Even if he had notice that the Master had found that he was indebted to the estate, we submit that that circumstance would in no respect have affected his right as a purchaser for a *bona fide* consideration. A sale of property for a good consideration is not, either at common law, or under the Statute, 13 Eliz., c. 5 (made perpetual by 29 Eliz., c. 5), fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. *Wood v. Dirie* (7 Q.B. Rep. 892), *Twyne's case* (3 Coke, 80, b. 81 a; and see note, 1 Smith's L. Cases, p. 10, where all the authorities on this question are collected), *Cudogan v. Kennett* (2 Cowp. 432, 434), *Riches v. Evans* (9 Car. and Pay. 640). The learned Judge says, in his judgment, "that directly he heard the speech of the counsel for the Plaintiff, and ascertained that a case, in itself suspicious, was accompanied with most improbable details, and that these details had absolutely no witnesses at all to prove them, I felt no doubt whatever that the Defendant was entitled to a verdict, and that the conveyance was altogether simulated and fraudulent." Now it is clear, from these expressions, that the Appellant had to contend with unusual disadvantages in establishing his title to the property in question. The mind of the Judge was unfavourably disposed towards the case anterior to the Appellant's proofs and evidence being adduced. The adverse presumption of fraud which the Appellant had to combat from the beginning, was derived, not from the case of the Appellant himself, but from facts which it [42] is said had been established or were apparent in a suit, to which he was no party, and to the issues involved in which he was an entire stranger, and which he never had an opportunity of contesting. The whole proceedings are irregular. The Court ought to have directed an action of ejectment to try the validity of the conveyance.

Second. The order cannot stand, for if the Court below entertained so much doubt upon the evidence as to decline giving effect to the deed of purchase, yet the property ought, at all events, to have been treated as a security for the debt due to the Appellant, with interest. Assuming, therefore, that in a proceeding as the present it was competent to the Court, and proper, to set aside the deed for fraud, still, as the conveyance was rescinded, the ordinary rule of a Court of Equity ought to have been applied, and it ought to have directed that the Appellant should be paid the amount really due to him, and also the whole of his expenditure made by him in substantial improvements. *Hamblyn v. Ley* (3 Swans. 301, n.).

The Solicitor-General (Sir R. Bethell), and Mr. Ayrton, for the Respondents.—It is evident that the conveyance under which the Appellant claimed, was executed collusively, with the intention to delay, or defraud, the Respondent from enforcing any decree that might be pronounced against Aga Mahomed Rahim Sherazee, in the suit then pending against him by the Respondents. Such conveyance was, therefore, fraudulent and void. The deed was not proved to be a *bona fide* conveyance for a valuable consideration, so as to be valid in equity against [43] the writs of sequestration under which the property was sequestered. *Coulston v. Gardiner* (3 Swans. n. 279), *Mushedy Kazim's claim* ("Oriental Cases," by Perry, p. 35). The objection now urged by the Appellant, that the order cannot stand, is founded on the sole ground, that the Court below improperly discredited the testimony of witnesses. Such objection is untenable, as this Court, upon a mere question of evidence, will not

reverse a decision upon that ground alone. *Santacana v. Arderol* (1 Knapp's P.C. Cases, 269). The Appellant was under the obligation of satisfactorily proving that his purchase of the property was *bona fide*, but this obligation was not discharged by the evidence he adduced. Lastly, there was no irregularity in the proceedings: if a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the Court. *Empringham v. Short* (3 Hare, 461).

The Right Hon. T. Pemberton Leigh (Feb. 15, 1854).—In this case, on the 2nd of February, 1847, a writ of sequestration was issued by the Supreme Court of Judicature at Bombay, on the Equity side of that Court, in a cause in which one Meerza Ally Mahomed Shoostry and Bebee Mariam Begum were Plaintiffs, and Aga Mahomed Rahim Sherazee and others, Defendants, for the payment of Rs. 100,000. On the 4th of March following, a second writ of sequestration also issued for the non-payment of a like sum of Rs. 100,000; and on the 27th of March, the Sheriff, to whom these writs were addressed, made his return [44] to the Court, by which he certified, that on the 18th of March instant he had seized and sequestered the Mazagon docks, under and by virtue of those two writs of sequestration. Now the terms of the writ of sequestration, addressed to the Sheriff, were these: he was commanded “to enter upon, take, and sequester all the houses, lands, and tenements, and the rents, issues, and profits thereof, and also all the personal estate, debts, and effects of the said Aga Mahomed Rahim Sherazee, in your bailiwick, and to hold the same in your possession until the said Aga Mahomed Rahim Sherazee shall pay the said sum of Rs. 100,000.” Now, under the terms of this writ, what the Sheriff had to do was to receive the rents, issues, and profits of this property, which was at that time in the possession of the Peninsular and Oriental Steam Navigation Company, as tenants, and to pay the amount of these rents into Court; so that any disposition of such rents, when paid in, would be the subject of a further application to the Court. All that the writ commanded, was a direction to the Sheriff to retain the property of Aga Mahomed Rahim Sherazee in his possession until the further order of the Court.

In this state of circumstances, it appears to us that, according to the rules of a Court of Equity, no proceedings could be taken against the sequestrator except by leave of the Court. If a person has a legal title to property seized by an ordinary trespasser, he can bring his action of ejectment to recover possession of such property; but where the property is in the custody of the Court, as when in the possession of a Receiver, the course pursued in our Courts, if it appears there is a legal title, has been to permit an [45] action of ejectment to be brought, to put the matter in the most convenient course of determination. That course was adopted by Lord Eldon, in the case of *Angel v. Smith* (9 Ves. 335), where, after much discussion, he permitted an action of ejectment to be brought against a Receiver. In *Brooks v. Greathed* (1 Jac. and Wal. 176), the Master of the Rolls says, “It was settled in *Angel v. Smith*, when the rule was laid down both with respect to Receivers and Sequestrators, that their possession is not to be disturbed without leave. But when a party is prejudiced by having a Receiver put in his way, the course has either been to give him leave to bring an action of ejectment, or permit him to be examined, *pro interesse suo*.” In this case, the Appellant set up a title to property that had been seized by the Sheriff, or, at least, to one moiety of property so seized, and he presented a petition to the Court, on the 8th of April, 1847, praying that the Sheriff might be ordered to withdraw the writs of sequestration and relinquish one moiety of the property, that is, the dock and premises, to the Appellant; thus, in truth, asking the same relief which he would have obtained if he had brought his action of ejectment, and had succeeded in that action; and he further prayed that, if the Court should think fit, the Respondents (the Complainants in the suit) might be directed to exhibit interrogatories in the office of the Master of the Court, for the examination of the Appellant and for the discovery of his interest in the premises, or that such other order should be made as might be fit. Now, instead of bringing this petition on to a hearing, in which case, inasmuch as his title appeared, on his own showing, to be a mere legal title, he [46] would merely have obtained liberty to

bring an action of ejectment, he took an *ex parte* order of another sort, on the same day as that on which the petition was presented. The terms of the order were: that the Appellant should come in and be examined, *pro interesse suo*, in the moiety of the Mazagon docks and premises in the petition mentioned; and that the Respondents should file interrogatories for that purpose in a week, before the Master, and if the Respondents should think fit to reply to the examination of the Appellant, put in by him in answer to such interrogatories, either party should be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim; and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof; and the Master was to be at liberty to state any special circumstances, and the parties were to be at liberty to apply to the Court as they might be advised. Under this order the Petitioner went in to be examined. Interrogatories were filed for his examination, and he put in his answers to those interrogatories. From that examination it appeared, that he claimed a right to this property by what seemed to be a good legal title, namely, by purchase for a valuable consideration, paid when the conveyance was executed, and under which he was in possession of the property at the time of the seizure, he having received the rents, and made a considerable expenditure on the premises. On the other hand, it appeared, upon this examination, that the statements of the Petitioner were open to great suspicion. The sale, [47] to the last degree, was improbable, depending upon his own statement; while there were circumstances from which the Court might be led to conclude that the title so set up was only simulated, and that no real interest was vested in him. This being so, the Respondents filed a replication and examination. According to the terms of the order, they might have proceeded to the examination of witnesses before the Master, who would have made his report, and if the Respondents had been dissatisfied with that report, they might have excepted, and the case would have come before the Court on the exceptions, and a trial at law ordered to settle the question of title. In this state of things the parties appear to have come to an arrangement which seems to have been extremely reasonable and proper. If a trial had taken place, that trial would have taken place before the two Judges of the Court sitting on the plea side of the Court as a jury, and, at the same time, as Judges, for the purpose of delivering the verdict in the trial, in the form either of an action of ejectment, or an issue. If they had pursued the order, according to the terms of it, instead of adopting the course they did, they would have gone before the Master, attendant with all the expense and delay of an examination, report, and order, and then the Master would have reported on that examination, and it would, in all probability, have resulted in an order to try at law that question; to avoid which, on the 4th of September, 1848, an order was made, by consent, in these terms: "It is ordered, that so much of the order made in the above matter by this Honourable Court, on the 8th day of April, 1847, as directs, that if the said Meerza Ally Mahomed Shoostri and Bebee Mariam [48] Begum should think fit to reply to the examination of the Petitioner, put in by him in answer to the interrogatories in the order mentioned, then that either party was to be at liberty to examine witnesses, *viva voce*, before the Master, touching the Petitioner's claim; and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Petitioner had made out a title to the moiety of the ground, buildings, dock, and premises, or any and what part thereof,—be, and it is hereby discharged; and it is further ordered, that the matter of the petition be set down on the board of causes for hearing on the first day of the next ensuing November term, and that the witnesses on both sides be examined *viva voce*, before the Court at the hearing." Now the question is, whether this is not intended to be substituted for a trial at law, on the plea side of the Court—the trying an action of ejectment, in substance, upon this petition, which prayed precisely the same relief that would have been had in an action of ejectment, and substituting these proceedings for such trial. That it was so, appears to us to be clear. In the first place, when the evidence is taken before the Court at this trial, all the documents that are produced are entered in the plea side of the Court, and signed by the officer, not as Registrar, but as Prothonotary; and, when the Judges are disposing of the case, Chief Justice Perry says, "I felt no

doubt whatever that the Defendant was entitled to a verdict." Well, then, supposing that to be the case, the question was in fact tried in the most convenient form for the purpose of the action, namely to restore to the Petitioner that possession which alone he claimed by this peti-[49]tion. Upon that petition, witnesses were examined at great length; and the Court came to the conclusion that this transaction of the alleged purchase was a mere simulated and fraudulent transaction; that no money had ever been paid; that no possession had ever been delivered; but that, in truth, the alleged purchase and possession had been simulated for the purpose of defeating the sequestration and the claim of creditors in the suit which was then pending, and in which it was probable, or, rather, in which it was certain, that a very large balance would be found to be due from the estate. Being of that opinion, the Judges necessarily, and naturally, and properly, concluded that the deed, if it were a deed executed under those circumstances, was fraudulent as against creditors; and that the Plaintiff in an action of ejectment (the Petitioner standing in the position of a Plaintiff in an action of ejectment) must fail, and that the petition must be dismissed.

If they were right in law, the question is, whether they were right in fact. And upon that question the course which this Court always takes, in appeals from the inferior Courts of India, where the Judges are so much more familiar with the circumstances of the parties, the nature of the case, and the probabilities or improbabilities attached to certain states of circumstances, and the credibility of the witnesses, is, that although we by no means consider it conclusive, still great weight is to be given to their opinion, and this Court is not in the habit of disturbing a judgment founded upon a decision of those questions, unless their Lordships entertain a clear and strong opinion upon it. But where a judgment has been [50] pronounced, and a verdict found, and that judgment pronounced by the Judges of the Supreme Court, sitting as a Court for the purpose of the trial of an action, their Lordships will give, at least, the same weight to that decision as is given in this country to the verdict of a jury, to which the Judge who tries the cause makes no objection; and, where there are no reasonable grounds to suppose that the jury have come to a wrong conclusion, it is not sufficient to say that the Judge might, probably, if the case was *res integra*, have come to a different conclusion. We are far from saying here, if the case had been *res integra*, that we should have come to a different conclusion from that which the Judges of the Court below have come to, and we think their Order was perfectly right.

But then it is said, supposing this transaction to be fraudulent and void against creditors, still the party is entitled to the sums which he had been allowed to lay out upon the repairs of the property. Now, there is a case, *Hamblyn v. Ley* (3 Swan, 301, note), where a voluntary deed had been executed, under circumstances much resembling the present case, the deed having been executed for the purpose of defeating a sequestration. Lord Hardwicke set aside that deed, and made an allowance to the parties for what had been expended, both in the payment of interest on the mortgage, and for taxes and repairs. But, in the first place, that was a case in which only equitable relief could be administered, because it was a case of an equity of redemption; and in the next place, it was clear that there had been an actual possession, and a receipt of rents and profits. If in this case the [51] parties had prosecuted the matter before the Master, and it had appeared to the Master that this deed was good at law, but void in equity, then probably there might have been an account of the profits and of those sums that had been laid out in improvements. But the course that has been here taken rendered such an account impossible. No such account could have been directed in an action of ejectment brought for the recovery of the possession of the property, and, this being a mere legal title in which the Court was of opinion that there was no estate or interest in the Plaintiff against creditors, upon both grounds, it seems impossible that any such allowance could have been made; no claim for such allowance was made, nor was any demand of the kind brought before the Court below; and, even if it had been, in the view that the Judges took, it would have made no difference, because they considered the whole transaction, from the beginning to the end, as void. They considered that the possession never ought to have been changed. Mr. Justice Yardley, in referring to the grounds upon which he proceeded, says, "To the best of my recollection, aided by the notes I took at the hearing, the petition was dismissed because we thought that the con-

veyance of a moiety of the Mazagon dockyard by Aga Mahomed Rahim Sherazee to the Petitioner was merely colourable, and that the accounts, by which it was attempted to show that a large balance was due at the time, or immediately before the execution of the conveyance, from Aga Mahomed Rahim Sherazee to the Petitioner, were fictitious; and that the Petitioner entirely failed to prove to our satisfaction that the payments making [52] up the residue of the alleged purchase-money had been actually made, and that the possession of the dockyard only nominally passed to the Petitioner, Aga Mahomed Rahim Sherazee still continuing to be the real owner of it, and still continuing to exercise exclusive dominion over it, and that this was part of a concerted design by Aga Mahomed Rahim Sherazee and his friends, of whom the Petitioner was one, to make away with all the property and effects of the said Aga Mahomed Rahim Sherazee, in order to deprive Meerza Ally Mahomed Shoostry of the fruits of a decree."

It appears to their Lordships, upon every view of this case, that the Order pronounced by the Court below was perfectly right, and that it is their duty to recommend Her Majesty to affirm such Order, with costs.

[53] GOPEEKRIST GOSAIN,—Appellant; GUNGAPERSAUD GOSAIN.—

Respondent * [July 17 and 18, 1854].

On appeal from the Supreme Court of Calcutta.

The presumption of the Hindoo law, in a joint undivided family, is, that the whole property of the family is joint estate, and the *onus* lies upon a party claiming any part of such property as his separate estate, to establish that fact.

Where a purchase of real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo law is in favour of its being a benamee purchase, and the burthen of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.

Purchase of a talook in Bengal by a Hindoo in his eldest son's name, the conveyance, though in the English form of lease and release, held to be a benamee purchase, and the son in whose name it was purchased declared to be a trustee for the father, and the talook part of the father's estate.

In reversing the judgment of the Court below, the Judicial Committee remitted the cause with certain directions, leaving the question of the allowance of costs in the discretion of the Court below.

The Appellant and Respondent in this case were brothers, and joint heirs by the Hindoo law of their deceased father, Rogoram Gosain. The question raised by the suit in the Court below and by the present appeal was, whether a talook called Gheritty, situate in the district of Hoogly, in Bengal, which was purchased by Rogoram Gosain many years before his death, and previously to the birth of the Appellant, in the name of the Respondent, did or did not, at the time of his death, form part of the real estate of [54] Rogoram Gosain, so as to pass to the Appellant and Respondent jointly under a general devise to them contained in his Will, or descended to them as joint heirs in case of intestacy. The case of the Appellant was, that the talook formed part of his father's real estate. The Respondent, on the contrary, insisted, that it was his separate property, having been bought by his father in his name, for his separate use and benefit.

The circumstances giving rise to this question were as follows:—

Rogoram Gosain, a Hindoo, of considerable property, was, up to the year 1831, jointly possessed with his brother, Ruggubram Gosain, of property derived from their father; of which a partition was in that year effected, and his share of the property ascertained. In the year 1825, Rogoram Gosain purchased, for the sum of

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

Rs. 64,000, the talook in question. The receipt for the purchase-money and the conveyance was taken in the name of the Respondent, who was then his only son, of the age of two years or thereabouts. The conveyance of the talook was in the English language and form, by lease and re-lease, dated the 12th and 13th of July, 1825, in which the Respondent was simply described as Zemindar of Serampore. As between himself and his brother, Rogoram Gosain debited himself with the purchase-money, but he shortly afterwards opened an account in his private books with the Respondent, and therein debited the Respondent with the purchase-money, and credited him from time to time with the rents of the talook; this account was continued down to the time of the death of Rogoram Gosain.

In the year 1832, subsequently to the birth of the [55] Appellant, and after the partition between Rogoram Gosain and Ruggubram Gosain had been effected, Rogoram Gosain bought another talook, called Chattra, the conveyance of which was taken in the name of the Appellant, and Rogoram Gosain debited the Appellant in another account, which he opened in his books in the Appellant's name, with the purchase-money of this talook, and credited him in the account, from time to time, with the rents, in like manner as he did in the account in respect of Gheritty with regard to the Respondent. This account was also continued down to the time of the death of Rogoram Gosain. He also made other purchases of land in the name of other members of his family.

Rogoram Gosain died in the year 1842, having executed an instrument purporting to be a Will, dated the 5th of November, 1841; by which he bequeathed the whole of his property, real and personal, whether Zemindary, or rent-free tenure, houses, Company's papers and other obligations, bonds, notes, etc., due to him, to his sons, Gungapersaud Gosain and Gopeekrist Gosain, in equal shares; and he gave also certain pecuniary legacies to his four daughters and their issue.

As this instrument contained no appointment of executors, the Appellant and Respondent did not consider it as a Will, and they accordingly, after taking the usual legal proceedings, were admitted to be the heirs and representatives of Rogoram Gosain; and acted as such, treating the instrument as of no effect as a Will. The rents of the two talooks, Gheritty and Chattra, were, after the death of Rogoram Gosain, generally received on the joint receipt of the Appellant and Respondent; but the rents of Gheritty were [56] carried in the joint books of the Appellant and Respondent to the credit of the Respondent.

In the year 1848, the Appellant, for the first time, set up a claim to have Gheritty treated as forming part of the real estate of Rogoram Gosain, and as such belonging to the Appellant and the Respondent jointly. The Respondent refused to recognise this claim, and insisted that Gheritty was his own separate property, being purchased in his name.

The Appellant took proceedings before the Magistrate of Serampore for the purpose of enforcing his right to a joint possession with the Respondent of Gheritty, but the Magistrate decided in favour of the Respondent. The Appellant then appealed to the Sessions Judge, who reversed the decision of the Magistrate, and directed that both the Appellant and Respondent should be put in possession of Gheritty. In consequence thereof, the Respondent, in May, 1849, brought an action of ejectment in the Supreme Court at Calcutta, on the plea side of the Court, against the Appellant, for the purpose of recovering possession of Gheritty, and the cause stood for trial, when the Appellant, on the 18th of July, 1849, brought the present suit on the equity side of the Supreme Court against the Respondent. The bill stated, that it was customary for Hindoos of property to purchase various parcels of real estate in the names of their different sons, but without any intention whatever of giving to such sons whose names were so used, the sole beneficial estate or interest therein, or any other beneficial estate or interest therein than what the son would or might ultimately take in the rest of the estate and property upon the father's death. That Rogoram Gosain took the two convey-[57]-ances in the names of the Appellant and Respondent respectively, in conformity with such custom, and without any intention whatever of altering the succession thereto; and that he intended that the Appellant and Respondent should hold the talooks respectively upon the same trusts and to the same uses as the rest of his estate and property. That in devising to the Appellant and Respondent jointly all his estate and property, he included and meant to include therein both of the talooks, as the Appellant had always

admitted with respect to Chattra. That in the year 1825, when Rogoram Gosain so purchased Gheritty, he was joint with his brother, Ruggubram Gosain, as to a certain ancestral real property, and that his object in taking the same in the Respondent's name was to keep it separate from the joint ancestral estate in which Ruggubram Gosain was interested, and under colour of which Ruggubram Gosain set up a claim or joinder on the whole estate of Rogoram Gosain. That Rogoram Gosain purchased Chattra in the Appellant's name, because he at the time was alleged to be involved in the Calcutta Bank, in partnership with the late firm of Palmer and Co., which had failed in business. The bill then contained various allegations relative to the manner in which Rogoram Gosain and the Respondent and Appellant respectively had at different times acted in reference to Gheritty and Chattra; and after stating the legal proceedings which had taken place between the Appellant and Respondent, and the action of ejectment brought by the Respondent, prayed that the talooks of Gheritty and Chattra might be declared and decreed to have been parcels respectively of the real estate of Rogoram Gosain, deceased, and to have passed under [58] the general devise in his Will to the Appellant and Respondent, as joint devisees thereof; and that the Respondent might be declared to be a trustee for himself and the Appellant jointly, in respect of the Gheritty talook and premises, and might be decreed to execute such conveyance or other deed in respect thereof as might be necessary to secure to the Appellant his right and interest as such devisee as aforesaid in a moiety thereof; and that he might be restrained from further prosecuting the action of ejectment, and from commencing or proceeding with any other action of ejectment, in respect of the talook and premises, against the Appellant, either in that Court, or in the Mofussil Courts, or doing any other act to oust the Appellant, or to obtain exclusive possession of the talook and premises, or to prevent the Appellant from receiving his moiety of the rents and profits thereof.

Judgment in the action of ejectment was obtained by the Appellant, but execution was stayed pending the suit in Equity.

The Respondent, by his answer, admitted the death of Rogoram Gosain, and that in his lifetime he signed the instrument in writing, dated the 5th of November, 1841, as before-mentioned; and submitted to the Court the effect of such instrument, and whether the Appellant and Respondent were thereby constituted executors. The answer also admitted the purchase of Gheritty, and that the conveyance was by lease and release to and in the name of the Respondent, but not as the eldest son, and then the only son, Rogoram Gosain, he being described in the deeds respectively simply as Zemindar. And the Respondent, by his answer, further admitted [59] that Rogoram Gosain was at that time joint with his brother as to certain ancestral real estate, but denied that at the time of such purchase, Rogoram Gosain had a dispute with his brother, Ruggubram Gosain, as in the bill mentioned, or that there was any dispute between them as to their joint estate previous to the year 1828. And he admitted that Rogoram Gosain debited his own account in the joint books of himself and brother with the purchase-money, but under the head of Gungapersaud Gosain, as a transaction of Rogoram Gosain, by way of temporary loan to the Respondent; that, after separation from his brother thereafter mentioned, he transferred the purchase-money to separate accounts, which he opened under the separate head of the Respondent, who was debited therewith; and that in the year 1832, having previously in the year 1831, effected partition between himself and his brother, he debited another account, which he opened in his own separate books, under the head of the Appellant, with the purchase-money of the other talook, called Chattra; and the Respondent denied that Rogoram Gosain bought the same in the name of the Appellant, but as benamsee merely, and by his answer he further stated that Rogoram Gosain bought the same for the separate use and benefit of the Appellant in the same manner as he bought the talook of Gheritty, in the name and for the separate use and benefit of the Respondent. He also admitted that it was sometimes done, but denied that it was customary, for Hindoos of property to purchase various parcels of real estate in the names of different sons, but insisted that such practice was without any intention whatever of giving to such sons whose names were so used, the [60] sole beneficial estate or interest therein, or any other beneficial estate or interest therein than what the son would or might ultimately take in the rest of the estate and property upon the father's death; and the Respondent denied

that Rogoram Gosain took the two conveyances respectively, in the names of the Appellant and Respondent respectively, in conformity with such alleged custom or any custom, or without any intention whatever of altering the succession thereto, or that he did, from the time of the purchase thereof up to his death, hold and enjoy the talook of Gheritty as part of his real estate, but stated that Rogoram Gosain, as the father and natural guardian of the Respondent till he was of proper age to act for himself, held the talook, and collected and received, and at his pleasure disposed of, the rents and profits thereof. And the Respondent denied that Rogoram Gosain intended that the Respondent and Appellant should respectively hold the talooks upon the same trusts and to the same uses as the rest of his estate and property; or, that in devising, by the before-mentioned instrument (if any devise were therein contained), jointly all his estate and property, he included or meant to include therein both the talooks; or that the Appellant had admitted the same as regarded Chattrra, save that when he found the same was not quite so valuable as the talook of Gheritty, by circumstances that happened after the purchase, he then set up the case made by the bill. And the Respondent denied that he and the Appellant had always held the talook of Chattrra jointly; and stated that since the beginning of the Bengally year 1255 (A.D. 1848), the Appellant had received and expended the [61] rents and profits, and entered the same in his separate books of account which he had kept since the last-mentioned period.

Both parties entered into evidence relative to the purchase of the talooks of Gheritty and Chattrra; and also relative to the manner in which the accounts of the purchase-moneys and of the rents of the two talooks were kept, both during the lifetime of Rogoram Gosain and subsequently to his death. The effect of this evidence is fully considered and commented upon in the judgment.

The cause was heard by the Supreme Court on the 1st, 2nd, and 3rd days of August, 1850; and on the 13th of September in the same year judgment was delivered by Mr. Justice Colville, sitting for the Chief Justice, the material part of which was as follows:—

“The question in this cause is, whether a certain talook, purchased by Rogoram Gosain many years before his death, in the name of one of his sons, became the property of that son, or is to pass under a general devise of his estate to his two sons in equal shares. If the question had arisen between British subjects, the principles on which it would have to be decided are clearly defined, and not difficult of application. In ordinary cases, if an estate be purchased in the name of one, but by and with the money of another, there arises, by a presumption of law, a resulting trust in favour of that other. In the exceptional case, wherein the person who thus employs his money stands in the relation of parent to him in whose name the purchase is made, the law presumes an advancement, and the resulting trust does not arise. This presumption of advancement is, however, capable of being rebutted by evidence, showing that the real [62] intention of the parent was, that the purchase should enure for his benefit, and that the child should take only as trustee. Declarations by the parent, if contemporaneous with the purchase, are admissible to prove such an intention, but declarations subsequent are rejected. The reason of this distinction is obvious. A contemporaneous declaration is an indication of a present intention; a subsequent declaration is, at most, evidence of what a former intention was, and as such can rank no higher than any other declaration, which, unless against the interest of the party making it, is excluded by the known rules of evidence from judicial consideration. These principles and distinctions are established and enforced by a long course of decisions, beginning with *Grey v. Grey* (Cases temp. Finch 338); and going down to more recent cases, before the Vice-Chancellor Knight Bruce, the more leading authorities are *Taylor v. Taylor* (1 Atk. 386); *Dyer v. Dyer* (2 Cox. 92); *Murless v. Franklin* (1 Swanst. 13); *Crabb v. Crabb* (1 Myl. and K. 519); and *Sidmouth v. Sidmouth* (2 Beav. 447). This case, however, arises between Hindoos, and is one which the Hindoo law, so far as it is distinguishable from the English law must govern. ‘Benamie transactions’ are common against Hindoos; but I am not aware that there is any authority for applying to them the doctrine of resulting trust, as a presumption of law. On the other hand, the presumption of advancement does not necessarily arise upon a purchase by a father in the name of his son. There seems, then, to be nothing in the Hindoo law which is contrary to either the Plaintiff’s or the Defendant’s view in this case. And the Court must

determine the case upon its own conviction, deduced from the [63] evidence of what the intention of Rogoram Gosain in this particular transaction was. We ought not, however, in dealing with this question, entirely to leave out of consideration the decisions of the English Courts, because, although the presumptions which I have mentioned are not to be applied as legal presumptions, the process of reasoning on which they are founded, so far as it rests on experience, or observation of the ordinary principles of human action, and is not repugnant to any of the peculiarities of Hindoo faith or customs, may, most legitimately and usefully, be applied to the construction of ambiguous acts, and to the deduction of a particular intention from them; and further, because in determining what is and what is not admissible to prove intention, we must in this, as in every other case, follow the English law of evidence.

" Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence on the one side or the other is conclusive upon the question of intention. A great portion of it relates to the purchase by Rogoram Gosain, in 1832, of another talook called Chattra, in the name of his younger son, the Plaintiff; but since it is admitted that his intention (whatever it was), with respect to the purchase of Gheritty in the name of the elder son, was the same with the intention afterwards manifested by him in the purchase of Chattra in the name of the younger son, this portion of the evidence ought, equally with the rest, to receive the careful consideration of the Court. Again, the evidence is divisible into proof of things done by Rogoram and his sons in the lifetime of the former, and proof of things done [64] by the sons after their father's death. The effect of these two classes of proofs it will be convenient to consider separately.

" The evidence shows that Gheritty was purchased when Rogoram was joint in estate with his brother Ruggubram. The conveyance is in the English form of lease and release, and direct from the vendor to the Defendant, Gungapersaud (then an infant). There can, therefore, be no doubt, that at law, the estate became vested in possession in the Defendant. There are, besides, some entries in the books of the charges for setting up a bamboo, which, it may be presumed, is some symbolical mode of taking possession. But this, considering the nature of the conveyance, could only import a possession taken in the name and on account of Gungapersaud, the nominal purchaser.

" There is no satisfactory evidence of any parol contemporaneous declaration by Rogoram, of his intention in respect of this purchase, whether it was to be for his own or for his son's benefit. Rustonjee Cowasjee says, generally, that he recollects the purchase; that it was in the name of the son; that Rogoram told him he bought it in the name of his son. Assuming this communication to have been contemporary with the purchase, it is ambiguous as respects the point in dispute. The conversations deposed to by Goberdone Sain, and the cashier in the official assignee's office, appear to have been conversations subsequent to the event, and they are hardly more conclusive of the question of intention than that deposed to by Rustonjee Cowasjee.

" The books seem to show that upon the purchase Rogoram debited himself in the joint books, as between himself and Ruggubram, with the purchase-money [65] of the estate, Rs. 61,000; and that he then, or shortly afterwards, opened an account between himself and his son, Gungapersaud, in which he debited his son with the principal purchase-money, and credited him with the net rents of the talook. This account, so opened, seems to have been continued on that footing, in one or other of the books, up to the time of Rogoram's death.

" It is further proved, that long after the purchase, in 1838 and 1839, upon an attempt being made to assess the Lakhiraj lands of Gheritty for Government revenue, Rogoram Gosain, in his memorials to the Deputy Collector, and to the then Deputy Governor of Bengal, treated this talook as the property of his son, and that he also treated it in a letter to Mr. Storm, who rented part of the estate.

" As to the general management of the estate during the life of Rogoram Gosain, the evidence, I think, pretty conclusively shows, that the ostensible ownership was in the son, that the estate stood in his name in the Collector's books, that leases were granted, and receipts for rent given to the tenants and Ryots, also in his name; but on the other hand, that the rents when collected were received by Rogoram Gosain, and the receipts for those collections given in his name; and that with the

concurrence of the Defendant after he attained his majority. The books, however, show that the rents so received by Rogoram were duly carried to the account I have mentioned,—The account wherein the Defendant was credited with those rents, and debited with the principal purchase-money.

“The general management of Chattra appears to have been the same as that of Gheritty. There is, how-[66]ever, this further evidence as to the original purchase of Chattra, namely, that if the witness, Hurrochunder Lahoree, is believed, Rogoram expressed, at the time of that purchase, an intention to purchase for the benefit of his younger son, what he probably conceived would be equal in value to the purchase already made for the benefit of his elder son. The conversation spoken to by Rustonjee Cowasjee, which would imply an intention on the part of Rogoram to purchase Chattra in the name of the younger son, in order to prevent its falling into and becoming part of the estate wherein he was joint with Ruggubram, evidently relates, not to the actual purchase of Chattra, which was after the separation in estate of Rogoram and his brother's representatives, but to a former and ineffectual treaty for that purchase.

“The Plaintiff relies strongly on evidence of other purchases in the name of the Defendant, which are admitted to be part of the joint estate that passed by the Will of Rogoram, and upon one particular book, called the abstract account book of the estate of Rogoram Gosain, in which the rents of Gheritty and Chattra are entered with those of estates admitted to be the property of Rogoram.

“As to the first, the Defendant's answer is, and the books seem to support this view, that Rogoram Gosain, whether he had or had not any right so to do, did make a transfer to himself of other properties, particularly of the house in Calcutta, which he had purchased in the name of the Defendant, but that he did not so transfer the talook, Gheritty; but, on the contrary, continued up to the time of his death, to make a distinction between that and the transferred [67] property, crediting the Defendant with the rents, and debiting him with the principal purchase-money of the estate.

“As to the second, it is to be observed, that the book itself is of so late a date as 1837, and, therefore, the declaration, if one is to be implied from the ambiguous entry of the rents of these estates in such a book, that the beneficial interest in the estates was in the father, would not be admissible in evidence against the son. But if this be the meaning of these entries, it is difficult to reconcile them with the Exhibits, Nos. 11 and 12, proved by the Defendant, which show that at that time, and up to a later date, he continued to credit his sons respectively with the rents of Gheritty and Chattra.

“Upon the whole, therefore, the case would seem to stand thus:—the legal estate in Gheritty, and the ostensible ownership of it, were clearly vested in the Defendant. They were never vested in his father. The purchase was made by the father in the name of an infant son of tender years. Without applying the English doctrine of advancement, we may fairly consider an intention to benefit a son as *prima facie* more probable than a like intention in favour of a stranger in blood; and we may treat the age of the nominal purchaser as a circumstance contradictory of an intention on the part of the father to reserve the dominion over the estate to himself, or to make a trustee of one incapable of executing a trust. It is also more reasonable to suppose, that the intention was to provide for the son by a purchase made with money borrowed by the father from the joint estate, than to suppose that he intended to create a secret trust in favour of himself in fraud of the brother with whom [68] he was thus joint in estate. As to any declared intention, the evidence, unsatisfactory at best, seems to us to preponderate in favour of the Defendant. The perception of rents by the father in his lifetime is not inconsistent with the Defendant's claim. The reasoning of Lord Langdale, in *Sidmouth v. Sidmouth* (2 Beav. 457), concerning the receipt of the dividends by Lord Stowell, applies even more strongly to the case of an Hindoo parent and child living together as members of a joint family: the *patria potestas*, and the respect paid to the head of the family, being certainly at least as strong amongst Hindoos as amongst Englishmen. In this case, moreover, the receipt of the rents is fully explained by the manner in which they were dealt with, in being carried to the credit of his son, and set against the principal sum which the father obviously intended to be repaid to his estate. On other matters relied upon by the Plaintiff, we have already incidentally remarked. Upon the whole, therefore,

we should have thought, had this case been submitted to the Court immediately after Rogoram's death, that the Plaintiff had failed to show, that the Gheritty talook was to be treated as part of the estate over which the Testator had a disposing power."

The Court further held that the Will raised no case of election as to these estates, and that, upon the whole case, the Plaintiff failed to show any sufficient ground why the Court should interfere with, or disturb, the legal title of this estate; and that the bill, being limited to that object, ought to be dismissed, without costs.

Against the decree made pursuant to this judgment, the present appeal was brought.

[69] Mr. R. Palmer, Q.C., Mr. Leith, and Mr. Maude, for the Appellant.—The decree cannot stand. The Court founded its judgment on an assumption, that in the case of a purchase made by a father in the name of his son, the *onus* of proof that he was trustee only, rested on the Appellant; and dealt with the case as if he was bound to prove a joinder in estate in respect to this talook. On authority and principle, that was an erroneous view of the burthen of proof. Here the parties are brothers, and if the Court went on the English rules as to a purchase by a father for the benefit of a child, it was wrong, the legal presumption being clearly in favour of the children where there are more than one child. It was a benamtee transaction, very common in India, a purchase by the father in another's name, for his own benefit, and the validity of such a transaction is recognised by the Hindoo law and custom in Bengal. *Amanee Tewaree v. Rai Rughoobun Suhai* (3 Ben. Sud. Dew. Rep. 363), *Doe dem. Tilluck Seal v. Gour Hurry Day* (Morton's Dec. 249), *Maha Ranees Bussunt Comaree v. Bulloabdeb* (Fulton's Rep. 383). —[The Lord Justice Knight Bruce: Is it your contention that a purchase by a father in name of son is in Hindoo law the same as a purchase by one person in the name of another is by the English law, so as to raise the question of a resulting trust?—Yes. And we submit that the Respondent was bound to prove the contrary, and to establish that he had the sole separate beneficial interest in the talook. It is a very strong circumstance, that at the time of this purchase, Rogoram Gosain and his brother constituted a joint undivided family, and [70] that any property they might have was joint estate. The presumption of the Hindoo law is, that the whole of the property of an undivided family belongs to the common stock, *Lurimon Row Sadasew v. Mullar Row Bajee* (2 Knapp's P.C. Cases, 60), *Dhurum Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229, 240), *Gour Chunder Rai v. Hurish Chunder Rai* (4 Ben. Sud. Dew. Rep. 162); and it probably was for that very reason that it was necessary to purchase this talook as "benamtee," to avoid disputes. The mere fact of entries in the books, of the profits of the talook which Rogoram Gosain debits himself with, prove nothing as to the sole beneficial interest of the Respondent.—[The Lord Justice Knight Bruce: It is admitted that the father received the rents: this by the English law would make no difference, but by the Hindoo law it may be different. There is no evidence during the father's life of any enjoyment of the profits by the Respondent.]—It was a benamtee transaction, and cannot defeat the right of the Appellant, either as devisee with his brother under the Will, or in case of intestacy, as having devolved upon them by the Hindoo law, as joint heirs and representatives. The same principle relating to a purchase in another's name is recognised by the Mahomedan law, called by that law "furzee," or fictitious name, *Sheikh Bahauder Ali v. Sheikh Dhomun* (1 Ben. Sud. Dew. Rep. 250).

Mr. Rolt, Q.C. Mr. Dickens, and Mr. A. Gordon, for the Respondent.—The question is purely one of fact, and not of law. In such a case, therefore, the Court below is the best judge of the value of the testimony, and this Court [71] will not reverse a judgment founded upon facts only, unless the conclusion of the Court be palpably wrong. This is a simple purchase by a father in the name of his son. The conveyance is in the English form of lease and release, and direct from the vendor to the Respondent; a fact of considerable importance, as no case of "benamtee" can be referred to where the conveyance was by lease and release. The evidence in the case shows that the father intended and gave the Respondent by such deed the sole beneficial estate and interest in this talook. The entries in the books are strong proof of intention. It is a debtor and creditor account, the Respondent being credited with the profits. The fact of the father remaining in possession and receiving the rents is satisfactorily accounted for, as the Respondent was a minor. Whether

the case be tried by the Hindoo or English law, the judgment appealed from is, we apprehend, correct. Such a gift was lawful by the Hindoo law, 2 W. H. Macnaughten's "Principles of Hindoo Law," pp. 243, 244, 250. But the fact of the conveyance being in the English form, shows that the father wished the English law to be applied to the case; if so, as the purchase is by the father in the name of his son, the presumption of advancement necessarily prevails, and the doctrine of resulting trusts does not arise; the English authorities, therefore, apply, *Grey v. Grey* (1 Cha. Ca. 296; S.C. Finch. 338), *Ehrand v. Dancer* (2 Cha. Ca. 26), *Elliot v. Elliot* (2 Cha. Ca. 231), *Mumma v. Mumma* (2 Vern. 19), *Stileman v. Ashdown* (2 Atk. 477, 480), *Dyer v. Dyer* (2 Cox. 92), *Lamplugh v. Lamplugh* (1 P. Will. 111).—[The Lord Justice [72] Knight Bruce: in *Murless v. Franklin* (1 Swanst. 13), the Court held that to rebut the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase.]—The Appellant, on whom the burthen rested, has failed to prove that the Respondent is not solely entitled to the legal and beneficial estate in this talook. There never has been any agreement express or implied between them to treat the talook as part of the joint estate.

The Lord Justice Knight Bruce.—In this appeal two questions of importance arise, one of fact, material only to the particular parties to this litigation: the other of law, interesting, not only to them, but to society at large among the natives of India, at least among the natives of Bengal. The questions arise in this way: A wealthy native of the name of Rogoram Gosain, employed as a Banian, at Calcutta, and having also mercantile concerns of his own, made at different periods of his life purchases of immovable property in other names than his own; some of these purchases being made in the names of his sons, and some in the name of his son-in-law and of his brother. It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "Benamtee transactions;" they are noticed, at least, as early as the year 1778, in Mr. Justice Hyde's notes, where, in a case that came before him in that year, *Doe dem. Tilluck Seal v. Gour Hurry Day* (Morton's Dec. 249), the practice is thus mentioned: "In mere personal demands, such as Ben-[73]-gal bonds, the Courts have upon consideration determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the Court has so far complied with the very general practice in this country of using the names of other persons in mere personal demands, that in many cases the Plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his; such for instance, that the money lent was his, and that he took the Bond in the name of another." Then he speaks thus in reference to real estate: "but it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court."

In a much more recent case, which occurred in Sir Edward Ryan's time, *Maha Raneer Bussnut Comaree v. Bullohdeb* and others, reported in Fulton, 383, which report Sir Edward Ryan informs us is substantially accurate, it is said, "As far as the evidence goes, for there was no proof of the deed, the transaction is a simply benamtee one, in the name of the complainant, but in truth for the benefit of Rajah Tez Chunder. It may be for religious purposes, but the question raised, whether the Court will recognise a benamtee trusteeship, or a trust upon a trust, does not arise. It being once established, then, that the transaction is 'benamtee,' the circumstance of the receipts being in the name of the complainant proves nothing, that being in accordance with benamtee usages. The complainant, therefore, has no title to call for the account, and the bill must be dismissed."

Other cases were mentioned in the course of the [74] argument, which came before the Sudder and other Courts, to the same effect. The law upon this subject was recognised by the Judicial Committee, in 1843, in the case of *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229), where Lord Campbell, in delivering the opinion of the Court, at page 240, says, "We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan (whose most valuable assistance we have in this case, and it

gives me a confidence that I should not otherwise have felt), that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the Appellant had any separate property, or that it was from his funds that any part of the purchase money was paid; therefore, I think, that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property."

It is clear, and their Lordships are confirmed by the opinion of Sir Edward Ryan, that the knowledge and assent of the person in whose name the purchase is made is immaterial: to repeat the language of Lord Campbell, the criterion is, the quarter from which the money comes, and in the greater number of instances of benamie purchases they are made in the names of persons ignorant at the time of their being so made. In the present instance there is no question but that all the money was provided by Rogoram Gosain: that is indisputable. I do not allude now to whether the money was the joint property of Rogoram Gosain and his brother. It is clear it was not the money of the individual in whose name the purchase was effected. [75] If then the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen: he would have been *prima facie* a trustee, and if he desired to contend that the *prima facie* character of the transaction was not its real character, the burthen would have rested on him; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that that circumstance changes the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son: that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or dictum, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a benamie transaction, that is a trust: but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different: and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to pro-[76]-vide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being. The note on this subject is clearly stated in W. H. Macnaghten's "Principles of Hindu Law," which we learn from Sir Edward Ryan is cited as an authority in the Courts of Bengal. In the first volume, p. 2, he says, "The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle, [77] that is, by the death of the owner (natural or civil).

or his voluntary abandonment. In ancestral real property the right is always limited, and the sons, grandsons, and greatgrandsons of the occupant, supposing them to be free from those defects, mental or corporal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility. The property of the father being thus restricted in respect of ancestral real property, and Wills and Testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime. A Will is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death; but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a Will in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system; and such gift can only be held valid under the same circumstances as those under [78] which an ordinary gift would be considered valid. What may be done *inter vivos* may not be done by Will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another, without sufficient cause. This has been declared in the *Dáyabhaga* to be a precept not a positive law; and it is therein laid down, that a gift or transfer under such circumstances is not null; for a fact cannot be altered by a hundred texts. There is nothing inconsistent in this, as the doctrine is rather confirmatory of the text, which declares the absolute nature of the father's power over such property; but it has been held to extend to the legalising of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right though morally objectionable."

It is their Lordships' opinion, therefore, that notwithstanding the Respondent was the only son of [79] Rogoram Gosain when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed; it forms an objection against importing into the Hindoo law that rule of positive law which exists in England. I have omitted to observe that benamée purchases in the names of children, without any intention of advancement, are frequent in India; that is recognised in many cases, and, among others, in that of *Amaree Tewaree v. Rai Rughoo Bun Suhai* (3 Ben. Sud. Dew. Rep. 366), where may be found this statement: "The present case does not appear to be at all of a nature with those benamée transactions which are prohibited by the Regulations, as Sheo Suhai, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply."

Their Lordships are, therefore, satisfied, that according to the law by which this case must be governed, the presumption in favour of its being a benamée transaction is different from that which would have existed by the law of England. It is, therefore, upon this point of view that their Lordships must look at the evidence,

and to this test it must be submitted. In this case it is on the Respondent to prove whether what was *prima facie* the nature of the transaction, was really not so. It might, of course, be a very different thing if the burthen of proof were the other way, and the Appellant had to show the opposite state of the case. Now, the Supreme Court, without saying it, has held that the presumption was not against the Respondent, and has certainly not held that it [80] was in favour of the Appellant, and this is a position of law on which their Lordships find themselves compelled to differ from the able judgment under review. This relieves the case from the difficulty pressed, that the case ought to be very strong before, on a mere question of fact, a Court, constituted as this is, should dissent from the Court in India, before which the witnesses were examined, and which possessed such peculiar means for arriving at a correct conclusion. We have, as I have said, to look at the evidence from a different point, and to submit it to a different test. Now, on this evidence, their Lordships are not sure it would be right to dissent from the expressions on the subject in the very able judgment delivered by Mr. Justice Colvile, in the name of the whole Court; one is, that in which he speaks of the evidence as unsatisfactory at best, and the other is this: "Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence, on the one side or on the other, is conclusive upon the question of intention." If that is a correct view of the evidence, as it is likely to be, the result is favourable to the Appellant and not to the Respondent, because the burthen is on the Respondent, and the evidence being assumed to be correctly viewed in the passage I have just stated, he does not discharge himself of the burthen. To enter into the evidence a little more in detail, the grounds on which the Respondent relies, are the age of the Respondent at the time of the purchase, the English form of conveyance, the accounts kept by the father in his books, including particularly the debit of Rs. 64,000 in the name of the Respondent, the different mode in which this purchase with [81] the purchase of Chattra, were treated in the books of the father from purchases made in the names of other persons; a document submitted to him as a case in another cause, containing a statement of his title, though this is claimed on each side; certain letters relating to the property; certain memorials addressed, one to Mr. Thompson, the Deputy Collector of Hooghly, and another to the Deputy Governor of Bengal, relating to the tenure of the property, and parol evidence as to conversations; to which may be added the evidence of the conduct of the Respondent and Appellant after their father's death, which happened in 1842, the benefit of which is claimed on each side.

With regard to the age of the Respondent, their Lordships are of opinion, that no weight is to be attributed to it: they believe it to be as usual to buy in the names of minor children as of others, and in this particular family another purchase, the Buttollah house, was made in the name of this very child, the Respondent, when not much older than he was when the purchase in question was made. The form of the conveyance was insisted on to show that the father wished the English law to apply in this case; but their Lordships are of opinion, that though the observation was a fair one to make, it would not be right to give weight to a deduction which, if I may say so, seemed to be too far fetched. As to the books, it seems impossible to extract from them anything favourably to either side, for their Lordships are not satisfied that they are not kept irregularly. As to the price of Rs. 64,000 debited to the Respondent, it does not appear until some years after the purchase—a singular mode of keeping the [82] accounts in any event; but, considering the other entries in the books, the conclusion to which their Lordships would come, if obliged to come to any, would be, that it was an account of a transaction in the name of a person rather than an account with a person. As to these talooks being treated after a certain time in a different way to the other purchases, this might give rise to some observations, but when the question arises whether an estate *prima facie* belonging to one shall be taken from him on account of entries in ill kept books, which may be accounted for in many ways, and he whose books they were had gone to his grave, it appears too unsafe to give this particular explanation to a circumstance which is possibly unsusceptible of any explanation, and which the father, if living, would probably have not been able to explain. With regard to the evidence of Carter and Storm, and the letter to Storm, and the

memorials to Mr. Thompson and Colonel Morison, their Lordships think they are explained by the legal nature of the title. In one case before Sir Edward Ryan, which I mentioned just now, the mode of giving receipts for rent and management was held to pass no legal ownership, and their Lordships think these documents are to be explained on that theory. Parol evidence is given of conversations during the life of the father, who died in 1842, but at this distance of time their Lordships think it would be unsafe to allow the title at law to be affected by them. Their Lordships having to consider the evidence from a different point of view to the Supreme Court, are of opinion, that if this were a time close on the death of the father, their view of the evidence would be rather unfavourable, than favourable, to the Respondent; but it is [83] sufficient that the evidence prove neither one thing nor the other. This, perhaps, was but a just estimate of it; but if not, the conclusions which I have before given would be.

We then come to the conduct of the brothers after the father's death—conduct to which much weight cannot be attributed either way; it would seem that parts of their mode of dealing with the property are in favour of the Respondent, and parts in favour of the Appellant, but no part of their conduct can be considered as wholly belonging to or supporting the theory of either party; they continued a considerable time after the death of the father, and after the Respondent came of age, to receive jointly the proceeds of the talook in question, and this conduct of the Respondent is rendered remarkable by the evidence of Ruggobanchunder Lahoree, the brother-in-law of the Respondent. His evidence is in these terms:—"I am the son-in-law of the late Rogoram Gosain. I married his daughter in 1836, and have lived ever since in his family house at Serampore, and live there still. The title deeds of the family property were kept in a room adjoining one which Rogoram used as his office, in his family house; all the family documents were kept in that room; some papers may have been lying about in another room, but, generally speaking, all deed and papers were kept in the room I speak of. I know the two talooks, Gheritty and Chattra. There were title deeds belonging to both of them; and in the lifetime of Rogoram, these deeds were kept in separate tin boxes, in the room I have spoken of, next to Rogoram's office, and of which Rogoram himself kept the key, up to the time of his illness. He then handed the key to me, and I re-[84]-tained it up to the time of his (Rogoram's) death; and I then gave it to Gungapersaud Gosain, Rogoram's eldest son. I gave him the key about six or eight months after Rogoram's death, and it may have remained with him ever since. Rogoram died in 1842; and his son, Gungapersaud, is about twenty years old, and Gopeekrist a year or two younger." On his cross-examination he says, "I gave up the key to Gungapersaud after his father's death. Rogoram gave me the key when he became ill, and told me to give it to Gungapersaud."

We must then remember the whole course of conduct on the part of the Respondent and the Appellant, who were in joint receipt of the rents, having possession of the title deeds, and who, therefore, knew what the title was. Stress has been laid on the accounts kept of Mr. Rattray's loan, by which it was said to appear that a sum of money which the Appellant refused to lend, was carried to the Respondent's account as for Gheritty. Their Lordships are of opinion that it would be unsafe to give such a character to the transaction; they think that it probably was, that the sum was to be debited in some way to the Respondent rather than to the Appellant, and that it was not intended to affix any particular character to the account in which it might be found. Their Lordships, however, think that the views which the sons may have taken of the matter are of very little importance; they may have mistaken their rights, and their conduct can only be material as being that of persons knowing what the father's intention was, and as, therefore, proving that intention; but it appears that they had no means of knowledge beyond what the Court at Calcutta and the Court here [85] have, for there is no trace of any communication having passed between their father and them, and, therefore, their conduct since the father's death does not afford any valid ground for changing the view of the case which would have prevailed at the death of the father if it had just occurred.

On the whole, it is not necessary to express any dissent, or, at least, to any great extent, from the view taken by the Supreme Court of the evidence. The

Court thought it was not conclusive, their Lordships may say the same; the presumption, however, remains in favour of the Appellant: but if the evidence is to be taken as of any value, their Lordships view it that it is rather in favour of the Appellant than of the Respondent. Another point arises, but the case seems hardly touched by the pleadings. It appears that Rogoram Gosain and his brother formed a joint family, their property was joint, and there is no proof that the Rs. 64,000 were not part of the joint property: if they were, and perhaps the true inference may be that it was joint property, both families would have been interested in these purchases; but the family of the father's brother are bought off: this would leave the property part of the joint family property of Rogoram Gosain, in which case it would belong to the two sons. If this view is open on the pleadings, which we do not say, the Appellant would on this ground be entitled. On the whole, then, their Lordships feel bound respectfully to dissent from the judgment of the Supreme Court. The dismissal of the Bill cannot, therefore, stand: there are no costs to be dealt with, the Bill having been dismissed without costs. Their Lordships will declare that the purchase was a benamie purchase, and will [86] also declare the party in whose name it was made was a trustee for the father, and that the property in question was part of the father's estate at the time of his death.

Mr. Dickens suggested that the declaration should extend to Chattra, to avoid chances of further litigation between the parties, which was agreed to by the Appellant's Counsel and the Court.

Their Lordships made the following report, which was confirmed by Her Majesty's Order in Council:—Declare that the purchases by the late Rogoram Gosain, in the pleadings mentioned, of, amongst others, the talooks, Gheritty and Chattra, with their appurtenances, severally comprised in the indenture of lease and release, dated the 12th and 13th days of July, 1825, and the indenture of lease and release dated the 29th and 30th days of January, 1832, in the name of the Appellant and Respondent respectively, as in the pleadings mentioned, were and are benamie transactions, and that the Appellant and Respondent thereby severally became and thenceforth continued, and were, up to and at the time of the death of their father, Rogoram Gosain, trustees respectively for him, as the absolute and beneficial owner of each of the two talooks respectively, with their appurtenances aforesaid. And that it ought to be further declared that talooks, Gheritty and Chattra, respectively, with their appurtenances aforesaid, were, at the time of the death of Rogoram Gosain, integral parts of the estate and property of him, Rogoram Gosain, and that execution upon the judgment (if any) in the action of ejectment in the pleadings mentioned, and all [87] proceedings in the action, ought to be stayed, and that in case the possession shall have been changed under any execution issued upon the judgment, such possession ought to be restored as the same stood before such execution was issued: and their Lordships are further of opinion that the cause ought to be remitted back to the Supreme Court, with directions to the Supreme Court to give effect to this report and to Her Majesty's Order made thereupon: and their Lordships not thinking fit to deal with the costs incurred as aforesaid, do recommend the Supreme Court to deal with the costs of the parties incurred and to be incurred in the Court below, as to the Supreme Court, having regard to the declarations and directions aforesaid, shall seem just (a).

(a) Upon the doctrine of purchases made in the name of the nominee of the vendee, the nominee being the son or a person the purchaser had a natural obligation to provide for by the Roman law, see Code, lib. v. tit. xvi. "*De Donationibus inter virum et uxorem*," etc. sec. 25; Voet. Pand. lib. xxxix. tit. v., vi.; by the Scotch law, Stairs' Inst. of the Law of Scotland, b. i. tit. viii. sec. 2, and in addition to the English authorities cited in the argument, *Finch v. Finch*, 15 Ves. 43; *Rider v. Kidder*, 10 Ves. 360; *Collinson v. Collinson*, 3 De G. Mac. and Gor. 409; *Prankerd v. Prankerd*, 1 Sim. and Stu. 1; *Skeats v. Skeats*, 2 You. and Coll. N. R. 9, 11. See also, by the Hindoo law, *Sibchunder Kur v. Nund Gopal Mullick*, S.D.A. Dec. Beng. 605; *Rungama v. Atchama*, 4 Moore's Ind. App. Cases, 1; by the Mahomedan law, *Ruggoo Mull v. Bunsedhur*, 5 Dec. N.W.P. 147; *Newazee Feraush v. Mussummaut Aflussee*, 1 Ben. Sud. Dew. Rep. 31.

[See *Moulvie Sayyad Uzhur Ali v. Mussumat Beebe Utaf Fatima*, 1869, 13 Moo. Ind. App. 232; *Nawab Azimut Ali Khan v. Hurdwaree Mull*, 1870, 13 Moo. Ind. App. 400; *Juttendromohun Tagore v. Garrendromohun Tagore*, 1872, L.R. Ind. App. Sup. vol. 71.]

[88] DWARKA DOSS.—*Appellant*; BABOO JANKEE DOSS.—*Respondent* *
[Feb. 6, 7, 1855].

On appeal from the Sudder Dewanny Adawlut at Agra.

In an action by a banking firm against another firm to recover a balance upon an account between them, the Plaintiff put in evidence the account-books of his firm, and the Inspector of the Court certified that the books were regularly kept, consistently with the rules of banking, and that they agreed with the account rendered by the Plaintiff to the Defendant. The Plaintiff, however, examined no witness to prove that the books were regularly kept, or the general accuracy of the particular charges constituting the demand; he proved admissions by the Defendant of the correctness of the account and of an award in his favour of one of the disputed items. The Defendant in his defence did not deny the accuracy of the Appellant's account, or of the books put in evidence, but objected to two items in the account, and claimed a set-off, but examined no witnesses to rebut the Plaintiff's case.

Held (reversing the Sudder Court's decree) that although the Plaintiff's books, and the Inspector's report, were not conclusive evidence, yet that the necessity of strict proof was removed by the admission of the Defendant, and the fact of the absence by him of any evidence to impeach the accuracy of the accounts, the disputed items being satisfactorily accounted for.

This was an appeal from a judgment of the Sudder Dewanny Court at Agra, which reversed a decree of the Sudder Ameen of the Zillah Court of Benares, in the Appellant's favour, in an action brought by him in that Court against the Respondent for recovery of Rs. 20,119. 3a. 9p., the alleged amount of the balance due to him of an account between them. Both parties were bankers, having houses of business at Calcutta and Benares.

The facts of the case and the pleadings are so fully stated in the judgment as to render any further statement unnecessary.

[89] The case was argued by Mr. Leith and Mr. Fulton for the Appellant, and Mr. W. H. Watson, Q.C., and Mr. Field, for the Respondent.

The argument was confined to the question of the sufficiency of the evidence adduced by the Appellant of the balance claimed upon the accounts between him and the Respondent. The Respondent insisted that the account books of the Appellant were not admissible or sufficient evidence of his liability. On the other hand, the Appellant submitted that there were sufficient admissions made by the Respondent by the pleadings and evidence of the disputed items, coupled with the fact of his not going into evidence to rebut the Appellant's case, to sustain the judgment of the Zillah Court.

The authorities cited were *Baboo Bonee Suharee v. Baboo Hurkishen Doss* (2 Knapp, P.C. Cases, 255; and see *Rai Sri Kishen v. Rai Huri Kishen*, 5 Moore's Ind. App. Cases, 132, and authorities collected at p. 446), and Macpherson "On Civil Procedure," pp. 255, 271.

The judgment of their Lordships was pronounced by

The Right Hon. T. Pemberton Leigh (Feb. 10, 1855).—In this case, an action was brought by the Appellant against the Respondent to recover the alleged balance of an account. Some evidence was given on the part of the Plaintiff. No evidence whatever was given on the part of the Defendant; and the sole question which their

* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Lord Justice Turner.

Lordships have to consider is this, whether such a case is made out on the part of the Plaintiff as to call for an answer on the part of [90] the Defendant, and, in default of any answer being given, to entitle him to a verdict.

The Appellant and Respondent are both bankers in extensive business in India. The Appellant has one house of business in Benares, and another in Calcutta. The Respondent has a house of business in Benares, and none at Calcutta. He has other houses of business, at Patna, Chuprah, and various other places in India. The Benares firm of the Respondent employed the Calcutta firm of the Appellant as their agents, and this agency continued for a great number of years. The transactions were extremely extensive, and it is represented on the part of the Respondent that they amounted, as he says, to "lacs upon lacs of rupees." It would be in the ordinary course of such business that the account should be regularly transmitted in each year by the agents of the house to the principal, showing the transactions which had taken place, and the balance which resulted upon those accounts. And it is reasonable to presume that that which was the ordinary course was pursued in this case. It is so alleged on the part of the Appellant, and is nowhere distinctly denied on the part of the Respondent.

On the close of the account in the year 1849 (the mercantile year ending, as we take it from the papers, in the month of July or August), an account was delivered by the Appellant to the Respondent in respect of the transactions between the Respondent's Benares firm and the Appellant's Calcutta firm, on which a balance of between Rs. 18,000 and Rs. 19,000 was shown to be due from the Respondent to the Appellant. Payment of this balance was demanded: and it is stated on the part of the Appellant that one item, [91] constituting a portion of that balance, was objected to: an item of Rs. 4800 and odd. That was an item which had not occurred in the year to which the account related, but two or three years before, and it consisted of the value of certain gold coins which had been sent by the Appellant, or by his firm, to the Respondent, but which the Respondent alleged had never been received by him.

This matter, it is agreed on all sides, was referred to arbitration, and an award was made, as the Appellant alleged, by which that point was decided in his favour.

The Respondent persisting in a refusal to pay this balance, on the 24th of December, 1849, the plaint in this suit was filed. The plaint alleged the facts which I have already stated, but it was not until the 12th of April, 1850, that the Respondent filed any answer to that plaint. The effect of that answer is very fairly stated in the Respondent's case. He says, that "he denies the correctness of the Appellant's claim, and claims a nonsuit." In effect, he pleads what may be called a general issue. "He also insists that the suit was not properly brought at Benares;" and he makes various other technical objections. He then "alleges that the Appellant has included in his claim a sum of Rs. 1500 relating to the Chuprah agency, of which no particulars are given." He then states as an objection, that various other items in respect of other agencies are not included in this account. He objects to the award on the grounds of want of notice, and of partiality and misconduct: and states that "the parcel in question was never dispatched from Calcutta, and claims fuller details of the Appellant's accounts."

The agency, therefore, and the fact of the submis-[92]-sion to arbitration, are admitted. The regular transmission of the accounts is not denied, but he disputes two items in these accounts, or alleged to be contained in these accounts, and he raises a set-off in respect of other transactions, on account of other business transacted with the other firms of which he is a member.

On the 15th of May, 1850, the Appellant files his replication, and in that replication he denies the Respondent's alleged set-off. With respect to the item of Rs. 1500 for the Chuprah agency, he says, that no such item is contained in the account, and he denies the partiality of the arbitrator which is alleged in his answer. He then says, that the accounts which he has transmitted are in the possession of the Respondent. He offers to produce his own accounts: he appeals to the accounts of the Defendant in his books, and he then distinctly calls the attention of the Court to this, that he has not denied the accuracy of the general accounts between them.

To this replication the Respondent might, if he pleased, have filed a rejoinder. But he did not think fit to adopt that course, and the period within which the re-

joinder ought to have been filed having elapsed, on the 27th of June, 1850, issues between the parties were settled by the Judge. These issues were as follows:—"In this suit Plaintiff should produce the day-book and journal, and show evidence to prove the balance in his favour, and also substantiate the award of the arbitrator respecting the item of Rs. 4000 mentioned in the petition of plaint, and should also substantiate the statement that Defendant admitted all the items of his claim with the exception of the item set down as lost in its passage by Dāk. And Defendant should refute the points stated above, and [93] should prove the falsity of Plaintiff's claim." And it is ordered "that both parties do file in one week all the evidence for or against the claim which is the subject of dispute."

Now, the Appellant's books were in Calcutta, and it was impossible for him to produce those books within the time limited by this order. But on the 25th of July, 1850, he presented a petition to the Court, filing the award, which was one of the points upon which evidence was to be given, and stating that he had copies of several accounts for, I think, four, five, or six years between himself and the Respondent, the originals of which had been delivered to the Respondent, and that he would file those accounts in order that they might be examined by the Respondent, and that as soon as the books arrived at Calcutta, those books should be produced in verification of those accounts.

On the 17th of August, 1850, those books were produced and were filed, and the books were handed over to a person of the name of Kunhya Lall, for the purpose of examination and inspection, according to the ordinary course of the Court. The order, addressed to the Inspector, was in these terms:—"You are, therefore, requested to appear in Court, and in the presence of both parties or their agents, to inspect or compare Plaintiff's account books, and file a report of the correctness or incorrectness of the same." This was to be done in the presence of both parties, and, accordingly, the Plaintiff's agents attended before the Inspector. The Defendant's agent did not think fit to appear until an order had been made by the Court, which was pronounced about a week afterwards, that in default of appearance on the part of the Defendant the Inspector should proceed [94] *ex parte*. Hereupon the Defendant's agent did attend, and objected: and the objection which he made was this: not that those books were not the genuine accounts which had been kept at Calcutta, not that those books were incorrect in their general statement; on the contrary, the Inspector reports that the Defendant's agent upon his attendance inspected those accounts, and stated that they were generally accurate; but he alleged, that with respect to one item in these accounts, a parcel of sugar, which had been sold five or six years before, he wished for further explanation; and that inasmuch as the earliest of those accounts included a balance of still earlier accounts, he wished those earlier accounts to be produced. The Inspector told him that he either could not or did not think it was his duty to comply with these requisitions; but that if any objections were pointed out, either to a particular item, or to the general accuracy of the accounts, or if anything was produced on the part of the Defendant showing that those accounts were defective by reason of errors in the earlier accounts, he would pay attention to those objections. The agent attended again on the following day, and repeated the same objections, and, upon those objections being disallowed, he stated that he would apply to the Court for an order giving directions as to the Inspector's proceedings. He took no step whatever in pursuance of this threat, if I may so call it; he never attended again before the Inspector, and the Inspector, therefore, proceeded *ex parte* with the examination of those accounts. He made his report on the 5th of September, 1850, and the result of that report was this, that he had fully investigated and examined those accounts, that the accounts had been regularly kept, that with two trifling exceptions, not necessary [95] to be particularly adverted to, the accounts in the books corresponded with the accounts alleged to have been delivered to the Respondent, and that it was proved to him, by the production of various letters from the Respondent to the Appellant, that those accounts so alleged to have been delivered, actually had been delivered, it being found, of course, that there was this balance, subject to a trifling modification due from the Respondent to the Appellant.

Now, the Inspector's report is evidence, but not conclusive evidence, and it is open to the parties to contradict, by evidence produced on the other side, the state-

ments contained in that report. No "refutation," however (as it is called), of that report was filed by the Respondent. But, on the 9th of September, 1850, he presented a petition praying to be at liberty then to go into evidence for the purpose of refuting that report, and he was told that as long as the case remained open until the record was closed, it was perfectly competent to him to go into evidence. He had asked for three weeks. In point of fact, at least two months had elapsed, before the matter came on for hearing, but not one particle of evidence was produced during that period on the part of the Respondent in "refutation" (as he calls it) of this report. The other evidence produced by the Appellant in the action was this: He produced the award which had been made, and he proved by the examination of the arbitrator who had made that award, the submission (which was not denied), and the fact that he had made that award after a careful examination, not only of all the documents in the possession of the Appellant, but of the letters and books in the possession of [96] the Respondent, and that he came to the conclusion that the item of Rs. 4811 had been properly charged by the Appellant to the Respondent, and that with respect to the item of Rs. 1500 that belonged to another account, and was not included in the Benares account. He proved further that this award, of which the Respondent affected to know nothing, had been actually signed in the presence of the Respondent's agent, that one copy had been delivered to the Appellant, and the other copy had been delivered to a person called Gobundkur Doss, for the purpose of being handed over to the Respondent. The fact of this award being made, and made under the circumstances I have stated, was confirmed by the evidence of another person, a witness who was present, and who speaks to those facts. The Appellant went further into evidence for the purpose of proving the various admissions alleged to have been made by the Respondent, by which, as it was stated, he had consented to pay the balance of the account, provided this particular item of Rs. 4800 were deducted. Four or five witnesses were produced for the purpose of establishing those allegations.

The evidence upon these admissions was dissected with consummate ability by Mr. Field, on behalf of the Respondent. The Judge in the Zillah Court does not appear to have placed much reliance upon those witnesses, and the Judges of the Superior Court were of opinion that considering the usages and habits of India, it was entirely incredible that such conversations could have taken place. And the experience of one of their Lordships, who is familiar with that country, confirms in that respect the opinions of the Judges. But upon the other [97] evidence, on the 3rd of November, 1850, the Judge of the Zillah Court pronounced a judgment which I must say entitles him to very great credit. He examines the case with the utmost care. He discusses the principles upon which the judgment is to be founded. He gives his opinion as to the weight to be attributed to each distinct portion of the evidence, and he comes to the conclusion, that in the absence of all evidence on the part of the Defendant (who produced no evidence whatever), there was sufficient to entitle the Plaintiff to the judgment which he claimed. And, accordingly, judgment was pronounced in his favour for the amount of the debt, with costs.

On the 30th of December, 1850, the Respondent presented a petition for a review of that judgment, and the first paragraph in the petition for review strongly confirms the view which their Lordships take of this case, namely, that the real question between the parties were these and these only: first, as to the accuracy of the two items complained of in the Plaintiff's account of Rs. 1500 and Rs. 4800; and, on the other hand, the set-off alleged on the part of the Defendant, the fact of the balance being turned in his favour, as he alleged, by various other accounts subsisting between the parties, and which ought to be taken into consideration when they were dealing with the Benares account. For in that petition for review he states, "The following was substantially the reply which the Petitioner made to the above-named charge, namely, that according to the accounts, Petitioner has large sums to receive from Plaintiff on account of agencies in other Districts, and that the present suit cannot be brought against Petitioner."

[98] That petition of review was refused, and on the 31st of December he presented a regular petition of appeal.

The appeal came on for hearing on the 20th of April, 1852, and the Judges of the Sudder Court reversed the judgment of the Zillah Court, and they appear to

have proceeded upon three grounds: First, that the accounts had not been satisfactorily made out. Secondly, that the award was not sufficiently proved, and it was in itself open to great suspicion. And, thirdly, that the evidence proving or affecting to prove the admissions of the Respondent was not worthy of credit.

On the last of these grounds their Lordships are not, as I have already intimated, disposed to differ from the Judges of the Sudder Court. But we feel ourselves unable to agree with them upon the other two grounds of their Judgment. It is perfectly true that the regular proof of books and accounts, requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy. But the question is, whether having regard to the issue joined between these parties, and the facts which must be taken to have been impliedly admitted between them, and to what took place before the Inspector when those books were produced to him, whether, having regard to these circumstances, the necessity of that strict proof was not removed, and whether it is possible for the Court to hold that any doubt can exist as to the genuineness of those accounts, or as to the accuracy of those accounts, excepting in the par-[99]-ticulars to which objections have been specifically made, and which objections had been distinctly, and in our opinion properly, overruled.

Now, their Lordships are of opinion, that what had taken place was abundantly sufficient to remove the objection on the ground of the absence of that strict proof. It appears that witnesses, to afford that proof, had been tendered for examination, that a commission issued at Calcutta for the purpose, and that that commission had been returned without any evidence being taken under it. It is alleged that it happened by mistake. There is no proof of that. Of course, therefore, we do not at all found our judgment upon that. But having regard to the fact that the genuineness of those books was not disputed when they were offered to the Inspector, and that their accuracy was not disputed by the Respondent's agent, who attended to examine them, but that, on the contrary, their general accuracy was admitted; that the accounts contained in those books had been for several months open to the inspection of the Respondent, with power to him to point out any inaccuracies, if any inaccuracies existed, and that he had in his own possession means at any moment of disproving the accuracy of those books (if inaccurate they were) by the production of his own accounts, books, and vouchers, their Lordships are of opinion that there was a *prima facie* case for the establishment of those accounts, and that then the only question was, whether the particular items objected to had been made out by the Appellant, and whether the set-off alleged on the part of the Respondent had been established.

Now, with respect to the award, the Judges of the Sudder Court state, that it is open to great suspicion [100] on the ground that the award was not made for more than twelve months after the submission to arbitration. Their Lordships cannot think that that is a sufficient ground for doubting the fact of the award having been made. Some determination must have been come to under the submission, which is not denied; and the fact of that award having been made is distinctly sworn to by the arbitrator who made it, and by another witness who was present upon the occasion of its being signed.

Upon the whole, therefore, their Lordships are of opinion, that the judgment of the Sudder Court must be reversed, that the judgment of the Zillah Court must be re-established, and that the costs of the proceedings in the Sudder Court must be paid by the Respondent to the Appellant; but that considering the great weight which is to be attributed to the judgment of the Sudder Court, and the doubt which unquestionably exists upon some parts of the case, it will not be fit to award any costs of the proceedings in this Court.

[101] RAJA LELANUND SING BAHADOOR,—*Appellant*: THE GOVERNMENT OF BENGAL,—*Respondent* * [June 13, 14, and 15, 1855].

On appeal from the Court of the Special Commissioners for the Districts of Calcutta and Moorshedabad.

By the tenure of Ghatwally, the lands are held under a grant from the ruling power, by the performance of the defined duty of the Ghatwal guarding the Ghats or passes.

Upon the death of the Ghatwal last seised, the lands descend entire to a male heir, as Ghatwal.

Exposition of the principles which induced the Government to recognise the title of the Zemindars in Bengal, as landowners, and to make the Settlement with them for a permanent annual jumma.

Under the provisions of the Decennial Settlement of 1789, the Bengal Government, in 1790, assessed the whole of the Zemindary of Khuruckpore, including certain Ghatwally lands, as a fixed jumma. This Settlement was made perpetual in 1796, under Ben. Reg. I., of 1793, at the same fixed jumma. In 1838, the Government set up a claim to resume, for the purpose of revenue assessment, the Ghatwally lands in this Zemindary. Such claim dismissed, by reason,—

First. That the Ghatwally lands were part of the Zemindary of Khuruckpore, and were included in the Permanent Settlement of the Zemindary, and covered by the jumma assessed on that Zemindary; and

Second. That lands of Ghatwally tenure were not liable to resumption under cl. 4, sec. 8, Ben. Reg. I., of 1793, as included in allowances made to Zemindars for Tannah, or police establishments.

In circumstances respecting the enforcement by Government of their claim to resume these lands, the Judicial Committee, in reversing the decree of the Special Commissioners, decreed all the costs incurred in the proceedings in India and in this Court, to be paid by the Bengal Government.

In this suit the Government of Bengal sought to establish their right to resume and assess with revenue certain Ghatwally lands, containing 755 beghas, [102] attached to Ghat Foujdar in Tuppa Dhumsaen, in Pergunnah Gorda, forming part of the Zemindary of Khuruckpore, situate in the District of Bhagulpore, in Behar, in the possession of Toofany Sing, as Ghatwal, on the ground that they were held as La-khiraj, without sufficient title to exemption from payment of revenue.

At the time when this suit was commenced, Maha Raja Rehmut Ali Khan was the Zemindar in possession of an extensive Zemindary and principality called the Khuruckpore estates, within which the lands in question were situate, and of which they had always formed part. Raja Biddianund Sing, since deceased, represented by the present Appellant, his son and heir, and one Balnath Sahoo, became during the progress of the suit the purchasers at public auction of that Zemindary, together with the rights of Maha Raja Rehmut Ali Khan therein, and they were subsequently as such auction purchasers made parties to the suit. The Khuruckpore estates, including the Raj and principality, had descended through a long line of ancestors on Maha Raja Rehmut Ali Khan. The Zemindary was in the possession of this family at the time of the accession of the East India Company to the Dewanny in 1765, and it had been in their possession from a period long anterior thereto.

The origin and nature of Ghatwal tenure is fully stated and explained in the judgment. It appears that long before 1765, the Zemindars of the Khuruckpore estates had created certain Ghatwally tenures for the purpose of protecting their Zemindary from the attacks of mountaineers and other turbulent people in their neighbourhood; and those tenures embraced the whole of the lands lying within the village of Dhum-[103]-saen, of which the lands in question had always formed part.

* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

as well as lands in other villages belonging to and also forming part of the Khuruckpore estates. These lands, held in Ghatwally tenure, were apportioned and attached by the Zemindar to particular Ghats, or passes, including the Foujdar Ghat, to which were apportioned and attached, amongst other lands, the 755 beghas of land in question. At the same time persons were selected and appointed by the Zemindar to perform the duties of Ghatwals at those several Ghats, and as such to act as the servants and dependants of the Zemindary for the time being; and among those Ghatwals, the Zemindar, from time to time, allotted and apportioned the lands, which were held by them on condition of their performing those duties in lieu of wages, but subject also to the payment of a fixed rate of rent to the Zemindar for and in respect of the cultivated land allotted to them, and for and in respect of the land which they might thereafter bring into cultivation. These Ghatwals were appointed, and their lands were at the same time granted to them by formal sunuds and grants made and executed by the Zemindars, who thereby reserved to themselves the power of dismissing such Ghatwals, and appointing others in their stead as they might see fit, or if they failed to perform efficiently the services required of them. Thus a permanent guard was established under the absolute control of the Zemindar for the protection of his Zemindary and the Ryots, as well as travellers and wayfarers, according to the ancient custom of the country, and which custom still prevails throughout those Districts of India in immediate proximity to the mountain ranges, as a security against the inroads and at-[104]-tacks of the mountaineers and other turbulent people banded together for the purposes of robbery and plunder.

The proceedings out of which this appeal arose were commenced in the year 1836, by the Sudder Board of Revenue giving instructions to Mr. Travers, the Special Deputy Collector of the District of Bhagulpore, to investigate the question of the Ghatwally tenures, and the right of Government to revenue from the lands held by Ghatwals in his District.

Mr. Travers accordingly proceeded to make the inquiry, and, in May, 1838, eleven suits were instituted before him on behalf of Government against different Ghatwals to assert the Government's right to assess the Ghatwally lands in Tuppa Dhumsaen with revenue. In one of these suits, Toofany Sing of Ghat Foujdar was the Defendant, and the question there raised and which was the subject of this appeal, was the right of the Government to attach and resume for non-payment of revenue these 755 beghas of land. The proceedings, to which Toofany Sing was a party, involved the same question as that in the ten other suits, and the question with regard to them was agreed to be determined by the result of his suit.

A summary of the various proceedings before the Collector and Special Commissioners, and their respective decrees, will be found in their Lordships' judgment.

By a final decree, dated the 27th of June, 1845, made by the Special Commissioner, Mr. Moore, in favour of the Government, these lands were directed to be resumed and assessed under cl. 4, sec. 8, Reg. I. of 1793, as being granted for police establishments.

[105] The present appeal was from this decree.

At the hearing, two grounds were taken by the Appellant against the Government's right of resumption. First, that Ghatwally lands were by the nature of their tenure held by, and formed part of, the Zemindary of Khuruckpore, and were included in the Decennial Settlement made between the Zemindar and Government in 1790, by which the Zemindary of Khuruckpore was assessed at a fixed jumma, which Settlement was made permanent by Ben. Reg. I. of 1793, and that such Settlement could not now be reopened. Second, that even if these lands were not included in the Permanent Settlement, they were exempt from resumption for taxation by the State, as they had been held for sixty years, from the date of the Company's accession to the Dewanny, without paying rent, which operated as a prescriptive bar to the Government's right to resume.

The Bengal Government relied upon their right to resume and assess these lands under Ben. Reg. I. of 1793, sec. 8, cl. 4, and contended, that previously to the passing of that Regulation, respecting the Permanent Settlement of the revenue, the produce of the Ghatwally lands was appropriated by the Zemindar to the maintenance of the Tannah, or police establishments; and by that Regulation, in consequence of the Government having taken upon itself the charge of maintaining the police of the

country, lands of that tenure were made liable to assessment of revenue, in addition to the jumma assessed on the Zemindary by the Permanent Settlement, and that the jumma assessed by the Permanent Settle-[106]-ment on the Zemindary of Khuruckpore, in fact, included no sum assessed in respect of the produce appropriated from these lands to the maintenance of the police establishments.

The authorities referred to on these points were:—

As to the nature and tenure of Ghatwally lands, *Hurlal Sing v. Jorawum Singh* (6 Ben. Sud. Dew. Rep. 169).

Upon the right of the Government to resume, Ben. Regs. LXXII., sec. 31 of 1791, XLIX. of 1792, secs. 1, 2; L. of 1792, sec. 17; I. of 1793, sec. 8, cl. 4; VIII. of 1793, secs. 36 and 41; XXII. of 1793, sec. 2; XXIII. of 1793, sec. 36; XXVII. of 1793, sec. 5, cl. 4; XXV. of 1803, XXIX. of 1814, II. of 1819; IX. of 1825; and 2 Harrington's Analysis, p. 236.

And, that the Government's claim was barred by prescription, *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government* (4 Moore's Ind. App. Cases, 466), Ben. Regs., II. of 1805, sec. 2, cl. 2, and II. of 1819.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Wigram, Q.C., Mr. Lloyd, Q.C., and Mr. Melvill, for the Bengal Government.

At the conclusion of the argument, judgment was postponed, and was now delivered by

The Right Hon. T. Pemberton Leigh (July 25, 1855).—The question to be decided in this case is the validity of a claim made by the East India Company to resume, for the purposes of revenue assessment, [107] against the Raja of Khuruckpore, 755 beghas of land (between three and four hundred acres), part of his Zemindary. Their Lordships had no doubt, at the hearing of the appeal, as to the advice which it would be their duty to tender to Her Majesty; but it was stated that there were ten other suits which would be governed by the present decision, and it was obvious, from the nature of the claim, that if it could be maintained, it might affect a very great extent of land throughout the Provinces included in the Decennial Settlement. Their Lordships were, therefore, anxious to explain fully the grounds of their opinion, and by enabling parties to judge what cases will or will not fall within their decision, to prevent, as far as possible, further litigation.

The lands sought to be resumed, are of what is called Ghatwally tenure, and the great question in the case is, whether lands of this description are liable to be resumed under Regulation I. of 1793, sec. 8, cl. 4, relating to Tannah, or police establishments.

As the question depends on the effect of the Settlement of 1793, and the changes which were then introduced, it will be convenient to advert to the state of these Provinces, and the mode in which they were administered previously to that time. The three Provinces of Bengal, Behar, and Orissa, were ceded by the Mogul to the East India Company, in the year 1765.

At this time the territorial division of the country was into mouzas, or villages, occupied by Ryots; Pergunnahs, each of which included several villages; and Zemindaries, varying in extent, from a moderate English estate, to Districts equal to or larger than many European principalities. The Zemindary of Beerbhoom, which immediately adjoins Khuruckpore, is [108] stated in a document, dated in 1786, to which we shall have occasion to refer, to be twice as large as the Kingdom of Sardinia. Khuruckpore was probably of inferior but still of vast extent.

Many of the greater Zemindars, within their respective Zemindaries, were entrusted with rights, and charged with duties, which properly belonged to the Government. They had authority to collect from the Ryots a certain portion of the gross produce of the lands. They, in many cases, imposed taxes and levied tolls, and they increased their income by fees, perquisites, and similar exactions, not wholly unknown to more recent times and more civilised nations. On the other hand, they were bound to maintain peace and order, and administer justice within their Zemindaries, and, for that purpose, they had to keep up Courts of civil and criminal justice, to employ Kazees, Canoongoes, and Tannahdars, or a police force. But while, as against the Ryots and other inhabitants within their territories, many of these potentates exercised almost regal authority, they were, as against the Govern-

ment, little more than stewards or administrators. Their Zemindaries were granted to them only from year to year; the amount of their jumma, or yearly payment to Government, was varied, or might be varied, annually; it was an arbitrary sum fixed by the Government officers, calculated upon the gross produce of the Zemindary from all sources, after making an allowance to the Zemindar for his maintenance, and for the expenses of the collection and of discharging the public duties with which he was entrusted by the Government. Amongst the lands thus granted to the Zemindars were often included lands which had been appropriated to the [109] payment and support of public officers of the Zemindaries, or villages included in them. These lands were called Chackeran lands; and it appears that under the ancient system such lands were usually exempted from assessment in favour of the Zemindar, though they had no legal title to exemption. But there was another class of lands called La-khiraj, which, by reason of a special exemption in a royal grant, or by having been legally devoted to religious uses, or by other means, had become or were claimed by their owners to be free from Khiraj, or assessment to the Government.

The police of the country was maintained by means of Tannahdars, or police officers, kept by the Zemindars, and appointed and paid by them; but, where no other provision existed for their maintenance, the expense was in effect defrayed by the Government, either by direct allowances to the Zemindar, or by deduction from his jumma, or by excluding from assessment, or assessing below their value, lands appropriated to that purpose by the Zemindar.

In addition to the police force thus kept by the Zemindar, at the expense of the Government, and which seems to have been usually very inefficient, private individuals and communities were accustomed to keep watchmen for the protection of their persons and property, under the name of Chokeedars, and various other names, who were paid by their employers, and from whom no allowance was made by the Government.

Besides the disorder which prevailed generally through the Provinces, particular Districts were exposed to ravages of a different description. The mountain or hill districts in India were at this time [110] inhabited by lawless tribes, asserting a wild independence, often of a different race and different religion from the inhabitants of the plains, who were frequently subjected to marauding expeditions by their more warlike neighbours. To prevent these incursions it was necessary to guard and watch the Ghats, or mountain passes, through which these hostile descents were made; and the Mahometan rulers established a tenure called Ghatwally tenure, by which lands were granted to individuals, often of high rank, at a low rent, or without rent, on condition of their performing these duties, and protecting and preserving order in the neighbouring Districts.

Nothing could be more deplorable than the state of the Provinces under this system. Murder and rapine were common throughout the country; more than half the lands were waste and uncultivated; and neither the Ryots nor the Zemindars had any inducement to improve them, as any increase in their value had only the effect of increasing the Government assessment.

It was considered by the East India Company that the first step towards a better system of government and the amelioration of the condition of their subjects would be to convert the Zemindars into landowners, and to fix a permanent annual jumma, or assessment to the Government, according to the existing value, so as to leave to the land proprietors the benefit of all subsequent improvements.

Accordingly, they determined to make the assessment in the first instance for a period of ten years, with a view to its being ultimately made permanent.

In 1789, the original Rules and Orders for the Decennial Settlement of Behar were issued; the Settle-[111]-ment in the other Provinces being issued in subsequent years.

In 1791, by Regulation LXXII., an amended Code of Regulations relative to the Decennial Settlement of Bengal, Behar, and Orissa was promulgated.

By section 1 of that Regulation it was provided, that a new settlement of the land revenue should be concluded for a period of ten years.

By section 2, it was provided, that it should be at the same time notified to the landowners with whom the settlement might be concluded, that the assessment fixed by the Decennial Settlement would be continued after the expiration of the ten

years, and remain unalterable for ever, provided such continuance should meet the approbation of the Court of Directors.

By section 31, it was ordered, that the allowances of the Kazees and Canoongoes, heretofore paid by the landholders, as well as any public pensions hitherto paid through the landholders, be added to the amount of their jumma, and be in future paid by the Collectors on the part of Government.

The assessment was to be exclusive of all La-khiraj lands, whether exempt from Khiraj with or without authority.

The Chackeran lands, or lands held by public officers and private servants in lieu of wages, were not to be excluded, but were to be subject to assessment in common with the other lands in the Zemindary, the exemption which such lands had previously enjoyed being thus destroyed.

The landholders were declared responsible for the peace of their Districts as theretofore, and were to act agreeably to such Regulations on this head as might be thereafter enacted.

[112] The jumma was to be fixed by the Collectors on fair and equitable principles, with the reservation of the approbation of the Board of Revenue, to whom he was to report the grounds of his decision.

The Collectors, in fixing the jumma, were to adopt the following as a general rule:—that the average product of the land in common years be taken as the basis of the Settlement, and from this deductions be made, equal to the Malikana and Kurcha, leaving the remainder as the jumma of Government.

The Malikana is the allowance made to the Zemindar for his maintenance, and the disbursements and outgoings allowed to him against his receipts fall under the term "Kurcha."

At this period Raja Kadir Ali was the Zemindar of Khuruckpore. This Zemindary is situated in the Zilla of Baghulpore, on the frontier of the Province of Behar, and forms a considerable principality, including many Pergunnahs, and, amongst others, the Pergunnah of Gorda, in which the lands in dispute lie. A very large quantity of lands within this District had been granted by the ancestors of the Raja on the Ghatwally tenure before described. In the Tuppa of Dhumsaen, a subdivision of the Pergunnah of Gorda, no less than thirty-five villages were held at this time upon this tenure by Ghatwals, and, amongst others, the lands in question by an ancestor of the original Defendant in these proceedings.

The extent and particulars of these vast estates, and the nature of the Ghatwally tenures, were well known to the Government of Bengal at the time when the settlement was made. Some years before, in consequence of disturbances which had taken place in the country during the time of Kadir Ali's father, the Government had found it necessary to interfere [113] with a military force, and having displaced the then Raja and restored tranquillity, had placed the Zemindary under the charge of one of their own officers, Mr. Augustus Cleavland, who had the management of it up to the year 1781, about which time Kadir Ali (his father having died) was put into possession of the Raj.

It appears from evidence in the cause (the report of the Collector of Baghulpore, of the 19th of November, 1813), that Mr. Cleavland, during the time that he was in charge of these estates, had granted no less than 87,084 beghas of land in this and (we presume from the extent) the adjoining District upon Ghatwally tenure, in conformity with the orders of Government.

It appears from other evidence (in Mr. Sutherland's Report, dated the 8th of June, 1819) that the grants before Mr. Cleavland's time to the Ghatwals reserved a payment of two annas per begha, as a fee or perquisite to the Zemindar; that some sunuds were granted unadvisedly by Mr. Cleavland without such reservation, but that he afterwards insisted on such payment being made to the Government while he was in charge on behalf of the Government, and that all grants subsequently made by the Raja of Khuruckpore contained the same reservation.

In 1789-90 the jumma to be paid by Kadir Ali was to be fixed, with a view to the Permanent Settlement. As might be expected, considering the magnitude of the estate, it appears to have undergone great consideration. Every village was enumerated and entered in a register; the deductions and allowances to be made out of the income, and the particulars of the lands to be excepted from the assessment

(for some lands, called Nankar lands, were excepted), were the subject of correspondence between the Collector of [114] the District and the President and Board of Revenue at Fort William, and finally the jumma was fixed at Rs. 65,459. 8a. 10½p.

It is beyond dispute, and, indeed, in this case has been fairly admitted, that the Ghatwally lands formed part of the Zemindary. It is equally clear that they were included in, and covered by, this assessment. Had they been excluded, the accounts to show it are in the possession of the Government, and might have been produced; but the contrary is perfectly clear upon the evidence, and indeed is found as a fact in the cause by the Special Commissioner, Mr. Moore, in his judgment of the 17th of May, 1843.

Whether these lands were or were not productive of revenue to the Zemindar at this time, is not material: though, if it were important, a careful examination of the evidence has satisfied their Lordships that there was some profit derived from them by the Zemindar even in money; but, at all events, he derived the benefit arising from the services of the Ghatwals, and enjoyed the valuable right of appointing the individuals, who, with the lands, were to take upon themselves the duties of the office. It was not the intention of the Settlement that no lands should be covered by the jumma which did not actually produce income, and, therefore, contribute to increase the jumma at that time. On the contrary, probably more than half the lands in the country were waste and unproductive at this period, and one of the main objects of the Permanent Settlement was to bring them into cultivation.

Thus matters continued up to the year 1792. The Tannahdars, or public police officers appointed by the Zemindars, had been found very inefficient, and the [115] Government had appointed officers of their own to assist in keeping order, who had concurrent jurisdiction with those named by the Zemindar. But, in the year 1792, the Government determined altogether to suppress the Tannahdars, or police establishments, maintained by the landholders, and to take to themselves exclusively the preservation of peace and the prevention of crime by means of a police force of their own, to be established at convenient stations throughout the provinces. As the landholders were to be relieved from the expense to which they were subject for the maintenance of the force now to be suppressed, it was very reasonable that, where allowances for such expenses had been made by the Government, they should no longer be continued, and the Government, therefore, resolved to reserve the right of discontinuing them, or (where lands had been allowed for the purpose) of resuming them.

To carry these arrangements into effect, Regulations XLIX. and L., of 1792, were issued.

The preamble of Regulation XLIX. recites, in strong language, the disorders which prevailed, and the utter inefficiency and frequent corruption of the Tannahdars employed by the landholders.

Section 1, provides that the police of the country is in future to be considered under the exclusive charge of the officers of the Government, who may be specially appointed to that trust. The landowners and farmers of land, who keep up establishments, Tannahdars and police officers, for the preservation of the peace, are accordingly required to discharge them, and all landowners and farmers of land are prohibited from entertaining such establishments in future.

By section 2, landowners and farmers are no longer [116] to be held responsible for robberies committed on their respective estates. Provision is then made for the appointment of a police force in different stations throughout the Provinces, each under the charge of a Darogha or superintendent, and the whole is subjected to the control of the Magistrate.

It is clear that the police force here spoken of is distinct from the Chokeedars and village watchmen, for these persons are by the 12th section declared subject to the orders of the Darogha, and by the 13th section are ordered to apprehend and send offenders to the Darogha, and afford every information to him.

By Regulation L. of the same year, 1792, a tax is to be levied within the District of each police establishment, for defraying its expenses; and the 17th section, which is very important, is in these words (it is a circular addressed to the magistrate of each district):—"You will report whether the landowners of your District have been allowed any deductions on their jumma, or are in receipt of any money allowances,

or hold any land either free of, or at a reduced revenue, for the purposes of keeping up Tannahdars or other police officers, and also your opinion whether the whole, or any, and what part of such deductions, allowances, or produce of such lands may with equity be brought to the public account, in consideration of the landholders being now prohibited from keeping up such establishment, and Government having taken upon itself the charge of the police."

Nothing can be clearer than this—that the lands referred to, are lands which the Zemindars, had been permitted by the Government to hold free from revenue—[117]—or at a reduced revenue, for the purpose of keeping up Tannahdars: not lands which the Zemindars had permitted other persons to hold free from rent, or at a reduced rent; or lands which such persons had a right to hold free from rent, or at a reduced rent; and that any lands which were in the first predicament were to be reported to the Government by the magistrate, together with his opinion, whether it was consistent with equity that the whole or any part of the produce of such land should be brought to the public account; and further, that this provision relates and is confined to a class of officers whom the Zemindar is no longer permitted to keep.

Though the Decennial Settlement had been made as to the several Provinces of Behar, Bengal, and Orissa under different Regulations, and although as to some of the estates the Settlement had not been entirely concluded in 1793, it was thought right in that year finally to establish its permanency, and for this purpose the celebrated Regulations of 1793 were published.

They were many in number, and after declaring the Settlement to be now permanent, re-enacted, with some modifications with respect to the three Provinces collectively, the provisions which had been previously made with respect to them separately.

The clause relating to the resumption of allowances which had been made to the Zemindars for police establishments, is in these words:—"Regulation I, section 8, clause 4. The jumma of those Zemindars, independent Talookdars, and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of, any allowances which have been made [118] to them in the adjustment of their jumma, for keeping up Tannahs, or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands, according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the police of the country. The Governor-General in Council, however, declares, that the allowances or produce of lands which may be resumed will be appropriated to no other purpose but that of defraying the expense of the police; and that instructions will be sent to the Collectors not to add such allowances, or the produce of such lands, to the jumma of the proprietors of land, but to collect the amount from them separately."

Upon the meaning of this clause the question in the cause depends. It is obvious that it has reference to the Police Regulation of 1792, and to the allowances with respect to which an inquiry was directed to be made in that year. It is unnecessary, therefore, here to repeat the observation already made as to their effect.

By Regulation XXIII. of 1793, the same inquiries are directed to be made by the Collectors as had been ordered to be made by the Magistrates in 1792; but, as the language is not precisely the same, it may be as well to state the clause at length. It is section 36, and is in these words:—"The Collectors are to report all allowances that may have been made to the [119] proprietors of land for keeping up police establishments, either by deduction from their jumma, or by permitting them to appropriate the produce of lands for that purpose, or in any other mode, which may not have been already resumed, with their opinion of how far the whole or any portion of such allowances can with equity be resumed in consequence of the proprietors of lands being exonerated from the charge of keeping the peace, as declared in Regulation XXII. of 1793:" which Regulation had re-enacted the provisions of Regulation XLIX. of 1792.

The same provision with respect to Chackeran and La-khiraj lands which had been contained in the Regulations of 1789 are repeated in those of 1793, namely, that the

Chackeran lands should be included in the Settlement, and the La-khiraj lands excluded from it.

Although both the La-khiraj lands and the Tannaahdary lands are reserved for further inquiry under these Regulations, there was obviously a great distinction between them with respect to the period at which the decision relating to them ought to be made.

The La-khiraj lands were separate from the Zemindary, and were excepted out of the Settlement. The validity of the exception claimed for them depended on the validity of the grant under which it was claimed. Very many of the grants were believed to be fraudulent; but each case was to depend upon its own circumstances. The investigation of such circumstances might occupy a long time, and a discovery of grounds of suspicion might take place at any period. As these lands were not to be included in the Settlement, no great inconvenience could arise from delay.

[120] But with respect to the allowances for a police force made by the Government, whether in land or in money, the case was quite different. They were included in the Settlement, and if any additional charge was to be thrown upon the landholder in respect of such allowances, it was necessary that it should be ascertained as part of the Settlement. No difficulty in ascertaining the fact could possibly exist. The assessment had been very recently made, and the officers who had made it must, in every case, be perfectly aware whether any such allowances had or had not been made.

In pursuance of these Regulations, Mr. Dickenson, the Collector of Bhaghulpore, was required to report whether, in the Settlement for Khuruckpore, any such allowances had been made; and on the 29th of April, 1794, he makes his report in the negative. His words are these (contained in a letter addressed to the President and Members of the Board of Revenue of Fort William, relating to this and other Zemindaries):—"In obedience to the 36th Article, I have made the necessary inquiries, but do not find that any allowances, either by deduction from their jumma, permission to appropriate the produce of lands, or any other mode, have been granted to any proprietor for keeping up a police establishment."

This inquiry took place before any permanent grant had been made of this Zemindary, and with a view to such grant. No claim to resumption of lands or to alteration of jumma was, or, upon the footing of the report, possibly could be, set up by the Government; and nearly two years afterwards, namely, on the 25th of January, 1796, the Government made a grant to the Raja, of the whole Zemindary of Khu-[121]-ruckpore, including the lands in question, to hold to him in perpetuity at the jumma assessed in 1789-90, namely, Rs. 65,459. 8a. 10½p.

It is said that Mr. Dickenson made his report under a mistake. A mistake of what. Not of facts, certainly. The existence and nature of these Ghatwally tenures, the extent to which they prevailed in this District, and the mode in which they had been dealt with in making the assessment, must, from the circumstances which have been stated, have been perfectly familiar both to the Collector and to the Board of Revenue.

But was he under a mistake of law? That he considered the Ghatwally lands as not within the meaning of the clause in question is abundantly clear, and if he was mistaken as to the intentions of the Government who had framed it, a mistake so deeply affecting their revenues, and reaching to such a great extent of territory, must at once have excited the remarks and the remonstrance of the Revenue Board; but they made no objection to his view of the subject, and, accordingly, the grant is made on the terms already stated: the grantee holds under it, and for more than forty years no attempt is made to disturb it.

It would seem to be very difficult, under such circumstances, to permit any part of the lands so granted to be resumed on any allegation of mistake, if there were reason to suppose that any mistake has been made.

Indeed, by Regulation II. of 1819, the East India Company formally "renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a [122] Permanent Settlement has been concluded, at the period when such Settlement was so concluded, whether on the plea of error or fraud, or any pretext whatever, saving, of course, mehals expressly excluded from the operation of the Settlement."

But their Lordships are far from thinking that there was any mistake either on the part of the Collector or of the Board of Revenue. All the information which their Lordships can obtain with respect to those lands leads to a different conclusion.

In Mr. Grant's Analysis of the Finances of Bengal, addressed to the Court of Directors, in the year 1786, and printed in the Appendix to the Fifth Report of the Select Committee on the Affairs of the East India Company, p. 268, the Zemindary of Beerbhoom is stated to have been conferred by Jaffier Khan on an Affghian or Patan tribe, "for the political purpose of guarding the frontiers on the west against the incursions of the barbarous Hindoos of Jharcund, by means of a warlike Mahomedan peasantry entertained as a standing militia, with suitable territorial allotments, under a principal landholder;" and Mr. Grant afterwards describes the tenure "as in some respects corresponding with the ancient military fiefs of Europe, inasmuch as certain lands were held La-khiraj, or exempt from the payment of rent, and to be applied solely to the maintenance of troops."

There is no doubt that the tenures here spoken of are Ghatwally tenures, though they are not mentioned by that name.

Beerbhoom immediately adjoins Khuruckpore, and in 1795 some Ghatwally lands were transferred from Beerbhoom to the District of Bhagulpore, in which Khuruckpore is situate, and in 1797 lands of the same [123] description were transferred from Bhagulpore to Beerbhoom.

In 1813, a report was made by the Collector of Bhagulpore to the Magistrate of Beerbhoom, in answer to certain inquiries with respect to Ghatwally lands in his District. The Collector states, that the Ghatwally lands in his District are of four kinds: First. The lands already referred to as granted by Mr. Cleavland. These he states to have been allotted in the environs of the forests, at the foot of certain mountains, which he names in various Pergunnahs, and amongst others "Pergunnah Kankjole, and in some other villages of the Khuruckpore estates, to certain Ghatwals and watchmen in lieu of salaries, in the proportion of the number of watchmen attending the said Ghatwals to attend to and guard the watch stations at the passes, and to patrol the precincts of the villages, that no mountaineers might be able to descend from those passes of the mountains to commit night attacks, to invade or assault, or to plunder money or cattle, or to create disturbance." The second class the report describes as, "The Ghatwals attached to the Khuruckpore estates, who pay a stipulated rate of rent for their lands and villages, being bound to protect and guard the highways, to watch the stations at the passes, to prevent disturbances being created by the mountaineers, thieves, and highwaymen. They hold their lands in virtue of sunuds granted by the Zemindar of Khuruckpore, except some who have received theirs from the former authorities." The report then proceeds to state, "That when the Zemindar, or Government authority, wishes to appoint a Ghatwal to guard the frontiers of the villages, it is his duty to ascertain the produce of the [124] villages, the quantity of Ghatwally lands therein, and after deducting a certain rate in the ratio of the guards with the Ghatwals, in lieu of wages, to fix a certain rent to be paid by the Ghatwals."

After mentioning other descriptions of Ghatwally lands, he states his opinion, that the Ghatwals have no right of inheritance or proprietary interest in their lands, but hold right of possession as long as they perform the terms and conditions of their sunuds. The report then states, that at the time of the Decennial Settlement, the Ghatwals were not treated as independent Talookdars; that no Settlement was made with them, but that they were included in the Settlement of the Zemindar of whom their lands were held.

In 1816, another report was made by the Collector of Bhagulpore, in which it is stated, that the Ghatwals pay a fixed rent to the Zemindar of Khuruckpore, and continue under his control, direction, and subjection, while the Raja is answerable to the Collector for the rents of the entire district of Khuruckpore.

With respect to the Ghatwally tenures in Beerbhoom, it is stated in a Regulation passed with respect to them in 1814 (Regulation XXIX. of that year), that the class of persons called Ghatwals in the District of Beerbhoom, form a peculiar tenure, and that every ground exists to believe, that according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject, nevertheless, to the payment of

a fixed and established rent to the Zemindar of Beerbhoom, and to the performance of certain duties for the maintenance of the public peace and support of the police.

This description is confined in terms to the District [125] of Beerbhoom, but in the case of *Hurlall Sing v. Jorawun Sing* (6 Sud. Dew. Rep. 170), which occurred in 1837, a question arose as to the nature of these tenures generally, the point for decision being, whether they were divisible on the death of a Ghatwal or descended to his eldest son. One of the Judges states, that these tenures are very common in the Nerbudda territory for the protection of the Ghats. Another of the Judges seems to consider them as Chackeran lands; and the Court was of opinion, that the lands being held conditionally on the performance of certain defined duties, they were not divisible on the death of the Ghatwal, but descended to the eldest son.

Lands of this description could not properly be considered as lands of which the Zemindars had been permitted by the Government to appropriate the produce to the maintenance of Tannah, or police establishments. They were held by a tenure created long before the East India Company acquired any dominion over the country, and though the nature and extent of the right of the Ghatwals in the Ghatwally villages may be doubtful, and probably differed in different Districts and in different families, there clearly was some ancient law or usage by which these lands were appropriated to reward the services of Ghatwals: services which, although they would include the performance of duties of police, were quite as much in their origin of a military as a civil character, and would require the appointment of a very different class of persons from ordinary police officers.

We find accordingly that the office of Ghatwal in this Zemindary was frequently held by persons of high rank.

[126] Before the date of the Regulations, and in 1783, we have a letter from the Collector of Bhagulpore to the Raja Kadir Ali, informing him that the Ranees Surbissuree (who from the title must have been a female of high rank) had been dismissed from her office of Ghatwal of Jumme Hamapa, which is situate in the Khuruckpore estates, by order of the Governor-General in Council, and intimating that, "as the office is in your Highness's gift, your Highness will, should you deem it necessary and proper, appoint a person to the office of Ghatwal of the said Pergunnah, to watch day and night at the said Ghat. Should it be advisable, your Highness may retain it under your Highness's control, informing the Court of the Circumstance." Surely the language here used in speaking of the Ghatwal is little suited to the appointment of a police officer. It is rather that which in ancient times in England might have been addressed to a Lord of the Marches with respect to a chieftain under his orders.

Again, the officers contemplated by the resumption clause, were a class whom the landowner was in future prohibited from keeping. Was this the case of the Ghatwals? Why, we have a letter from the Collector of Bhagulpore to the Raja of Khuruckpore, on the 1st of September, 1808, in which he observes, "as the settlement of rent between the watchmen and yourself rests with you, as also does the dismissal and transfer of the Ghatwals, etc., as usual and customary on your estate, the Magistrate has no objection to the measure" (which the Raja had proposed to take), "nor is the Collector opposed to the step": and in the reports of the Collectors to which we have already referred, it is stated, that it is the province of [127] the Raja to appoint and dismiss the Ghatwals attached to the Khuruckpore estates; that he usually, but not always, makes a report to the Government when he does so, "that the settlement rests with him, and he raises or depresses the rent."

The appointment of Ghatwal has been continued, with the assent of the Government, up to the present time.

Upon this review of the evidence, their Lordships are of opinion, that if any attempt had been made in 1796 to resume these lands under the Regulation now in question, such attempts must have failed, and that, therefore, there can be no ground for the claim now set up by the Bengal Government.

It may be proper to notice the proceedings which have ended in the judgment against which the present appeal is brought.

It appears that on the 29th of November, 1836, the Government in India ordered that if the Ghatwally lands were of a nature to be resumed they be subjected to resumption.

The proceedings to be taken for the purposes of resumption, and the Court or tribunal which is to decide the matter, are of a special character.

The Collector of the District, or his deputy, enters on record, a claim to assess the disputed lands; notice is given to the owners; upon their answers, and upon evidence, the Collector who has made the claim, or one of his deputies, decides upon its validity, and if either party is dissatisfied, there is an appeal to a Special Commissioner appointed by the Government.

On the 1st of May, 1838, Mr Travers, then Special Deputy Collector of the Districts of Bhagulpore and Monghyr, entered the following claim on the part [128] of the Government against Toofany Sing, Ghatwal, who was in possession of the disputed lands in this case:—

“ Claim to assess 755 beghas of Ghatwally lands, situate on Ghat Foujdar Tuppa Dhumsaen. As it appears from an examination of the Ghatwally books, furnished by the Magistrate of this District, for the year 1819, C.E., that the lands in dispute have been appropriated rent-free by the said Defendant, as belonging to the said Ghatwally, and as it is necessary under Regulation II. of 1819, C.E., and Regulation III. of 1828, C.E., to inquire into the legality or otherwise of the deeds of grant, it is, therefore, ordered, that this case be numbered and placed upon the file of the Court, and that notice be served upon the Defendant.”

It does not very distinctly appear from this statement of the claim, upon what grounds it was intended to be rested, but we collect that it was thought that these lands were not included in the estate of Khuruckpore; that they belonged to the Ghatwal: and that as no Settlement had been made with him, they were still the subject of settlement, or, in other words, of assessment.

The matter then came upon some interlocutory proceedings before Mr. Alexander, described as Officiating Special Deputy Collector of the Districts of Bhagulpore and Monghyr, and on the 10th of November, 1838, he made a minute in part in these terms:—“ It is consequently decided that these lands were conditionally granted: but, firstly, the officers do not perform those conditions; and, secondly, the Government have no need of their services; besides which, it is evident that the said lands have not undergone [129] any settlement up to the present time, for the settlement was effected in 1197, F.E., while the said lands were set apart in 1181, F.E.; and notwithstanding that 2 annas per begha used to be paid to the Zemindar for certain lands, yet, as that cannot be considered rent, but a simple fee, in acknowledgment of the right of the Zemindar, the said lands are consequently of a nature to be resumed.” It was then ordered, “ that the Defendant produce any document in his possession invalidating the above-mentioned circumstances within a week, otherwise judgment would go in favour of Government, without any plea in opposition being taken into consideration.”

The Raja of Khuruckpore was apparently supposed to have nothing to do with the question; he was not made a party to the proceedings, nor served with notice of them; but, on the 27th of November, 1838, he presented a petition, stating that he was the owner of the land, and that Toofany Sing held under a lease from him.

The original Defendant put in his answer, stating, that he and his ancestors for several generations had held these lands at a rent of 2 annas per begha from the Raja of Khuruckpore, and that lands, including thirty-six original villages, beside others subsequently added, were held by the same tenure of the Raja.

A great deal of evidence was gone into; many inquiries were ordered, in the result of which, it distinctly appeared, that these lands were part of the estate of Khuruckpore, and had been included in the Settlement for that estate; and, accordingly, on the 9th of December, 1838, Mr. Alexander pronounced a decision founded on those proofs, in which he de-[130]-clared that the lands were of the nature of Chackeran lands; that they were not of a nature to be resumed; and he ordered the claim of Government to be dismissed.

Like decrees were at the same time pronounced by Mr. Alexander in the ten other suits.

Not long after these judgments were pronounced, judgments to which no objection can be made, except that they ought to have awarded costs of suit to those who had resisted the claims made against them, Mr. Alexander, unfortunately for all parties, altered his opinion, and thought that although the suits might not be

maintainable, on the grounds originally taken, they might be supported under clause 4, section 8, of Regulation I. of 1793, and he applied for permission to review his judgment.

The form of proceeding did not allow this to be done; and on the 31st of December, 1839, the Government appealed to the Special Commissioners, bringing forward the clause just mentioned, and also insisting that the lands were not included in the Settlement of the Khuruckpore estate.

Before this appeal was heard, the interest of Maha Raja Rehmud Ali Khan, the original opponent of the Government, had been assigned to the father of the present Appellant, and he was admitted a Respondent to the appeal of the Government.

During the course of these proceedings, the same question had been raised by the Government with respect to other Ghatwally lands in other Pergunnahs of this Zemindary: and on the 29th of May, 1838, Mr. Travers, in some of these suits, decided in conformity with Mr. Alexander's decision, and dismissed [131] the claim of the Government, and, it is said, that these decisions were confirmed by the Special Commissioner on appeal.

Other suits, on the other hand, of the same description, came before Mr. Alexander, who decided them, not in conformity with his first determination, but according to the view which he had subsequently taken.

On the 21st of May, 1841, the appeal in the present suit came before Mr. Elliott, Special Commissioner, who reversed the decision of Mr. Alexander, stating as the ground of his judgment, that it was evident that the Ghatwally lands in dispute in this case, as well as in the other Ghatwally suits, were distinct and separate from the Settlement made by the Government. He established, therefore, the claim of the Government, and ordered that all the costs of the suit should be borne by the then Respondents.

The concurrence of another Special Commissioner was necessary to give effect to this decision (see Ben. Reg. III. of 1828, Sec. 4, cl. 6), and on the 27th of December, 1842, the case came before Mr. D'Oyley.

Mr. D'Oyley differed from Mr. Elliott, and the case, was, therefore, remitted to Mr. Moore, special Commissioner for Calcutta and Moorshedabad.

That gentleman directed an inquiry to be made of the secretary of the Sudder Board, for the purpose of ascertaining whether the Ghatwally lands had been excepted from the Settlement of the Khuruckpore estates or not; and finding that they had not been so excepted, he concurred in the opinion of Mr. D'Oyley, and ordered that the appeal of the Government in [132] this, and the other ten suits of the same nature, should be dismissed.

The Government was still dissatisfied, and on the 19th of September, 1843, they applied for a review of the judgment.

The case came again, on several occasions, before Mr. Moore, who directed many more inquiries, the result of which, in the opinion of their Lordships, was to confirm the decision at which he had already arrived. Mr. Moore, however, considered that his former judgment was erroneous, and on the 9th of July, 1844, he reversed it. On the 9th of September, of the same year, the case came before Mr. Gordon, a Judge of the Sudder Court, vested with the powers of a Special Commissioner, under the orders of Government, who expressed his concurrence in that decision; and, at last, on the 27th of June, 1845, a final judgment in favour of the Government was pronounced by those gentlemen, resting their decision, as we understand it, on the ground that these lands were, in reality, lands granted for police establishments, and were to be considered as provided for in clause 4, section 8, Regulation I. of 1793.

From that decision the present appeal is brought to Her Majesty in Council, and it is scarcely necessary to say, that their Lordships must humbly report to Her Majesty their opinion that the decision complained of ought to be reversed. They have already sufficiently explained the reasons for their opinion, namely, that these lands are not properly within the meaning of the clause relied on by the Respondent, that they were a part of the Zemindary of Khuruckpore, and were included in the Settlement for that Zemindary, and covered by the jumma assessed upon it.

[133] If any case should occur in which lands of Ghatwally tenure, though not,

in their Lordships' opinion, properly falling within the meaning of the Regulation, have nevertheless been dealt with as such, and have not been included in the Settlement of 1793, such case will have to be decided upon its own circumstances, and will not be governed by their Lordships' present decision.

With respect to the costs of the proceedings which have taken place, their Lordships do not doubt that the Bengal Government, in bringing forward this claim, have acted under a sense of public duty, but it is an attempt to disturb, upon insufficient grounds, a Settlement which subsisted without dispute for above forty years, during all which time the right to disturb it, if it exists at all, existed with as much force as when the proceedings were instituted. The claim has been persisted in after several decisions against the Government by their own officers acting as Judges; the decree in their favour has been finally obtained upon grounds different from those on which it was originally sought, and the Appellant has been exposed to a long and most expensive litigation. Under these circumstances, their Lordships think that they should do but imperfect justice, if they did not humbly recommend to Her Majesty that the Respondent should be ordered to repay to the Appellant all the costs which they have received from him under orders of the Judges below, and should also be ordered to pay to him the costs which he has himself incurred in these proceedings, including the costs of the present appeal.

[See *Rajah Lelanund Sing v. Gov. of Bengal*, 1863, 9 Moo. Ind. App. 481; *Rajah Leelanund Singh Bahadoor v. Thakoor Munoorunjan Singh*, 1873, L.R. Ind. App. Sup. Vol. 184; *Pooshie Pershad Singh v. Raja Ram Narain Singh*, 1885, L.R. 12 Ind. App. 214.]

[134] NUSSERWANJEE PESTONJEE and Others,—*Appellants*: MEER MYNOO-DEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR,—*Respondent* * [June 19, 20, 1855].

On appeal from the Sudder Dewanny Adawlut at Bombay.

In order to enable the Zillah Court, under Bom. Reg. VII., of 1827, to give an award the force of a decree of Court, the deed of submission to arbitration must contain all the conditions required by that Regulation.

Section 3, clause I., of Bom. Reg. VII., of 1827, enacts, among other things, that the deed of reference must contain "the time within which the award is to be given." A deed of submission to arbitration contained no provision for the time when the award was to be made by the arbitrator: held to be bad, and an award made under it, which had been ordered to be enforced as a decree of Court, directed to be taken off the file, as the Court had no jurisdiction except upon the fulfilment of the requirements of the Regulation.

The parol consent of the parties to the deed of submission before the arbitrator to waive such omission will not cure the defect.

In this appeal the question raised was, whether an award of Mr. Frere, the agent of the Bombay Government at Surat, made upon a submission to arbitration by the Appellants and Respondent, was within the provisions of the Bombay Regulation, No. VII. of 1827, so as to entitle it to the force of a decree of Court, or had the effect only of an ordinary award. The Order of the Sudder Dewanny Court appealed from, directed the award to be enforced as a decree of Court against the Appellants.

[135] The Appellants were Parsee bankers, residing at Surat. The Respondent was the Bakshee of Surat, and by virtue of his rank and relationship to the Nawab

* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

of Surat, exempted from the jurisdiction of the Civil Courts, unless with the consent of the Governor of Bombay (a).

It appeared that in the years 1828 and 1830, the Respondent, in consideration of advances made to him, and for debts due by his father, mortgaged to the Appellants and others, large estates called the Mooglace of Gundavee, in the Kingdom of His Highness the Guicowar of Baroda. On the 24th of April, 1852, the Respondent conceiving that he had grounds for being relieved from these mortgages, presented three petitions to Mr. Frere, the Government agent, under whose authority he was placed as a privileged native of rank (being a member of the family of the Nawab of Surat), upon that subject; and on the 27th of that month, the Appellants and two other persons, who also held property mortgaged to them by the Respondent, at the suggestion of the Bombay Government agreed to refer the subject-matter in dispute to the arbitration of Mr. Frere, and, accordingly, they executed the following aktiarnamah, or submission to [136] arbitration:—"We, Meer Akbar Ali Khan, Wd. Meer Surefuraj Ali Khan, Nusserwanjee Pestonjee, manager of the firm of Pestonjee Kalabhaee; Cooverbaee, manager of the firm of Modee Rustumjee Hormusjee, who is his widow; and Bae Premcoover, manager of the firm of Shett Hurgovundass Nuthoolbaee, write this (to wit): Meer Mynooddeen Khan, Wd. Meer Sudroodeen Khan, in the matter regarding us, the creditors, presented three separate petitions in English, with their Goozerothee translations, on the 24th of April, 1852, the same being attached at the top of this paper. In this matter, we contend, that his claim is altogether false, and the contents of the petitions are without grounds. We, therefore, in conjunction with the said Meer Mynooddeen Khan, give this aktiarnamah, authority in writing, to William Edward Frere, Saheb Bahadoor, agent of Surat, to investigate this dispute, so that the said agent, after investigating the dispute consistently with justice, shall give his decision, which shall be agreed to by the parties. The parties shall not appeal against it; and should the resolution of the decision be consistent with the razeenamah, it shall be agreed to by us, the parties." This deed of reference was signed by the parties, and attested by four witnesses.

Pursuant to this deed of reference, both parties appeared before Mr. Frere. Evidence was adduced, and documents and accounts of great length produced, and counsel were heard for both parties before the arbitrator, who, on the 2nd of November, 1852, made his award, by which he, in substance, decided that the Appellants had been overpaid what was due to them, and awarded that the mortgage property should [137] be restored to the Respondent, and the balance due from the Appellants respectively refunded to the Respondent.

Mr. Frere, whilst acting as arbitrator, also held the office of Judge of the Zillah Court of Surat, in which capacity he ordered, on the 16th of November, 1852, the award and deed of reference to be filed in the Zillah Court of Surat, under Bom. Reg. VII. of 1827 (b).

(a) Bom. Reg. II. of 1827, ch. ii., sec. 21, cl. 2, confirms the stipulation made in the Articles of agreement, dated the 13th of May, 1800, between the East India Company and the Nawab of Surat, of the exemption of the Nawab, his family and servants, from the jurisdiction of the Civil Courts; and, by Bom. Reg. XI. of 1827, ch. i., from the Criminal Courts. The Act of the Legislature of India, No. 18 of 1848, provides for the administration of the Nawab's estate, and for certain privileges to his family. See, *In re the Nawab of Surat*, 5 Moore's Ind. App. Cases, 499, where the principal sections of that Act are set out.

(b) By this Regulation it is provided as follows:—Sec. 1, cl. 1.—"Any such matter of dispute as is cognisable in a Civil Court, may, for the purposes specified in this Regulation, be referred by mutual consent of the parties to one or more arbitrators, chosen in such manner as may be agreed on by the said parties." Cl. 3.—"It is clearly to be understood that nothing contained in this Regulation is meant to prohibit or discourage amicable adjustments, though made in a way different from that herein prescribed, provided that such adjustments shall not be entitled to the consideration conferred on arbitration awards by virtue of this Regulation."

Sec. 3, cl. 1.—"When the choice of the arbitrator or arbitrators has been made, the parties shall execute a deed of reference, which may be upon unstamped paper, showing the names of the arbitrator or arbitrators, the nature and extent of the

On the 16th of November, 1852, the Appellants presented a petition to the Zillah Court, insisting [138] that the proceedings were irregular and contrary to this Regulation, on the grounds, first, that under the Regulation the Zillah Judge could not be arbitrator; second, that the Judge who made the award could not in his capacity of Judge file it in his Court; [139] third, that the deed of reference did not state fully particulars of the nature of the claim, nor the amount, nor the time within which the award was to be made; and fourth, that as the Respondent had presented three separate petitions, there ought to have been three separate deeds of reference; and the petition prayed that the Judge would not file the award, or would suspend the filing of it until the Appellants could submit a petition to the Sudder Adawlut. This petition was refused by the Court, and the award was accordingly filed, but the three petitions mentioned in the deed of reference were not attached to the award, or filed in the Zillah Court with it.

On the 19th of November, 1852, the Respondent applied to the Zillah Court for execution of the award, and, on the 20th of the same month, the Appellants presented a petition to the Court, praying for delay; but Mr. Reid, the Assistant-Collector in charge, considering there was no grounds to stay execution, directed the Nazir to enforce execution.

On the 24th of November, 1852, the Appellants presented a petition to the Sudder Adawlut at Bombay, by which they insisted that Mr. Reid's order was illegal,

matter referred, the date of reference, the time within which the awards is to be given, the signatures of the parties and of two witnesses, and the consent of the parties to abide by the award, with any conditions that may be involved, such as whether the decision of a majority is to be conclusive, whether an umpire is to be appointed, etc."

Sec. 6, cl. 1.—"The period limited for completion of an award may be extended at the pleasure of the parties on their expressing the same and fixing a new period in writing on the deed of reference or on a paper attached to it, but the written attestation of two witnesses shall be necessary, as originally in the deed of reference."

Cl. 2.—"But if an award be not completed within the period either originally fixed in the deed of reference, or afterwards fixed according to the rules in the preceding clause, the arbitration shall be considered as cancelled, and the parties to be in the same relation as if no such arbitration had existed."

Sec. 8, cl. 1.—"The arbitration award, which may be upon unstamped paper, shall contain the names of the parties, the date of reference, the nature and value of the matter referred, and the decision made; it shall be dated and signed by the arbitrator, if sole, otherwise by the majority which made the award, and by the umpire (if any)."

Cl. 3.—"The award and deed of reference shall be presented and filed in the Zillah Court, or delivered to any Civil Commissioner to be forwarded to the Zillah Court for that purpose, by the arbitrators or parties or some one of them, within fifteen (15) days after the award is made, and they shall be accompanied by any documents which the arbitrators may consider requisite to put on record."

Cl. 4.—"But previously to the award being so presented or delivered, the arbitrator or arbitrators shall tender to each party a copy of it, and the date of tender shall be specified by indorsement on the award, or if by a party absenting himself the tender cannot be made, the circumstance shall be noted on the award."

Cl. 5.—"When an award appealable under section 10, clause 1st, is filed, a written notification thereof in the language of the Zillah, under the signature of the Judge or Assistant Judge, shall be affixed to a conspicuous place in the Court room, and shall remain there until the period for appealing has expired."

Sec. 9, cl. 1.—"Awards made and filed in conformity with the provisions and forms enacted in this Regulation, and final either when filed or by not being appealed against under section 10, shall have the force of decrees and shall be executed as such."

Cl. 2.—"Arbitration awards or other adjustments not made and delivered to be filed as prescribed in this Regulation, shall not be entitled to any other consideration in a Court than as evidence or agreements to be adduced or proceeded on by ordinary course of law."

on the ground that it was not allowable to execute awards as decrees, unless made in conformity with the Provisions of Reg VII. of 1827, and that the deed of reference had not been framed in conformity with sec. 3, cl. 1, of that Regulation; and insisting further, that the award was in excess of the authority conferred on the arbitrator, as the Respondent's coheirs had not objected to the mortgages, and the award should, therefore, have been confined to his share thereof; and insisting further, that the award [140] was a departure from some of the questions referred to the arbitrator and an evasion of others, and dealt with questions which were not intended to be referred to the arbitrator, and prayed that the Court would order the Zillah Court of Surat to stay execution on the award, and would send for the proceedings, and decide whether the award could be legally executed as a decree under sec. 9, cl. 1, of Regulation VII. of 1827; and if not, to cancel all the proceedings of the Zillah Court directed to enforce it.

On the 25th of November, 1852, the Sudder Dewanny Adawlut made an order, directing execution of the award to be stayed till further order, upon giving security.

On the 22nd of December, 1852, the Appellants' petition came on for hearing before the Sudder Adawlut, when, in addition to the ground stated in the petition, it was further insisted, on the part of the Appellants, that the award was not within Regulation VII. of 1827, on the grounds, first, that Mr. Frere being the Zillah Judge of Surat, and agent for the Government there, was precluded from acting as arbitrator; and, secondly, that inasmuch as by the Act of the Government of India, No. 18, of 1848, the Respondent who was of the family of the late Nawab of Surat, was exempted from any writ or process, unless issued with the consent of the Governor in Council of Bombay first obtained, the award was not within the Regulation VII. of 1827; and thirdly, that the Mooglaee of Gundavee, which was the subject of the mortgage, was situate in the territories of the Guicowar of Baroda; that neither the Surat Court, nor the Sudder Adawlut of Bombay, could [141] take cognizance of the matter on any suit relating thereto. And by an order of that date, the Sudder Adawlut (consisting of Messrs. Warden, Le Geyt, and Grant), ordered the award to be taken off the file of the Surat Court, as not being entitled to the force of a decree under that Regulation, and ordered all proceedings consequent on it to be quashed, and all securities furnished by the parties to be cancelled, and any monies placed in deposit to be returned. The grounds for this decision were recorded in a minute of Mr. Le Geyt, which, after stating that the matter sought for was immoveable property, and the rents arising therefrom (which had been ruled in Case 2948, to be of the nature of immoveable property), situated in territory beyond the jurisdiction of the Surat Court, and consequently not cognizable in that Court, and that the award was therefore not entitled to be filed or allowed the force of a decree in that Court, proceeded as follows:—"The next question to determine is whether the arbitrator's award should have the force of a decree of Court. In order to this, the matter of dispute must be such as is cognizable in a Civil Court; the deed of reference must contain in some shape the following matter, and be framed according to the following rules. It must exhibit the names of the arbitrators, the nature and extent of the matter referred, the time within which the award is to be given, the signatures of the parties and of two witnesses, and the consent of the parties to abide by the award with any conditions involved. If the 'time' be extended during the inquiry, such extension must be written, and such writing authenticated by two witnesses, and [142] in default of completion within the prescribed time, the arbitration is cancelled. The award must contain the names of the parties, the date of reference, the matter referred, and the decision made; it must be dated and signed. An award, as described, shall be filed in the Zillah Court, the parties having been previously furnished with copies, and shall be executed as a decree. It will be observed, that great stress is laid on the fixing of the time within which an award is to be made, and on turning to the title of the Regulation, and the notes on it of those who framed it, the reason is obvious. It is a law for regulating 'Punchayuts,' the chief defect in which Oriental mode of arbitration, was dilatoriness, and, therefore, in the Regulation, while form is dispensed with, dispatch is insisted on; 'the period should be particularly specified,' say the framers of the Code, 'within which the award was to be made, in order to promote regularity, prevent confusion and uncertainty, and

diminish the power of arbitrators to betray and neglect their trust.' The Court then, after referring to the deed of submission, proceeded:—"The decision is, *mutatis mutandis*, the same in respect to Nusserwanjee Pestonjee, manager of the firm of Pestonjee Kalabhee. It was ruled by this Court, on the 4th of August, 1852, in the special appeal, '*Moteelal Samuldaiss v. Dungursee Deosee and others*,' as follows:—"It will be observed, that cl. 1, sec. 21, Reg. II., A.D. 1827, enumerates, first, "claims on immoveable property including rents," and afterwards, "claims on moveable property"; and cl. 2 provides, that in order to make a claim for the first, viz., immoveable property cognizable within a Zillah, such immoveable [143] property shall be situated within that Zillah, and a Zillah Court has, therefore, jurisdiction over "complaints respecting the right of rents," provided they are "derivable from property situated within the Zillah"; and where such property has been mortgaged, a mortgagee may at any time, by the institution of a civil suit in the Zillah in which the immoveable property is situated, cause the mortgaged property to be applied to the liquidation of the debt; and the practice is in such cases to sue the mortgagor, to oblige him to settle the claim, failing which, the property to be applied to the liquidation of the debt.' The matter in the present case under the above ruling, relates to the disposal of immoveable property beyond the jurisdiction of the Court, and not, therefore, 'cognizable in the Civil Court.' The nature and extent of the references are not defined in the deed of reference. The umpire is a person who has to determine judicially the awards that have and the awards that have not the force of a decree, and who, moreover, is the person appointed to hear appeals from such awards. The Advocate-General says, it was by mutual consent that 'the time within which the award was to be given' was not defined: if so, it was by mutual consent, and not by any fraud or inadvertence, that the deed of reference to arbitration was so drawn, as that the award on it should never rise above the level of the ancient sluggish Panchayetnamah, to invigorate and reform which, specially as regards expedition, the Regulation was enacted; and, considering that one of the parties is not generally amenable to the Regulations, this condition that the award should not have the force of a decree was a very judicious one on the part of his antagonists; for no sooner did the Bukshee, [144] who now seeks to exercise the force of the Court against his alleged creditor, receive himself an order from that Court to refund, pending the present inquiry, the money that had been paid to him wrongfully through that Court, then he wrapped himself in his privileges and demurred to its jurisdiction. The award, therefore, is one of those 'amicable adjustments' alluded to in cl. 3, sec. 1, of the Regulation, the value of which is declared in cl. 2, sec. 9, of the same Regulation, but it has not the force of a decree, and should be taken off the file of the Surat Court. It only remains to quash all the proceedings had in the Surat Court on the award, and in doing so the Court cannot refrain from expressing its regret that Mr. Frere did not, before leaving Surat and delivering over charge of his Court to an officer of the Revenue Department, who cannot be expected to know how to conduct the duties of the judicial office, either request Mr. Reid to refrain, as prescribed in the circular already referred to, from meddling with so important a case, or give him clear instructions how to handle it, for by Mr. Reid's precipitance and want of caution in executing the award before the expiration of ten days from the date on which the award was filed and considered a decree, and that without taking security, the Surat Court has become involved in the dilemma of having paid money wrongfully to a person not generally amenable to its jurisdiction, to the injury of those who are entitled to its protection."

In obedience to the judgment of the Sudder Court, the award was taken off the file, the Government securities placed in deposit by the Appellant, Nusserwanjee Pestonjee, were restored to him, and the money [145] paid by the Appellant, Cooverbaee, was refunded to her by the Respondent.

On the 16th of March, 1853, the Respondent presented a petition to the Sudder Adawlut of Bombay for a review of judgment.

At a proceeding of the Sudder Court, on the 15th of June, 1853, Mr. Frere, the arbitrator, having become a Judge of that Court, the Court, consisting of Messrs. Frere, Remington, and Larkins, on taking the case into consideration, recorded that there was found on the original proceedings of the arbitrator, which had not been filed in Court, the following entry:—"The arbitrator then brings to the parties'

notice, that the reference to him contains the words, 'having inquired into the case, and in justice to decide it, then we are content.' That at the time the agreement was given in he observed these words, but looked on them merely as saving the parties in case of corruption, but having since heard that they have been quoted as showing a means of escaping from the arbitrator's decision being held finally binding, he requests to be informed, before coming to a decision, whether his decision was to be held final or not. Messrs. Le Messurier and Howard, on the part of their principals, both declared the decision is to be held final, and the above is read over and explained to the parties themselves."

On the 22nd of June, 1843, the Court also recorded the following minute of the arbitrator, which was read and placed with the case:—"With reference to the assertion that the omission in the deed of reference to specify the time within which the award was to be made, was not brought to the Petitioners' [meaning the Appellants'] notice, I can most [146] safely and truly aver that it was brought to the notice of both parties before their counsel appeared, and omitted with their consent; and with reference to the assertion, that the reference was irrespective of Regulation VII., and grew out of a political matter, I can safely declare, that all the reference made on the occasion to political affairs was my explaining to the parties, that if they did not agree to an arbitration I should be obliged to recommend to Government, that as much of the property was within the territories of His Highness the Guicowar, they should decide the matter upon the evidence they had before them, if the parties would produce no other, and recommend their decision to His Highness for execution."

The Court, on the same day, pronounced their decision on the petition for review, reversing the decision of 22nd December, 1852, and ordering the award to be restored to the file of the Surat Court: the material part of this judgment was in these terms:—"It is an error to suppose that the nature and extent of the reference was not fully before the arbitrator, as even the parties who contest the award admit that in the petitions which headed the reference it was alleged that the mortgages held by them were fraudulent and gross breaches of trust, which questions thus raised by Meer Mynodeen were undoubtedly submitted to the arbitrator for decision by consent of both parties, the arbitrator acting under Reg. VII. of 1827.

"That the nature and extent of the reference should be defined in the deed of submission is evident enough, when it is found that one side are now contending that it was never their intention to refer to [147] the arbitrator's decision the propriety of a former agent's act, when once shown and proved to be his, but that the substantial question to be decided was, whether the officer in question had sanctioned the mortgages with a full knowledge of their contents, and this by his own admission in writing had been established. The necessity, then, of having the subject clearly defined is manifest, for as an award should be consistent with the reference, and may be objected to if not so, there will always be a multitude of points in which it may be suggested that an arbitrator has exceeded his authority, though nothing is so difficult as to ascertain what may be an excess.

"In the present instance, the Court are at a loss to perceive how the arbitrator, keeping finality in view, the main object why his services were called into requisition, could satisfactorily decide the dispute without entertaining the point raised of there having been an excess of authority on the part of Mr. Romer and other arbitrators.

"The Court, therefore, do not consider that the award was in excess of the authority conferred upon the arbitrator, as contended for.

"It was an error to suppose that the Zillah Judge was not a proper umpire; but whether or not, the objection is not a very material one, when the power of this Court over the proceedings is considered, which, as already exercised in this case, shows that no prejudice whatever could accrue to the parties by such an appointment: be it observed, moreover, that neither the Judge nor agent are expressly excluded by the Regulation.

"In prescribing that a time must be fixed for pronouncing the award, it may be admitted that the law [148] intended to provide against procrastination and the evils attending the old form of Punchayet. But the Court are struck with the force of the observation, that in placing no restriction of that kind on the arbitrator, the

object of both parties was to facilitate, not procrastinate, his proceedings, which they severally intended should be final. The arbitrator, who is now sitting in Court, has satisfied us that the time was waived by consent of both parties.

"The Court do not, therefore, consider the condition as to time imposed by the Regulation to be of so stringent a character as could not be waived by consent of parties, where the object in view was to obtain a speedy decision in conformity with its spirit.

"The Court find in the deed of reference an express stipulation that there shall not an appeal from the decision of the arbitrator.

"Under the above circumstances, the Court can entertain no other belief than that the award of the arbitrator was sought for, in order that the dispute between the parties should be finally adjusted, and not that the award should be merely available as evidence in a civil suit. The provisions of cl. 1, sec. 9, Reg. VII., must be held to apply to the present award, unless the Court is prepared to let go the whole justice of the case.

"In reversing the decision of the 22nd December last, it may be proper to remark, that one of the three Judges, who was a party to the decision, only concurred therein because he felt bound by the decision on Special appeal, 2948, in which, however, he did not sit, and not because of the technical objections raised by the Petitioners, Nusserwanjee Pestonjee and Cooverbaee.

[149] "On this point the Court record the two following observations:—

"The first is, that Mr. Frere has taken no other part in the proceedings than that held in full Court. Beyond it, the discussion has been carried on exclusively by the other two Judges, unaided by their colleague, in his absence, and without reference to him on a single point.

"The second observation is, that should any further proceedings arise from the Court's present order, the Judges feel at full liberty to act in concert with their colleague, and to seek his opinion and advice in disposing of any question brought before them.

"The opinion of the Court, therefore, is, that the order of the Court of the 22nd December, 1852, should be reversed, and it is accordingly annulled; and the award of the 2nd November, 1852, is to be restored to the file of the Sudder Adawlut, and matters are to be put in the same position as they occupied prior to all motions made in this Court since the filing of the award in the Sudder Adawlut."

Against this decision the present appeal was brought, and now came on for hearing.

Mr. Serjeant Byles, and Mr. Ayrton, for the Appellants.—There are several fatal objections to the award being made a decree of Court. The chief one is, that the reference to arbitration was not made in accordance with the provisions of Bom. Reg. VII. of 1827. The award is sought to be made a decree of Court under this Regulation, similar to awards made rules of Court in England, under the Statutes, 9th and 10th Will. III., cap. 15, and 3rd and 4th [150] Will. IV., cap. 42, secs. 39, 40, 41. It is, therefore, essentially necessary that there should have been a strict compliance with the requisites of that Regulation, in order to create a jurisdiction in the Zillah Court, because if those conditions have not been complied with, there is no jurisdiction at all. Now, we submit, that any deed of reference which is to be made, ought to contain all the matters required by the Regulation, and that the omission of any portion is fatal to the award being made a decree of Court. Section 3, cl. 1, enacts, that the nature and extent of the matter referred, the date of reference, with "the time within which the award is to be given," shall be contained in the deed of reference; and cl. 1 of sec. 6, provides for extension of the time for making the award, but stipulates that it must be done in writing, with the attestation of two witnesses, as required by the original deed of reference. It cannot, therefore, be said, that the insertion of the time in the deed of submission is merely directory, it is clearly mandatory; the necessity of two witnesses required by these sections is conclusive upon that point. Here the deed of submission to arbitration entirely omits any mention of a time within which the award is to be made. That is fatal by this Regulation, as well as by the principles of English law; for it is an admitted principle that there must be in every case a certain day appointed on or before which the arbitrator is to make his award, and if it be not mentioned it is void,

Watson "On Arbitration," p. 14 (2nd Edit.). The fixing of the time was the very object of passing this Regulation: as the Court below truly says, it was to prevent the procrastination under the Panchayet [151] system. The judgment of the Court below however states, that the omission in the award was waived by consent of the parties, and that such waiving rendered the award valid: this was clearly wrong in law, as the Court had not power to make a parol submission to an award a rule of Court, *Ansell v. Evans* (7 Term. 1). Another technical objection is, that the three petitions referred to in the award were not filed with the award in the Zillah Court, as required by sec. 8, cl. 3, of this Regulation. Nothing can be more improper than the manner in which these proceedings were carried on. Mr. Frere was the Government agent at Surat, and also the arbitrator; he afterwards becomes, first a Judge of the Zillah Court, and afterwards of the Sudder Adawlut, and seeks to make his award a rule of the Court of which he had become a Judge, and the Court below has actually interpreted the written submission to arbitration by oral explanations communicated to the Court by Mr. Frere. If the objections we have urged are not fatal, then we contend that the award is, on the face of it, bad, as the arbitrator has awarded upon matters not referred to him, and directed certain acts to be done *ultra vires* the reference, and has not made the award final, and we insist that it ought not to have been executed as a decree of Court, *Bowes v. Ferne* (4 Myl. and Cr. 150), *Turner v. Turner* (3 Russ. 494), *Wilkinson v. Page* (1 Hare. 276), *Ross v. Boards* (8 Add. and Ell. 290).

Mr. Wigram, Q.C., and Mr. Le Messurier, for the Respondent.

[Their Lordships directed the argument to be con-[152]-fined to the two technical points raised by the Appellants.]

First, we submit, that the omission to specify in the deed of reference the time within which the award was to be made, did not prejudice the validity of the award, both parties having consented before the arbitrator to waive the specification of time; and having raised no objection on that ground until after the award had been actually made, the award cannot now be questioned on such a ground. It is similar to enlargement of time by an arbitrator, without sufficient compliance with certain directions in the award, but which the parties by consent agree to, and which has been held to be valid, *Hallett v. Hallett* (5 Mee. and Wels. 25), *Leggett v. Emley* (6 Bing. 255). It is true that there is no mention in the submission of the time when the award is to be made, but it is no less a good award for the purpose of Bom. Reg. VII. of 1827. Indeed, it is not contended that it is invalid as an award, only as being incapable of being made the subject of a decree of Court by Reg. VII. of 1827. The object of this Regulation is twofold: first to give the effect of a decree to an award when made; and secondly, it is intended to protect the parties while the reference is going on. In the case of a common award it was competent for a party to break off pending the arbitration. Clause 1, sec. 3, must be construed by section 7, which shows that the mention of the time in the deed of submission is only necessary when a suit had been instituted, that it might be suspended until the reference terminated. The award in this case was fully authorised by the deed of reference, and was final within the meaning of section 9, cl. 1. The [153] deed of reference says the party shall not appeal, which clearly contemplates a final award, and the same ought to have been executed as a decree. The objection that the petitions were not attached to the award when filed is of no value: it is sufficient that at the time of the reference they were attached to the deed. The circumstance of Mr. Frere being the Zillah Judge and agent at Surat, did not preclude him from undertaking the reference, and acting as arbitrator, more especially as by the terms of the reference any appeal against the award was excluded.

The judgment of their Lordships was delivered by

Sir John Patteson.—This case comes before their Lordships under a Regulation in India, No. VII. of 1827, and the question is, whether or not the submission and the award are within the terms of that Regulation.

The objections that have been taken are of a technical nature. The first is, that no time is specified in the deed of submission (which it is said is required by that Regulation), within which the award should be made, and that the omission of the time prevents the award from being entitled to be enforced as a decree of the Zillah

Court, according to the Regulation itself; and the second objection is, that there was an omission in the deed of submission as to the nature and extent of the subject-matters referred to arbitration, which, however, was not the case with the original deed, because the petitions on which the submission went, were stated to have been attached to the original deed, and those petitions forming part of the deed, though they were not filed in [154] the Zillah Court with the deed itself and the award, so as to enable that Court to proceed as upon a decree of their Court. There were other objections as to whether the award was final or not.

Their Lordships have been very much struck with the first and second objections which were taken, as to whether or not the case really comes within the Regulation of 1827, and it is upon those objections that they propose to advise Her Majesty.

Now, Regulation VII. of 1827 recites, "That it is advisable for the easy and amicable settlement of disputes of a civil nature, that the parties should have the means of adjusting them by arbitration, without being obliged to resort to a Court of Law, and that an award duly pronounced should have the force of a decree of the Court." It is very likely that this Regulation may have been enacted by the Legislature in India, with some reference to the Act of Parliament in this country, the 9th and 10th Will. III., cap. 15, by which submissions to arbitration were authorised to be made rules of Court, and enforced by process of contempt of Court, as if it were a proceeding actually in Court; it is very possible that that was so, but the difference between the law in England and the law in India, in that respect, is very marked, because, by the 9th and 10th Will. III., cap. 15, all that is enacted is, that if parties choose to submit their differences to arbitration, they may insert in the submission the agreement between them, that the submission may be made a rule of any of His Majesty's Courts of Record, upon an affidavit made by the witnesses to the submission, that there is such a clause; but there is no mention made in the Statute of Will. III. with respect to what the submission [155] itself shall contain; it is left entirely to the parties themselves to put into the submission anything they think fit. Therefore, the cases which have been cited upon that subject, with respect to the enlargement of time by consent, although not in the very terms in the deed of submission, are really beside the question which their Lordships have now to consider. No question arose in those cases, as to whether or not the deed of submission could be made a rule of Court; the only questions were, whether the terms of the deed of submission, such as they were, had been complied with, so as to make the award a sufficient one, that the Court might either enforce it by attachment or order it to be set aside; the motion generally was to set it aside, but, as I have said before, all these cases have nothing to do with the present question.

The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise.

Now, it is said here, that there is one condition in which this Regulation has not in terms been complied with. The Regulation, by sec. 1, cl. 1, enacts, that any such matter of dispute as is cognizable in a Civil Court, may, for the purposes specified in the Regulation, be referred, by mutual consent of the parties, to one or more arbitrators, chosen in such a manner as may be agreed on by the parties, and then [156] the Regulation specifies who shall be qualified to act as arbitrators. And cl. 1, sec. 3, states, that when the choice of the arbitrator or arbitrators shall have been made, the parties shall execute a deed of reference, which may be upon unstamped paper, showing the names of the arbitrator or arbitrators; the nature and extent of the matters referred; the date of reference; the time within which the award is to be given; the signatures of the parties, and of two witnesses; and the consent of the parties to abide by the award, with any conditions that may be involved, such as whether the decision of a majority is to be conclusive, or whether an umpire is to be appointed, and so on. Then a form of a deed of reference is given; but it is expressly stated, that it is not requisite that the deed of reference should be framed according to that form, and it provides for the award being deli-

vered within ten, or as many days as shall be specified, and that it contain the matters and be framed according to the rule specified in the preceding clause. Now, that provision is certainly not intended to put the thing altogether at large, and let the parties draw up their reference in any way they may think fit, without regard to the first part of the third section, because it expressly provides that it shall contain the matters, and be framed according to the rules specified in the first clause. It seems, therefore, that the Legislature of India, in passing this Regulation, attach importance to the matters, which they expressly enact shall be contained in the deed of reference.

Now, we are asked to consider, that, as far as regards the insertion of the time within which the award is to be made, it is directory only. Their Lordships are quite at a loss to see how they can possibly [157] so construe that clause. It is included with a number of other things, and if we say the insertion of the time is directory only, there seems no reason why all the other things that are there specified should not also be considered to be directory, or why they might not be disregarded altogether by the parties if they thought fit to do so. Another argument that was used upon this third section was, that so far as regards the insertion of time, that was, in truth, only inserted with a view to the seventh section, in which it is enacted that if pending an arbitration a suit be instituted, that suit may be stayed upon proof that the suit and arbitration relate to the same matters, and that the time for making the award has not expired. Here it is said by anticipation that the Legislature put into the third section the requirement that the time should be specified with a view to the seventh section; that if any suit should be instituted in the meantime, that suit might be suspended until the reference should be terminated. This is really a very ingenious but at the same time a very far-fetched argument, and a construction which their Lordships cannot think the Legislature of India at all intended when they framed this Regulation. It is manifest they required by the third section that the time should be mentioned, and they required by the fourth clause of that section, that if the time be enlarged, it must be done in a particular manner, and with the same formalities as the deed itself, which was to be executed before two witnesses: and then they go on to make a provision which is very natural, namely, that if any suit is instituted pending an arbitration, that suit shall be suspended until the arbitration is determined. That it is consistent to state, therefore, that the third [158] section has only reference to the seventh section, seems to their Lordships to be going much further than they can venture to do, particularly when it is considered that references had formerly been made in India under the name of "Punchayets," which had been attended with a very great and unreasonable delay. It might probably have been the intention of the Legislature in framing this Regulation to prevent such delays from taking place, and that might have been a very good reason why this requirement should have been made, that the time should be specified in the deed of reference within which the award should be made. To regard it, therefore, merely as directory, or of little importance, would seem to be letting in one of those very mischiefs which were expressly intended to be avoided by this Regulation. It is difficult, no doubt, for any Court to be quite sure that they know the reasons why an Act of Parliament is passed, or to account for the phraseology which is used in an Act of Parliament, or of a Regulation in India; but this reason for requiring the time to be specified and for making the Regulation in these terms, does seem to be natural and probable. Not only so, but it seems to have been stated that that was likely to have been the cause, because their Lordships perceive that in the first decree of the Sudder Court in India in giving their judgment, the Court say, "The Advocate-General says, it was by mutual consent that the time within which the award was to be given was not defined; if so, it was by mutual consent, and not by any fraud or inadvertence, that the deed of reference to arbitration was so drawn as that the award on it should never rise above the level of the ancient sluggish punchayetnamah, to invigorate and reform [159] which, specially in regard to expedition, this Regulation was enacted;" so that the Court there treat it as a reason for this Regulation, that it was to avoid the delay. It then goes on:—"And considering that one of the parties is not generally amenable to Regulations, this condition, that the award should not have the force of a decree, was a very judicious one on the part of his antagonists, for no sooner did the Bukshee,

who now seeks to exercise the force of the Court against his alleged creditor, receive himself an order from that Court to refund, pending the present inquiry, the money that had been paid to him wrongfully through that Court, than he wrapped himself in his privileges, and demurred to its jurisdiction." As to the latter part, it is immaterial in this case whether it be right or wrong; but the reason which they gave, and which they suppose to have been the cause of this Regulation, seems to have been strong in the mind of the Court at that time; neither did that pass away, because their Lordships have observed that in a subsequent decree when they reverse their former decree, they still adhere to this view; they say:—"In prescribing that a time must be fixed for pronouncing the award, it may be admitted that the law intended to provide against procrastination and the evils attending the old form of Punchayet. But the Court are struck with the force of the observation that in placing no restriction of that kind on the arbitration, the object of both parties was to facilitate, not procrastinate, their proceedings, which they severally intended should be final. The arbitrator, who is now sitting in Court, has satisfied it that the time was waived by consent of both parties." So that even in the last judgment when they reverse the former [160] one, the Court still adhere to their view of the reason why the time was mentioned in the Regulation of 1827. Their Lordships cannot help thinking that that probably was the true account of the matter, and that the time within which the award was to be made was considered by the Legislature of India to be essential, to be of great importance and to be necessary to be inserted in the deed of reference in order to give to the award the force of a decree of the Zillah Court. It is said that it may have been that the arbitrator in this case being a Judge of the Zillah Court, and also agent for the Government of Surat, his time was very much occupied with public duties, and it may have been inconvenient to him to limit the time for making his award, because his time being so much occupied with his public duties he would have very little time to afford to investigate the matters that were so submitted to him. That might have been a very good reason for giving a long time; but it was not any reason whatever for altogether omitting to mention the time in the deed of reference. Then it is said, it is done by consent. Now, what the Sudder Court in the first instance states, would seem very forcible if it was originally the case that all mention of the time was omitted in the deed of reference by consent, and intentionally by both parties. One cannot help seeing that it may very possibly have been that neither party was willing that it should come within this Regulation, and that the award should have the force of a decree of the Zillah Court. If, on the other hand, it were not so, if it were inadvertently omitted, then the proper course would have been, when it was found out, to have had a fresh submission, in which it could have [161] been interested, in order to make the matter clear; but they proceeded upon the case as if it had been done with consent of both parties.

That brings it to the question, whether the consent of the parties to waive one of the conditions which is required by the Legislature in this Regulation can give jurisdiction to the Zillah Court. Now, it is quite clear, upon all principles and authorities which have been determined in this country, that no such consent can give jurisdiction. That was decided in the case of *Ansell v. Evans* (7 Trem. 1), regarding a parol submission not coming with the Statute, 9th and 10th Will. III., c. 15. The Court there said, the parties cannot by consent give us the power which the Statute must give. In the case of a submission, they required two witnesses to attest the fact and bring it before the Court, and, therefore, they said, we cannot assume a jurisdiction by mere consent of the parties. Neither can the Zillah Court assume a jurisdiction to make this award have the force of a decree of Court merely by consent of the parties.

If, indeed, we could have been satisfied that the time was merely directory, the case might have been very different. Their Lordships are all quite clearly of opinion that they must take it that the Legislature of India meant distinctly to prescribe that any deed of reference under which an award was to be made, to have the force of a decree of the Zillah Court should contain all those matters which are specified in the section of the Regulation to which I have already referred. And these matters being omitted, their Lordships have, therefore, come to the conclusion that, although the award may have been a very

good one in itself, it cannot have the force which this [162] Regulation would have given to it if it had contained all the requisites which the sections specify.

This being so, it is sufficient upon that ground to decide this case. The other point, with respect to the petitions not having been filed along with the deed of reference, seems to their Lordships to be hardly ripe for their decision if it were necessary to decide upon it at all, because the facts are not quite clear. It may be that the petitions were originally attached to the deed of reference as mentioned in the deed of reference, it may be that possibly they may have been filed in the Zillah Court along with the deed itself, and not considered to have been of sufficient importance to be sent here, or it may be that they have become detached in some way that has not been accounted for. Although the question may very fairly have arisen upon whom the *onus* lay of showing the fact one way or the other, yet the fact is not sufficiently clear upon the face of the proceedings to enable their Lordships to come to a satisfactory conclusion about it. All that their Lordships decide is, that they are quite satisfied that it is necessary under this Regulation that the nature and extent of the matter referred should be contained in the deed of reference, not meaning by that, that every single thing should be specified which the parties dispute, but generally so as to be intelligible and clear, so that it may appear when once filed, if any future suit should arise, what it was that had been determined by the arbitrator. Whether the reference to petitions of a certain date might be sufficient or not, or whether the petitions ought to have been annexed or not, it is not necessary for their Lordships to determine, as they are satisfied upon the first ground [163] of objection, so as to render it unnecessary for their Lordships to express any positive opinion with respect to the second point.

All the other objections that have been taken as to the award not being final, their Lordships do not enter into; it may be doubtful how far a Court of Appeal could enter into that question at all, whether it ought not to have been originally raised in the Zillah Court, and disposed of there. Many difficulties of that kind may arise, but it is not necessary to say anything upon the subject; there being one fatal objection, that objection must prevail. The consequence will be that their Lordships will advise Her Majesty to restore the original decree of the Sudder Court, which directed that the award should be taken off the file of the Zillah Court, and to set aside the second decree of the Sudder Court.

Under the circumstances, their Lordships are of opinion that the costs subsequent to the first decree, including the costs here, ought to be allowed to the Appellants.

[164] BABOO GUNESH DUTT SINGH,—*Appellant*: MAHARAJA MOHESHUR SINGH, BABOO BASDEO SINGH, and BABOO KIRUT SINGH,—*Respondents* * [June 20, 21, 22, 1855].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Family usage for fourteen generations, by which the succession to the Raj zemindary of Tirhoot had uniformly descended entire to a single male heir, to the exclusion of the other members of the family, upheld.

A custom for the Raja in possession, in his lifetime to abdicate and assign by deed the Raj title and domain to his eldest son, or next immediate male heir; held good, and a deed so assigning the Raj to an eldest son (provision being made for Baboo allowances for the younger sons), sustained.

Quære.—Whether Ben. Regs. XI. of 1793, and X. of 1800, being confined to cases in which there is no deed or Will executed, apply to the case of a Raj?

The question in this suit was, whether the ancestral estate of the Raj zemindary

* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner and the Right Hon. Sir John Patteson.

of Sircar Tirhoot, situate in the Districts of Tirhoot and Purneah, constituted a Raj domain, and as such descended entire to a single heir to the exclusion of the other members of the family, or was divisible among the co-heirs in equal shares, according to the usual course of succession provided by the Hindoo law. The first Respondent maintained the former, and the Appellant the latter, of these propositions.

The suit was instituted by the Appellant against Roodur Singh, since deceased, the father of the Re[165]spondent, Maharaja Moheshur Singh, Baboo Basdeo Singh, and Baboo Kirut Singh, to recover possession of a moiety of the above Raj. He claimed by inheritance through his father, Gobind Singh, who was one of the four surviving sons of Madhoo Singh, and who was, up to the 18th of June, 1807, in possession of the Raj as sole proprietor. The other three surviving sons of Madhoo Singh, were Chutur Singh, since deceased, who was the eldest son, and succeeded him to the Raj, and Kirut Singh, and Ramaput Singh. Although the late Gobind Singh, the Appellant's father, deceased, was the third of four sons, the Appellant sought by his suit to recover not one fourth merely, but one full moiety of the Raj and moveable property which had been in the possession of Madhoo Singh at the time of his decease, alleging that Ramaput Singh, the youngest son, had been adopted into another family, and had thereby lost title to any share of the patrimony, and that Kirut Singh, the second son, had released and relinquished his share. The Respondent's, Maharajah Moheshur Singh's, answer to the Appellant's claim, was, that the succession to the Raj was governed by ancient family usage, and that by virtue thereof Chutur Singh, in 1807, as the eldest son and heir apparent, received, under a deed of gift, possession of the Raj from Madhoo Singh, and on his death succeeded to the Raj title and Raj domain thereunder, and as sole heir-at-law; Gobind Singh and the other brothers receiving for their maintenance and support as Baboos, agreeably to the family usage, a provision in land, which was granted to them by Madhoo Singh, subject to the payment of Government revenue to him. Accordingly, Pergunnah Burharpoor Ragho was granted, in 1807, to Gobind [166] Singh for his maintenance, under the condition of his paying the Government revenue to the Chutur Singh, as sole proprietor of the Raj. This revenue he paid up to the time of his decease, which happened in the year 1822. On his death the Appellant succeeded to this Pergunnah.

The Appellant, although admitting the grant of this Pergunnah to his father, Gobind Singh, alleged that the same was made under a deed, dated the 14th of March, 1806, by Madhoo Singh, on the occasion of the ceremony of investing Gobind Singh with the Brahminical thread; and the Appellant alleged that the Pergunnahs which the brothers of his father also received were not granted for their maintenance, but that such Pergunnahs were granted by Madhoo Singh on the occasion of their being invested with their Brahminical threads.

The facts giving rise to the suit were shortly these:—

The ancestors of the Appellant and Respondents had been in possession of the Raj of Tirhoot from a period long anterior to the commencement of British rule in India. The first of these ancestors was Mahesh Thakoor, and from his death to the succession of the late Roodur Singh, the father of the first Respondent, there had been fourteen several successions; and on every such occasion only one person at a time succeeded to the Raj, in pursuance of the family usage: maintenance having been provided for the younger members of the family by a grant of a Pergunnah out of the Raj estates. By the custom of this family, the Raja last seised, upon his abdication by ill health or withdrawing from the world, by deed of gift assigned the Raj to his eldest son, or to the next immediate male heir.

[167] Madhoo Singh, the common grandfather of the Appellant, and Roodur Singh, succeeded to the Raj in 1775 upon the death of Raja Pratab Singh. Madhoo Singh had four wives: by the first he had no issue; by the second he had a son named Kishun Singh, who died without issue in his father's lifetime, and another son named Chutur Singh, the father of Roodur Singh; by the third he had two sons, Kirut Singh and Gobind Singh, the father of the Appellant; and by the fourth, a son named Ramaput Singh, who was, however, adopted into another family, and ceased, therefore, to have any claim or title to the ancestral estate.

On the 18th of June, 1807, Madhoo Singh being dangerously ill, and before leaving his home for Benares, executed a deed of gift of the Raj and Zemindary to

Chutur Singh, his eldest son, making provision for his other sons by grants of Pergunnahs, by way of Baboo allowances; two petitions were about the same time presented in his name, one to the Zillah Court of Tirhoot, and the other to the Collector of that district. Both these petitions stated, that he had given the Raj and Zemindary, and all his property and effects, to Chutur Singh, and had given to his other sons, Kirut Singh, Gobind Singh, and Ramaput Singh, proprietary deeds for different Pergunnahs, for their support as Baboos. The petition to the Zillah Court prayed that Chutur Singh, might be allowed to appear and conduct in his own name all cases there pending in which Madhoo Singh was Plaintiff or Defendant, and that to the Collector prayed that Madhoo Singh's name might be erased from the revenue papers, and Chutur Singh's name entered in its stead, and that in future the Government revenue might be received from him.

Madhoo Singh died in the latter part of the year [168] 1807, whereupon Chutur Singh took possession of the Raj. In the month of May, 1811, Kirut Singh, his brother, set up a claim and instituted a suit against him in the Patna Provincial Court of Tirhoot, claiming a third part of the entire property, alleging that there were only three brothers entitled to share the property. By his plaint he impeached the validity of the deed of gift by Madhoo Singh in Chutur Singh's favour. In his answer to this plaint the Defendant relied upon the deed of gift of the Raj by Madhoo Singh in his favour, and insisted that Pergunnah Jedee was given to the Plaintiff by Madhoo Singh, as a Baboo allowance.

The Patna Provincial Court pronounced its decision in the suit of *Kirut Singh v. Chutur Singh* on the 22nd of June, 1814, and dismissed the claim of the Plaintiff, who appealed to the Sudder Dewanny Adawlut; but before the case was tried, he entered into a compromise with Chutur Singh, whereby he agreed to withdraw and abandon his appeal, and acknowledge the invalidity of his claim, which was accordingly carried into effect.

Gobind Singh died in 1822, leaving an only son, the present Appellant, who was then an infant about a year old.

Chutur Singh died on the 3rd of April, 1839, leaving two sons, Roodur Singh and Basdeo Singh, having made a deed of gift of the Raj to his eldest son, who thereupon took possession of the Raj. The Appellant having attained his majority, instituted the present suit on the 29th of July, 1839, in the Civil Court of Tirhoot, against Roodur Singh, Basdeo Singh, and Kirut Singh. The real Defendant was Roodur Singh, as the other Defendants had substantially no interest in the suit. In his plaint the Appellant alleged that he was entitled to the moiety in question, together with the acquisitions of his grandfather, Madhoo Singh, and his father, Gobind Singh, which had been purchased out of the produce of his grandfather's property, and the sum total at which he valued the property, reckoning the value of the revenue-paying lands at threefold their assessment, and that of the La-kiraj or unassessed lands at eighteenfold their yearly produce, amounted to Rs. 708,636. 14a. 1p. 4k., a moiety of which he claimed. He also alleged that the whole of the lands in dispute descended from his ancestor, Maharaja Nurindur Singh, to Pratab Singh, the adopted son of Nurindur Singh, and from Pratab Singh to his nephew, Madhoo Singh, his grandfather. He then stated that their father had given to each of them a Pergunnah, at the ceremony of the Brahminical thread, which Pergunnahs the Appellant, therefore, excluded from his claim, and alleged that Chutur Singh had fabricated documents while Madhoo Singh was in a state of insensibility, whereby he had got possession of the Zemindary after his father's death. He further stated the adoption of Ramaput Singh into another family, and the relinquishment by his uncle, Kirut Singh, of all claim to the hereditary property of the Zemindary in the suit which he had instituted against Chutur Singh, when, as alleged, Chutur Singh, by deed, assigned the Talook Bukanut, etc., to Kirut Singh, and withdrew him from the claim of his right to the whole property which was then pending in the Sudder Dewanny Court.

The Defendant, Roodur Singh, by his answer asserted that his brother, Basdeo Singh, and his uncle, Kirut Singh, the other Defendants, were in collusion [170] with the Plaintiff, and that the suit was at their instigation. He insisted that the property in question was an ancient Raj of Tirhoot, and that from its first creation and the commencement of the family the following custom had prevailed, namely, that the eldest son became the proprietor of the Raj and all its appendages and

property, and filled the place of the father, and the younger sons, after they attained their majority, had only a maintenance as Baboos (or younger gentlemen of the family); that it was also the custom, that whenever the Raja of the time being found that he was grown old, or for any other reason was desirous of forsaking the affairs of this world, or thought his death approaching, he delivered over the Raj, and all the property of the Raj, to the eldest son, who was the heir-apparent, and appointed a provision for the younger sons as Baboos, and confirmed the old-established usage; that if there was no son or grandson, the Raja of the time then gave the Raj and all its appendages to the brother or any other relative as his successor, who succeeded to the Raj, and possessed all the property belonging to it. He then traced the successive descents of the Raj, according to the family usage; by which it appeared, that the actual Raja before his death made over the Raj to his eldest son, or, in case he had no issue, to his brother, who took exclusive possession of it, and the younger children had merely a maintenance as Baboos. He alleged that in this manner, when Chuter Singh wished to forsake the world and go to Kashee (a holy place), he, according to the same family usage, assigned by a deed to Roodur Singh, his eldest son and heir-apparent, the Raj and all the property, and in his own lifetime placed him in the Raj as his successor, and [171] gave him possession; and that he assigned the profits of the Pergunnah of Jareel, after paying the revenue, as a maintenance to Basdeo Singh, the younger son, and gave him also a deed by which Roodur Singh was acknowledged the possessor of the property of the Raj and Government revenue. That such an ancient usage had been continued, and no division or partition ever made, and that the Plaintiff could not show that the Raj was ever divided into shares; that the property, according to the family usage, having descended from one to another, did not prove that it is heritable to all, and that the Plaintiff's claim for a share could not be in anywise admissible; for country usage, family usage, and the rules of Princes, according to the Hindoo law and rules of Court, were prevalent and preferable, and no book could abolish such usage. The answer next insisted that the allegations of the Plaintiff as to the various Pergunnahs mentioned in the plaint having been given at the times of investing the recipients with the Brahminical thread were false and futile, and that Madhoo Singh never gave any Pergunnah, or village, to any son on the occasion of such investiture; and that such was not the family usage, according to which nothing but jewels and money were given on such occasions. The answer then stated that Kirut Singh had instituted a suit in the Provincial Court of Patna on similar grounds, for a third share of the property, and that his claim was dismissed, which decision the Defendant asserted was sufficient to repel the claim and allegation of the Plaintiff. He said that Pergunnah Aalapoor was included in the other property of the Raj, which Madhoo Singh gave to Chuter Singh by deed in 1807, and was given by Chuter Singh to Moheshur Singh, the [172] present Respondent, his eldest grandson, at his birth. He denied that Kishun Singh got Pergunnah Dhurumpoor at the ceremony of the thread, and asserted that as he was the eldest son, his father, Madhoo Singh, gave him that Pergunnah at the ceremony of appearance; and that as Kishun Singh had no issue, he adopted his brother, Chuter Singh as his son; and that on his death the Pergunnah came into the possession of Chuter Singh in the lifetime of Madhoo Singh. And after stating the manner in which Chuter Singh succeeded to the Zemindary, the answer alleged that Gobind Sing was well acquainted with the family usage and laws of the Raj, and thinking it useless to prefer a claim, he continued during his life to pay revenue to Chuter Singh, according to the conditions of the deed of Madhoo Singh. It next alleged, that when Kirut Singh's suit for a third share of the property was dismissed by the Provincial Court, he appealed to the Sudder Court; but when he understood that the eldest brother's right was complete according to family usage and the act of the father, and that he had no other right but to maintenance as a Baboo, he withdrew the appeal and filed a deed of withdrawal, in which there was no mention of any mutual exchange of right having been made. The answer then stated, that by every Hindoo law particular customs were maintained and upheld, and concluded thus:—"What the Plaintiff's father got was merely as the right of a Baboo's maintenance, and accordingly Madhoo Singh, when he was about to forsake the world, followed the usage, and gave the eldest son, Chuter Singh, all the Raj and its rights which he had by the family

and country usage, and laws of the Raj. It deserves consideration, that if the property appertaining to this [173] Raj were divisible, by the family usage, among heirs, the Raj could not exist."

The Defendant, Kirut Singh, by his answer insisted that he had been improperly made a Defendant in the suit; that he was in possession of Pergunnah Jedee, under a deed of gift from his father, Madhoo Singh; that the Appellant had improperly included in his claim some villages which had originally belonged to Maharance Pudmavutee, the wife of Nurindur Singh, and ancestor of Kirut Singh, to which Madhoo Singh had no title, and of which he never had possession; and that the Appellant had no right to the hereditary property claimed by his suit.

The other Defendant, Basdeo Singh, by his answer stated that Kirut Singh had previously sued Chutur Singh for the same property, and that Chutur Singh had answered the plaint, denying that the property belonged to their grandfather and was ancestral, and that the suit was dismissed. He then said that in the present suit the Defendant, Roodur Singh, had intentionally abandoned the ground taken by his father, Chutur Singh, in the former suit, and had relied without any ground upon a family usage, which never existed in the Singh family. He declared that the line of defence adopted by Roodur Singh proceeded from fraud on his part; as he was in hopes that on the termination of the suit he might take an acknowledgment of the family usage from the Appellant, and acquire a proof of his assertion as to the family usage. Basdeo Singh then denied that the four Pergunnahs mentioned in the plaint had been given at the ceremony of the Brahminical thread, and asserted that the Zemindary was the private acquisition of Madhoo Singh, and had not descended to him by inheritance; [174] and that with respect to such property, a father had by law the power of making an unequal division of it amongst his sons.

The Appellant and Roodur Singh adduced evidence, and witnesses were examined on their respective sides. The material portions relating to the usage of the family and validity of the deed executed by Madhoo Singh, are sufficiently referred to in the judgment of their Lordships.

Previous to the cause coming on for hearing, and on the 20th of September, 1840, Basdeo Singh, the younger brother of the Defendant, Roodur Singh, had instituted a suit against Roodur Singh, claiming a share of the Raj, and raising exactly the same questions as were raised by the Appellant in his suit, namely, the existence of the family usage, and the validity of the deed executed in conformity with such usage by Chutur Singh in favour of Roodur Singh, his eldest son, with provision for the maintenance of his younger son. In both suits the points raised with reference to the family usage and the evidence on the subject being substantially the same, and the two cases being found so closely connected, they were heard simultaneously by the same Judge, and decided at the same time.

In Basdeo Singh's suit the question raised respecting the family usage was fully considered, and it was held by the Zillah Court of Tirhoot that the usage was fully established, and was valid, and Basdeo Singh's suit was accordingly dismissed.

The present suit came on for hearing before the Zillah Judge, Mr. David Pringle, on the 31st of December, 1844, who in his judgment and decree of that date stated as follows:—"In the case of *Kirut Singh* [175] v. *Chutur Singh*, the Plaintiff's claim (like the present Plaintiff's) was for an equal division; and the Court, upon finding that the possession of the Plaintiff was according to the deed of partition of Madhoo Singh, and not by a gift at the investiture of the Brahminical thread, dismissed it; and, by a legal opinion which was taken in that case from the Hindoo law-officer of the Court, and the acknowledged possession of the Plaintiff, the deed of partition was considered to be in conformity with it, and cannot now be disputed. It is my opinion that if the document of Madhoo Singh be sufficient with regard to the right of Kirut Singh, it is so with regard to all who are included in it. In this case the Plaintiff was at liberty to say that he was not a party to such a claim on that deed of partition; and if that deed was accepted by his father, it could not be prejudicial to him, and he referred to 2 Macnaghten's Principles of Hindu Law, p. 50, as a sufficient precedent for it; but the Plaintiff has never brought forward a claim to have the deed of Madhoo Singh annulled, and that deed has been confirmed by the Provincial Court, as above said, and he could produce no kind of proof. It is my opinion that the deed of gift at the investiture

of the Brahmical thread is contrary to rule and usage, and nothing has been found to show its authenticity: for the possession of the Plaintiff is according to the document of Madhoo Singh, and not by any other document: and by the Hindoo law, if any deed of partition be put in execution, and any one take anything under it, he will have possession of only that and nothing more, and my decision should be according to the Hindoo law, upon which the Plaintiff founds his claim: and it is [176] not necessary to enter into the question of family usage in this case, because in a similar case, in which the Defendants are parties, the question of family usage has been fully tried." The suit of the Appellant was accordingly dismissed with costs.

The Appellant appealed from this decree to the Sudder Dewanny Adawlut of Calcutta.

The appeal came on for hearing on the 27th of February, 1846, concurrently with an appeal brought by Basdeo Singh against the decree of the Zillah Court in his suit.

In Basdeo Singh's suit the Judge, Mr. Rattery, entered fully into the question respecting the family usage, and agreeing in opinion with the lower Court, dismissed the appeal (see case reported, *nom. Muha Raj Kowur Basdeo Singh v. Muha Rajah Roodur Singh Bahadur*, 7 Ben. Sud. Dew. Rep. 228); and for the same reasons dismissed the appeal of the Appellant in his suit, with costs. In his judgment he said:—"As this case is similar to case No. 50 (the suit of *Basdeo Singh v. Roodur Singh*), and with regard to the evidence in that case generally and to the documents filed by Roodur Singh, one of the Respondents in this case, particularly, it is not necessary in my opinion to enter into particulars in this case, which can be known by a reference to it. In this case my opinion coincides in every respect with that of the District Judge."

From this decree the Appellant appealed to England. Pending the appeal Roodur Singh died, having previously abdicated and by deed granted the Raj to his eldest son, Maharajah Moheshur Singh, who was admitted by the Sudder Court to succeed his father as Respondent, and carry on the appeal.

[177] The appeal now came on for hearing, and was argued by

Mr. R. Palmer, Q.C., and Mr. Shapter, for the Appellant.—Their argument was confined to two points: first, to an examination of the evidence, whether the Zemindary of Tirhoot constituted an ancient Raj or not, and the custom and usage of the family regulating the succession; secondly, as to the validity of the deed of appointment to the Raj by Madhoo Singh upon his abdication in his eldest son's, Chuter Singh's, favour, and the acquiescence in it by Kirut Singh and Gobind Singh, the Appellant contending, that the determination of the question of the succession was to be governed by the general Hindoo law, by which he claimed upon a partition to be entitled to the moiety sued for. They referred to *Rajah Deedur Hossain v. Rancee Zohoor-oon-Nissa* (2 Moore's Ind. Ap. Cases, 441), *Rawut Urjun Sing v. Rawut Gunsiam Sing* (5 Moore's Ind. Ap. Cases, 169), *Baidyanund Singh v. Rudranand Singh* (5 Ben. Sud. Dew. Rep. 198), *Muha Raj Kowur Basdeo Singh v. Muha Rajah Roodur Singh Bahadur* (7 Ben. Sud. Dew. Rep. 228), 1 Strange's Hindu Law (2nd Edit.), pp. 16, 177, 198, 1 W. Macnaghten's Principles of Hindu Law, pp. 44, 46: Ben. Regs. XI. of 1793, and X. of 1800.

Mr. Wigram, Q.C., and Mr. Leith, appeared for the Respondents: but were not called upon to argue the case.

Judgment was pronounced, as follows, by

[178] The Right Hon. T. Pemberton Leigh.—In this case their Lordships do not think it necessary to trouble the Counsel for the Respondents. We had very little doubt at the termination of the argument for the Appellant what judgment it would be our duty to recommend Her Majesty to pronounce, but we were extremely unwilling to intimate any opinion upon that subject until we had an opportunity, by a careful examination of the whole proceedings, of ascertaining, whether there was anything to be found in them which would either alter or confirm that impression. We have had an opportunity of making that examination, and the result of that is to remove all doubt from our minds as to the utter absence of any ground for the present appeal.

Before advertg to the circumstances of the case, either of fact or of law, which are in controversy, it may be convenient to state those as to which either there is no dispute, or as to which, in the opinion of their Lordships, all possibility of their being successfully disputed is removed by the evidence.

In the month of July, 1775, Madhoo Singh succeeded to the Zemindary of Tirhoot. He succeeded to the Zemindary on the death of his brother Pratab Singh, who had previously been in sole possession of it, Madhoo Singh during the lifetime of his brother being in possession of a Pergunnah called Dhurumpoor, as a Baboo allowance, which is a provision for younger sons, as an appanage of the estate. Madhoo Singh had five sons: Kishun Singh, his eldest son, died without issue in his father's lifetime, and a younger son called Ramaput Singh was adopted into another family, and ceased, therefore, to be a son of Madhoo Singh. There remained, therefore, three [179] sons of Madhoo Singh, namely, Chutur Singh, his eldest son, Kirut Singh, his second son, and Gobind Singh, his third son.

On the 18th of June, 1807, Madhoo Singh, thinking himself at the point of death, and being, in truth, extremely ill, abdicated the Zemindary, and retired to Benares, or to the banks of the Ganges, for the purpose of dying there, and on that day he made a deed, upon which, in a great measure, the merits of this case turn.

By that deed, after reciting that he was unwell, and was retiring from the world to die upon the Ganges, he transferred the Raj, as he called it, or the Zemindary in question, to his eldest son, Chutur Singh, and by the same deed he declared that he had already given one Pergunnah, Jedee, to his second son, Kirut Singh, by way of provision as a Baboo, and another Pergunnah, Burkarpoor Ragho, to his son Gobind Singh, as a similar provision for him as a younger son. He made a similar disposition of certain villages as a provision for his daughters. This deed was executed on the 18th day of June. On the 27th of that month he presented a petition to the Judge of the Zillah Court of Tirhoot, stating the terms of this deed, and praying that it might be carried into effect. On the 4th of July, 1807, he presented a similar petition to the Collector, praying that in his department this instrument might be carried into effect by entering the estates in the names to which the deed transferred them. On the 12th of August, 1807, an order was made by the Collector accordingly, directing those transfers to be entered, and on the same day the Collector issued an order to the tenants, ordering them to pay their rents and assess-[180]-ments according to the terms of this deed; and on the 14th of the same month, the Zillah Judge of Tirhoot sent a message or note to Chutur Singh, stating that he had received communication of this instrument, and that Chutur Singh should be put in possession, and remain in quiet possession according to the terms of that deed.

With respect, therefore, to this instrument, and to the fact of its having been made, of its being considered valid, and carried into execution, at least adopted by all the authorities of the country, there can be no doubt.

But all this takes place during the time that Madhoo Singh was alive; he continues to live till the month of November, 1807; no doubt is ever intimated by him, no suspicion suggested by him of any fraud having been practised upon him, or of there being any invalidity in this instrument, and upon this deed the possession in all respects, both with respect to the Raj, if it be a Raj, and with respect to the Pergunnahs given to those younger sons as Baboo allowances, is taken and confirmed according to the terms of the deed.

Thus matters continued till the month of May, 1811, when Kirut Singh, the second son, who was in possession of the Pergunnah Jedee, institutes a suit against his brother, Chutur Singh, for the purpose of obtaining one-third of the Zemindary. In the plaint in that suit he states the facts which I have alluded to, namely, the situation of the family, and the possession of the Raj by Chutur Singh. He then alleges that the Pergunnah which he held was given to him by his father upon his investiture with the Brahminical thread, and that he was not by the acceptance [181] of that Pergunnah deprived of his general rights in the Zemindary; and then he alleged that the Zemindary was divisible amongst all the sons, and that he, therefore, as one of the three sons, was entitled to a third share. He stated that his brother, Gobind Singh, was then a minor, but that when Gobind Singh came

of age, Gobind Singh would claim his third, or might claim his third, of the Zemindary.

On the 7th of May, 1812, Chutur Singh put in his answer in that suit, and he there distinctly alleged that the possession of the Pergunnah held by Kirut Singh was under the terms of this deed; he denied the fact of any grant having been made upon the investiture, and insisted upon the validity of the deed, under which he was in possession, and of his right as sole heir to this Zemindary.

On the 22nd of June, 1814, the suit of Kirut Singh was dismissed, and it was dismissed upon this ground; that totally independent of all family usage whatever, or of what the law might be if no such deed as that of 1807 had been assented to by the sons, Kirut Singh had taken possession of Pergunnah Jedee, and was then in possession under the terms of that deed; that he had, therefore, assented to the deed, and was bound by the whole effect of it.

That judgment was pronounced on the 22nd of June, 1814. Kirut Singh appealed against that judgment, and in the month of July, 1816, he abandoned that appeal, and by a deed of compromise and adjustment, distinctly recognised the title of his brother to the possession of this Zemindary, of this Raj, as it is there termed, as his undivided inheritance. On the 4th of September, 1816, it appears that there was a deed executed by Chutur Singh, which it was said was con-[182]-nected with the deed of July, 1816. Their Lordships can find no connection between those two deeds; there is nothing in the suit which had been instituted by Kirut Singh, in which the claim which Chutur Singh abandoned by the deed of the 4th of September, 1816, is raised or insisted upon by him. It never can be considered, in the opinion of their Lordships, as in the slightest degree affecting the validity or the effect whatever it may be of that abandonment of the appeal, that this deed was executed by Chutur Singh. The effect of Chutur Singh's deed was simply this, that Kirut Singh was to be put in possession of thirty-three villages, a comparatively small quantity of land, which had been given to him, not by a direct ancestor of the family, but by the Maharanee, the wife of one of those former Rajas, or at least a member of the family. Chutur Singh, it seems, had claimed that, not in this suit, but had claimed it, or set up some right to it, as a part of the Zemindary, and, upon this deed of the 4th of September, he abandoned it. The claim involved in this instrument of the 4th of September, 1816, is thirty-three villages, whereas the right involved in the suit by Kirut Singh is one-third of fifteen hundred villages, a large Principality. There is no sort of connection between those two instruments that we can perceive, and if there were it would be idle to represent that the one could be considered as a consideration for abandoning the claim to the other.

Now, observe this takes place in 1816. Gobind Singh had been in possession (as far as a minor can be in possession during his minority) of the Pergunnah which had been allotted to him, but in 1815 or 1816 he came of age. Kirut Singh, in his suit, had [183] adverted to his claim. I rather think he was guardian of Gobind Singh; but Gobind Singh, on coming of age, must have known, and could not have avoided knowing, the question which had been raised in this suit by his brother, Kirut Singh, and that if the possession of the Pergunnah which had been held by his brother was under that deed, he could have no claim, according to the decision of the Zillah Court, to any portion of the Zemindary. Now, in this state of things, what does he do? Having full knowledge of this claim, being called upon by the circumstances of the case, if he could distinguish his case from Kirut Singh's, to point out that distinction, and assert that claim in a suit of his own: he lives for seven or eight years afterwards: he acquiesces entirely in the possession of that Pergunnah; he raises no claim to the smallest portion of the Zemindary, and he dies in the month of June, 1822, leaving the present Appellant, his son, a minor.

Now, at the death of Gobind Singh, the present Appellant was about a year and a half old. His father had remained, at all events, after he came of age, for seven or eight years in the possession of this Pergunnah under that title, whatever it was, by which at that time it was held. In 1837, I think, the present Appellant would come of age. It is not material, but on the death of Gobind Singh the Appellant was made a ward of the Court of Wards, and during his minority the income of this Pergunnah was applied to his use.

In 1839, Chutur Singh, who had thus remained during the whole of his life

in the individual possession of this Zemindary, made a gift to his son, Roodur Singh, according to the family custom, as it is [184] alleged, by which he abdicated the Zemindary in favour of his son, and he soon afterwards died, and Roodur Singh took possession as sole Zemindar.

On the 29th of July, 1839, the present Appellant instituted his suit. Now, it must be observed, that he had full notice of the ground upon which Kirut Singh's suit had been decided, and the points which he had to make out, therefore, were these: that the Zemindary in its nature was divisible; that there was no deed, or no valid deed, executed which could destroy that divisibility, and that he never had assented, whatever Kirut Singh might have done, to the deed of 1807, by which, what they call a partition of this family property was made.

Accordingly, in his suit, he distinctly alleges, and it is the necessary foundation of his suit, that his possession of that Pergunnah had not been under the deed of 1807, but that grants had been made to each of the sons, and among them to Kirut Singh, upon their investiture with the Brahminical thread by their father; that upon the occasion of that investiture, a grant had been made to each son, of a Pergunnah, as a free gift by the father. He then disputed, as had been done in the former suit, the validity of the deed of 1807 upon other grounds, and he claimed one half of this Zemindary.

The answer put in by Roodur Singh insisted that the possession had been under the deed of 1807, and under the family usage, warranting the execution of that deed. In that answer he distinctly stated what was very important, that with respect to Kirut Singh there was not a pretence for saying that it had been made upon the investiture with the Brahminical thread. It appeared upon the documents to which [185] he referred, that there had been a gift made to him upon his birth by his father, as the eldest son, and that the documents in the Collector's office, and the Magistrate's office, distinctly proved that. Now, on the 31st of August, 1841, the replication was filed by the Appellant, still persisting in his statement of this grant having been made to all the sons upon the investiture with the Brahminical thread, and then for the first time he sets up a deed which he states is dated the 14th of March, 1806, by which he alleges that that grant to him was made.

Now it appears, that Roodur Singh had a brother named Basdeo Singh, and when this claim was set up by the present Appellant, insisting that the Zemindary was divisible, and that he was entitled to one half of it, as coming from Madhoo Singh, it occurred naturally enough to Basdeo Singh, that if that were so he was entitled to one half of that which belonged to Chutur Singh, and, accordingly, on the 20th of September, 1841, he instituted a suit, and the effect of the success of those two suits would have been thus: in the first place, one half of the Zemindary must have gone to the present Appellant, and one half of the remainder must have gone to Basdeo Singh.

Now, there was this difference, and this difference only, in the questions which were raised in those two suits. In both, the validity of the deed of 1807 and the existence of the family custom were equally in controversy. In the suit of the Appellant alone, could any point be raised as to the deed of 1807 becoming valid by acquiescence of the parties. In the Appellant's suit, therefore, both the family usage and the validity of the deed of 1807 were raised, and also [186] the point whether the present Appellant was or was not bound by the acquiescence of his father in the deed of 1807. These two suits involving in a great degree the same points, an order was made by which they were referred to the same Judge; they were heard at the same time, and there appears to have been a reference made to the evidence in both suits. The evidence taken in one was referred to in the other. On the 31st of December, 1844, both these suits were dismissed. The first suit, the Appellant's, was dismissed in this manner: It was said by the Court, that he raised there two points, first the acquiescence, which, as they held to be decisively against him, it was unnecessary to enter into the question of family usage in that case, because that was fully done in Basdeo Singh's suit, in which equally with this it was an essential part of the case. In the two suits together, therefore, they decide that this is a Raj; that family usage exists for which the deed of 1807 was executed; that the deed of 1807 was a deed to which Gobind Singh assented, and by which the Appellant, his son, is bound.

On the 10th of March, 1845, there was an appeal in both suits to the Sudder Court,

and on the 27th of February, 1846, both appeals were dismissed. In August, 1846, there was leave given to appeal to England. In 1850, Roodur Singh, the then Raja, following the usage which had prevailed in this family, or was represented to have prevailed in this family, for at least two centuries, abdicated in favour of his eldest son, the present Respondent, and by an order made by the Sudder Court, the Respondent was substituted for him in the appeal.

Now, the questions which have been raised at their [187] Lordships' bar, and argued with that ability which we always find in the arguments of the Counsel who have been employed in the appeal, are these: The first question is as to the validity of the deed of Mudhoo Singh, and that independent of any acquiescence by Gobind Singh. Now, questions of general law of great importance have been raised, but which it appears to their Lordships do not really arise in the present case. We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this District, and indeed generally under the Hindoo law, estates are divisible amongst the sons, when there are more than one son: they do not descend to the eldest son, but are divisible amongst all. With respect to the Raj as a Principality, the general rule is otherwise, and must be so. It is a Sovereignty, a Principality, a subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary. Now, it is said in this case, that there is no positive law which excludes the divisibility of this inheritance, unless it be clearly proved to be an ancient Raj, which it is denied that it is. But Regulation XI. of 1793 really has no bearing upon the case, for the Regulation of 1793 is confined to cases in which there is no deed and no Will executed. [188] While there is a deed, or where there is a Will, it does not give a validity to that deed or that Will, which the deed or Will would not otherwise possess, but it leaves it precisely where it stood before: therefore, the Regulation of 1793, and Regulation X. of 1800, and the authorities upon this point which have been referred to, do not appear to their Lordships to be at all involved in the consideration of the present case.

The question, therefore, is, first, was this a real and true Raj. Now, upon looking into the evidence upon that point, one can hardly avoid expressing some surprise that even the strong necessity of the case could induce a doubt to be raised upon that point at the Bar: because, what is the evidence? In the first place, it is not disputed that a considerable time before this country fell under the dominion of the East India Company, this was a Raj, with all the circumstances attending a Raj: that it was treated as such by the supreme authorities; it was treated as such by the vassals or tenants of the Raj, and that from that time to the present no question as to its being a Raj has existed.

But the evidence goes a great deal further, and it is some satisfaction to their Lordships in this case to find that there is at length one case (I think I may almost say it is the first I have ever seen in my experience in this Court), in which the parol evidence given in the case upon the part of the Respondents is really worthy of the utmost attention. It is given by persons not liable to any imputation whatever, either in respect of their position, or in respect of the form and mode in which they gave their testimony.

Now, the evidence which was given in this case is [189] produced from nineteen witnesses, fourteen or fifteen of them, if not more, being Zemindars or Talookdars, persons of station holding property, paying a large revenue to the Government, some Rs. 3000, some Rs. 5000, some Rs. 4000, some Rs. 8000; all well acquainted with the country, whose ancestors, as it appears in many instances, for twelve generations, in some for longer, and in others for a less period, have held lands in this District, who were interested, therefore, in knowing what the nature of this property was; and what is the account which they give? Why, the account which they give is this, that this was a Raj. Independent of this, however, there is the evidence of three Canoongoes, or Record-keepers, persons in this part of India especially, as it appears from reports which we have had occasion to look into for another purpose, entitled

to great credit, and who tell us that that which is stated in the parol testimony, as a tradition from their ancestors by other witnesses, is consistent with their knowledge collected from the records which have been in their possession. The account, therefore, which they give upon that point is this: that before the time of Mahesh Thakoor, above two hundred years ago, before the original founder of this family, Mahesh Thakoor, came into possession of it, it was a Principality, that it was granted by the Emperor to this first founder of the family, and that ever since it has continued in this family, one and indivisible, but to that I will advert presently. Now, what do they tell us? They are asked how they know this: why they say, we know it for this reason, that the whole of this Sircar Tirhoot was originally included in it. The whole of that great property was included in the possession of this family: [190] they were the only rulers whom we knew, and we knew they were the rulers, and we knew who they were, for this reason, that we and our ancestors held our lands from them, and until the East India Company assumed the dominion over this territory, we paid our rents as vassals or as holders to the Lords of this Zemindary, who were the rulers of the country, we knowing nothing of the Emperor from whom the grant to this founder of the family was made, and we find the seal with the fish, which is not in its own expression very intelligible, is stated to be an emblem of Sovereignty or of high nobility granted by the Emperor to great families; and if it were further necessary to inquire into the antiquity of this Zemindary before the possession of the East India Company, there is evidence which admits, in the opinion of their Lordships, of no doubt whatever that this was a Raj; was a Principality indeed, the remnant of it, as it appears, extending even at the present time to about 1500 villages.

Well, then, in the next place, is there usage? Is the family usage proved? Now, the witnesses to whom I have already referred, one and all, speak of its being not only a Raj, but without divisibility. They state further, that according to their knowledge, it has always been treated as indivisible, and that there is no instance to be found anywhere in which there are two Rajas to be found upon the records of the Supreme Government as coparceners of this Zemindary. Now, is that consistent with the evidence on the other side? Why, evidence on the other side there is none. The case has been examined with the greatest ability and ingenuity, and in different parts of the case circumstances have been pointed out as to [191] which it is said, "Why, it is difficult to reconcile that with the statement." Why, we are dealing with usage continued for two hundred years, and when you have no other knowledge than that which can be collected, after a great lapse of time, with the ignorance of these circumstances which might explain difficulties, it is impossible but that there should be difficulties; but I must say, that this is a case in which there are as few difficulties, at least in my judgment, as I have ever seen.

Now, let us see what the evidence is. The pedigree put in by the Respondent describes the original founder of the family and many of his successors, not as "Rajas" or "Maharajas," but as "Thakoors;" why, really, that is a circumstance which is utterly unimportant. The question is not what was the title or designation of the owner, but what was the nature of the property which the person held? The term "Raja," as it is well said, has been and may be usurped by almost anybody who is in a situation which would in any degree give countenance to it, as we find commonly enough in this country with respect to other titles. But we all know that in feudal times the greatest barons and princes in the feudal empire, in France especially at all events, held their estates without titles; one of them, I think De Courcy, boasting that he was neither King, nor Count, but Seigneur De Courcy. It may be just the same with this family. They may be called "Thakoors," they may be called "Rajas," but that makes no difference. Nay, these very Baboos themselves, the younger sons of the family, are in this very case termed Maharaja Baboo so and so.

But then, it is said, (and it is the circumstance [192] which alone appears to their Lordships to have any weight in this case,) but we give you evidence that with respect to one of those parties, Ram Singh, there was a joint possessor of this Zemindary, and we prove it in this way:—Nurindur Singh was in possession as Raja, and during the time that he was in possession as Raja, from about 1745 down to 1752, we find several grants made by Ram Singh of property within the limits

of this great Zemindary, most of them made for religious uses; but whether or not so made, it appears that one or two of those grants were subsequently confirmed by the Supreme Court. In the first place, it is quite consistent with possibility, and I should say with probability, that this Baboo would have, as the sons of the family always appear to have had, a Baboo's allowance, and that those grants were made out of that property which he held as Baboo, or out of other property which belonged to him in his individual character, and which was the subject of his own acquisition. But there is further evidence, that some of these grants were confirmed by Maharaja Nurindur; and with respect to others which were not confirmed, it is perfectly notorious to everybody acquainted with Bengal usage, that there is a very great reluctance on the part of the great proprietors to interfere with property so appropriated, whether with or without law; it is considered a sort of sacrilege so to do.

I am not aware that there are any other circumstances established in the evidence in this case which is in the smallest degree inconsistent with that usage which is proved by the witnesses to have prevailed for this great length of time, or anything which can throw doubt upon the truth of that statement.

[193] But there is this, which really removes, as it appears to their Lordships, all doubt upon the case. This property was acquired about two hundred years ago; according to the case which the Appellant is compelled to insist upon, not only was it not subject to division, but it was left to descend without disposition; it was not capable of being made the subject of disposition so as to exclude divisibility. Now, is it possible that in a period of two hundred years there should have been no division of this estate, or at least no such division as finally to divide and separate one portion of it from another? It is absolutely impossible; and can anything more strongly illustrate that impossibility than this, that if the question he raises, whether the general Hindoo law prevails or not, be decided in his favour, this Zemindary would naturally be split into portions; the Appellant would take one portion, Basdeo Singh would take another half of the remaining half, and the Raja would be left with only one-fourth?

Their Lordships, therefore, are quite unable to entertain any doubt, either as to the fact of its being a Raj, or as to the fact of the usage prevailing that the reigning Raja has the power of abdicating, and by deed assigning the Raj in favour of his eldest son or next immediate male heir; and we think that such usage is proved beyond all controversy to have prevailed in this country, and to have been acted upon in this instance.

If that be so, it is not very important to enter into the consideration of the sunuds, which were commented upon by the Appellant's counsel, the different grants which are represented to have been [194] made, beginning with that by Maheeneth Singh in the year 1690, and continuing down to the present time. Their Lordships are unable to find any reason to doubt the validity of these instruments, except with respect to one. With respect to that one, it is said, that that deed purports to bear date on the 12th of June, and that the Raja is proved to have died on the 9th of that month, and that, therefore, it could not be a genuine instrument. Well, the force of that argument depends, of course, entirely upon the accuracy with which these dates are given. Yet assuming that that instrument could not be genuine, upon which their Lordships in their present state of knowledge upon the subject are not able to pronounce any decided opinion, and striking that instrument out of the case, all the others would remain unimpeached, and that which is the most important of all would so remain.

Then, if there were no deed, the Raj would descend indivisible; but when we look at what has been done within the last one hundred years, there really seems to be scarcely room for the suggestion of a doubt that each of those different Rajas has actually adopted the custom contended for, whether reasonable or unreasonable; and, with respect to the deed in question, it would be unnecessary if that custom prevailed: and it may be observed, that though undoubtedly before the Regulation of 1793 such a deed was useful only if the Zemindar abdicated in his lifetime; yet, if he chose to retain the Raj, the deed was unnecessary as regards the Regulation of 1793; though it might possibly be important for other purposes.

[195] If, therefore, the case stood only upon this, that the Appellant has totally failed in making out the divisibility of this inheritance, and the invalidity of the

deed of 1807, their Lordships would be clearly of opinion that he had failed altogether in the case; but as the property is of very great value, and as we have taken the somewhat unusual course of stopping the Respondent's counsel, it may be proper for us to advert to another point—namely, whether this deed of 1807 was assented to by Gobind Singh, so as to bind his son, the present Appellant? Now, that depends entirely upon this. That Gobind Singh held possession of this Pergunnah admits of no doubt; that he took possession and held it, or that it was held for him, during his minority, and that he held it for himself during his lifetime, and that after his death it was held for his son during his minority, and is held by him up to this very hour, as it appears by the Appellant's statement, are facts which admit of no doubt. The Appellant says, that is very true, but I do not claim that Pergunnah under the deed of 1807; if I do, no doubt I am out of Court: for the deed of 1807 allots it to me expressly as a Baboo allowance; but I claim it not as a Baboo allowance, but as a distinct and absolute grant made to me upon my investiture with the Brahminical thread; similar grants on other occasions having been made by Madhoo Singh in favour of his other sons, and I produce this deed, late it is true, in the course of these proceedings, many years after the contest had arisen—a deed, the like of which it never occurred to Kirut Singh to suggest or produce. It is in his replication, for the first time, he mentions a deed dated in the year [196] 1806, which purports to make this grant to Gobind Singh on the occasion, as the Appellant alleges, of his investiture with the Brahminical thread.

Let us see what the evidence is upon this point. He produces several witnesses to state that they saw this deed; some of them cannot read; some of them do not know the language; but they say that they saw the deed on the occasion of the investiture; that Madhoo Singh came out and declared that he had made that gift to his son, Gobind Singh. In the first place, these very witnesses swear, at least several of them do, that a similar grant was made in favour of Kirut Singh; and after the attention of the Appellant had been called to the fact that the grant to Kirut Singh was of a totally different character, in his replication he persists in that statement, and it is upon that issue that the parties go to evidence.

Now, what is the evidence? The Appellant's counsel most candidly, as well as most judiciously, withdrew that from the consideration of their Lordships by stating, "We must admit that it was a mistake." A mistake! Why, it is a mistake which must have been within the knowledge of the parties at the time they made this allegation, for in the answer they were referred to the documents; and what are the documents? Why, among the documents is a grant of the Pergunnah of Dhurum-poor, a portion of this estate, but such a portion that it pays 18 lacs of rupees a-year for revenue to Government. This grant was made to Kishun Singh upon his birth. Whether any deed was executed upon the occasion does not appear. I rather think there was not: but upon [197] Kishun Singh coming of age in the year 1802, Madhoo Singh presented him to the Collector, stating the fact of his having made the grant eighteen years before, and stating the fact that his son had now come of age, and praying that the estate might be transferred out of his own name into the name of Kishun Singh, and that is done by the Collector. And what is the effect of that? Why, the effect is:—to separate the property from the Zemindary; to make Kishun Singh at once hold from the Government, to make Kishun Singh liable to pay the revenue assessed upon it, and not to the Raja, but to the Government.

Then, what is the case with respect to the other grants? They are quite different. Where an estate is granted to a younger son as a Baboo allowance, he continues to pay the rent and assessment to the Raja; the property is never separated from the Zemindary at all. The cases, therefore, of absolute grants, and of grants by way of Baboo allowance, are essentially different in their nature.

Let us see, then, in what way the Pergunnahs thus given are entered in the Collector's books. If they were entirely transferred under a deed of grant, they would be transferred as such into the names of those persons to whom they were given. If they were made as Baboo allowances, they will be described as Baboo allowances, and the owners of those Baboo allowances will have to pay the revenue, not to the Government, but to the Raja in whose Principality the property is situate. Upon that there is no question at all. We find with respect to each of those Pergunnahs, the mode in which they were entered in the [198] Collector's books, and

that they are especially entered as Baboo allowances, and entered immediately in these terms:—"Jumma Wassilbakee, or revenue account for the whole year, of the Pergunnah Jedee, in the Sircar of Tirhoot, the property of Maharajah Koonwur Baboo Kirut Singh, for his support as a Baboo." "Jumma Wassilbakee, or revenue account for the whole year, of the Pergunnah of Burhabpoor Ragho, in the Sircar of Tirhoot, the property of Maharajah Koonwur Baboo Gobind Singh, for his support as a Baboo." Is it possible to raise a doubt upon this? You have these entries made upon the petition of the Raja stating that he has made the grants for the Baboo allowances; you have those grants recognised by Kirut Singh and Gobind Singh, who held them, and they settle accounts distinctly upon the footing that they are Baboo allowances; they settle accounts upon a totally different principle from that upon which they would have been settled if they had been distinct grants like that to Kishun Singh.

It is useless to make further observations upon a case which, as to this part of it, at least, is so perfectly plain. But with respect to the deed of 1806 thus sworn to by witnesses who clearly are unworthy of credit, it may be remembered that every one of those respectable landowners whose evidence is given on behalf of the first Respondent distinctly state that there is no usage to grant land upon the occasion of these investitures, though there is a usage to make presents of jewels and of money, and, I think, three, or perhaps more, of those witnesses were present at this very investiture of Gobind Singh himself, and not one of them was asked by the Appellant—"Was [199] there such a deed made?" "Did not you see that deed?" Or, "Did not you hear of this deed which is sworn to by the Appellant's witnesses?"

Upon the whole of this case, therefore, their Lordships, neither upon the one point nor upon the other, are able to entertain any doubt.

They were much struck by an observation made by the Appellant's counsel upon the judgment which had been pronounced in this case: and they certainly had been led from their statement, which was a perfectly fair one, but from a misapprehension they had entertained of the nature of the two suits, to suppose that the case had been decided against Gobind Singh upon the ground of acquiescence, because it had been previously decided against Kirut Singh upon that ground. Now, it is quite obvious, that Kirut Singh might acquiesce and that Gobind Singh might not, but the case of acquiescence as against Gobind Singh is precisely the same as, only much stronger than, that against Kirut Singh; for with respect to Gobind Singh, he never during his life at any time, either by himself or by others on his behalf during his minority, made the slightest representation of his possession of this Pergunnah being otherwise than under the deed of 1807, and according to the entries made upon the Collector's books.

Their Lordships have looked through the report which was cited by the Appellant of the case of *Muha Raj Koonur Basdeo Singh v. Muha Rajah Roodur Singh Buhadur* [5 Ben. Sud. Dew. Rep. 198], and it is quite clear from that report that there was other evidence, probably a good deal of important evidence, which we have not before us upon the present occasion, but which it is wholly unnecessary we should have; and we advert to that now only for this purpose, that in dismissing the two suits at the same time, the Court below do not say, we exclude the consideration of the family custom in the Appellant's suit, and we exclude the consideration of the validity of the deed of 1807, independent of acquiescence; but having these same points raised in both suits, both being for this purpose consolidated, we will pronounce our opinion upon that point in the other suit, and upon the acquiescence in this.

Upon all these points, therefore, though the case is one of much complication, and has been argued with great ability, which might have thrown some doubt, if it had been possible that any doubt could be entertained with respect to it, their Lordships must come to the conclusion of humbly advising Her Majesty that this appeal should be dismissed, and with costs.

[See *Baboo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, 1867, 12 Moo. Ind. App. 36.]

[201] GUDADHUR PURSHAD TEWARREE,—*Appellant*; MOOSUMAT SOONDERKOOMAREE,—*Respondent* * [June 29, 1854].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Appeal restored after being dismissed for want of effectual prosecution within the time limited by the fifth rule of the Order in Council of the 13th of June, 1853; the new rules having been only recently adopted by the Sudder Court at Calcutta, and the Appellant in ignorance of their existence, being engaged in taking steps to prosecute the appeal within the time and according to the practice previously existing.

This was a motion upon petition, to restore an appeal which had been dismissed for want of prosecution, pursuant to the fifth rule of Her Majesty's Order in Council of the 13th of June, 1853 (see Rules, 5 Moore's Ind. App. Cases, ix.), six months having elapsed from the arrival of the transcript and registration in the Council Office, and no effectual step taken for the prosecution of the appeal.

The petition stated that the transcript arrived, and the appeal was registered at the Council Office on the 28th of July, 1853; and that on the 1st of February, 1854, notice was given by the Registrar [202] of the Privy Council to the Registrar of the Sudder Dewanny Adawlut at Calcutta, in the terms of the rule, that as six calendar months had elapsed from its registration, and no effectual steps taken for the prosecution of the appeal, the same was, pursuant to Rule V. of Her Majesty's Order in Council of the 13th of June, 1853, dismissed without further notice. The petition further stated, that the Petitioner was wholly ignorant of the new rules of practice, having previously had the usual notice to proceed with his appeal within two years, and was in no way prepared for this alteration, no Order having been issued respecting such alteration by the Sudder Court, until the 16th of February, 1854, when the new rules were first adopted by the Sudder Court. That in the latter part of 1853, the Petitioner had taken measures for the due prosecution of the appeal, and that his Mookhtar was in correspondence with his agent in England on the subject; and that he was prepared to proceed with the appeal in due course, and prayed that, under the circumstances, his appeal might be revived.

Mr. R. Palmer, Q.C., in support of the petition, urged, that it was a proper case for the indulgence of the Court, by restoring the appeal, as there was no laches in prosecuting the same, the dismissal being under the new rules and regulations, of which the Petitioner was necessarily ignorant, conceiving that the usual period of two years allowed by the Order in Council of the 4th of September, 1833, under the Statute, 3rd and 4th Will. IV., c. 41, sec. 22 (2 Knapp's P.C. Cases, xxvii.), was [203] still in force, the Sudder Court at Calcutta not having notified the existence of the new rules till after the dismissal.

Mr. Leith opposed, submitting, that if the appeal was restored, it ought to be upon terms of paying costs, and giving fresh security, according to the usual practice.

The Lord Justice Knight Bruce.—If we advise any positive departure from the new rules and regulations, it is only under peculiar circumstances. We think, in this case, that enough has been shown to justify us in recommending the restoration of the appeal, upon the terms of the sum of Rs. 4000, now deposited in India in Government paper, for costs to abide the appeal standing, without substituting any fresh security, the Appellant undertaking to appear forthwith and use due diligence to bring on his appeal. All costs of and consequent on this application and the dismissal, to be reserved.

[Mews' Dig. tit. COLONY: III. APPEALS TO PRIVY COUNCIL: 6. *Practice*: d. *Restoring*. S.C. 9 Moo. P.C. 86. Followed in *Seto Luchmeechund v. Seto Zorawur Mull*, 1854-55, 9 Moo. P.C. 351: 6 Moo. Ind. App. 204.]

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson, Knt.

[204] SETO LUCHMEECHUND.—*Appellant*: SETO ZORAWUR MULL.—*Respondent* * [Nov. 30, 1854].

On appeal from the Sudder Dewanny Adawlut at Agra.

Appeal from the Sudder Court in India, which stood dismissed under Rule V. of the Order in Council of the 13th of June, 1853, for want of effectual prosecution, restored, as the Appellant was in ignorance of the existence of the new Rules, the Sudder Court having served the Appellant (after the interposition of the appeal) with notice that two years was allowed after the arrival of the transcript in England for prosecuting the appeal.

Where Government securities for the due prosecution of the appeal and costs were deposited in the Registry of the Sudder Court, the Judicial Committee in restoring the appeal dispensed with the usual recognizance in England.

In this case, the transcript of the proceedings arrived in England and was registered in the Council Office on the 12th of October, 1853, but no effectual steps having been taken for the prosecution of the appeal within six months, pursuant to Rule V. of the Order in Council of the 13th of June, 1853 (see Rules, 5 Moore's Ind. App. Cases, ix.), the appeal stood dismissed under that rule.

It appeared that no notice of the existence of the new Rules had been given to the Appellant, who was resident in India, in time to cause effectual steps to be taken to prosecute the appeal, and that upon the appeal being preferred in the Court below, the Appellant had had notice served upon him in India by the Sudder Dewanny Court, that he was to prosecute the [205] appeal within two years from the registering of the receipt of the copies of the transcript in the Privy Council Office. The Appellant now presented a petition setting forth the above facts, stating the largeness of the sum involved in the appeal, and praying for leave to restore the same. An affidavit was also filed by the agent in England, stating his ignorance of the operation of the new rules, and confirming the circumstances above mentioned.

Mr. Leith, for the Petitioner, cited *Gudadhur Purshad Tewarree v. Moosumat Soonderkoomaree* (*ante* [6 Moo. Ind. App.], p. 201).

The Right Hon. Dr. Lushington.—The question is, whether there was sufficient means adopted by the Sudder Court to promulgate the new Rules and Regulations in India. It does not appear that the Petitioner was served with any notice, or had means of knowing of the existence of the new rules, and the Appellant very naturally relied upon the notice served upon him by the Sudder Court, by which two years were allowed for prosecuting the appeal after the arrival of the transcript in England. The mere fact of the arrival of the transcript here, in such circumstances, and that no steps have been taken to bring the appeal on for hearing, is not, in our opinion, sufficient to entirely shut out the appeal. The appeal will be restored upon terms of giving security here for £1000.

By the report of the Committee, the appeal was ordered to be restored, and the Appellant allowed to [206] prosecute the same upon lodging in the Council Office, within six months from the date of Her Majesty's Order in Council approving the report, a certificate of recognizance to Her Majesty in the penalty of £1000. This report was confirmed by an Order in Council, dated the 11th of December, 1854.

(March, 26, 1855 †) Mr. Leith, for the Petitioner, afterwards moved upon petition for liberty to waive so much of this Order as required the recognizance to be entered into in England for costs, on the ground that there was already a sum of Rs. 10,000, in Government securities, deposited in the Registry of the Sudder De-

* Present: Members of the Judicial Committee.—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

† Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

wanny Court for that purpose.—[The Lord Justice Turner: This Court has been accustomed to require security to be entered into here. Is not the appeal originally allowed in India defunct?—The security now lodged in the Court in India is amply sufficient for the costs, and it would only inconvenience the parties to get fresh security here.

The Right Hon. T. Pemberton Leigh. In the circumstances this application will be granted, but it must be upon condition that the money deposited in India remain in deposit to abide the appeal here.

By the Order in Council made upon this petition, it was ordered that so much of the Order of the 11th of December, 1854, as required that recognizance be entered into in the penal sum of £1000 sterling, be [207] dispensed with, and that the Government securities for Rs. 10,000 be held in deposit by the Sudder Dewanny Adawlut, to stand and abide the determination of the appeal, and such costs as might be awarded by the Lords of the Committee.

[Cf. *Gungadhur Seal v. Sreemutty Raddamoney Dasser*, 1855, 6 Moo. Ind. App. 209.]

SIBNARAIN GHOSE,—*Appellant*; HULLODHUR DOSS,—*Respondent* *
[Nov. 30, 1854].

On appeal from the Supreme Court at Calcutta.

If leave to appeal be obtained *ex parte*, the Respondent may, as a matter of course, present a counter-petition to dismiss.

Where an appeal had been granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs.

In this case special leave to appeal was granted by the Committee (see case reported on this point *nom.*, "*In re* Sibnarian Ghose," 5 Moore's Ind. App. Cases, 322) on an application made *ex parte* by the Appellant, upon, among other grounds, an allegation that certain exceptions taken in the Court below to the return made by Partition Commissioners had been overruled, as of course, in consequence of the absence of the Appellant's Counsel. This allegation turned out to be wholly unfounded, as it appeared that Counsel on both sides had been present on the occasion in question, and that the Appellant's [208] Counsel had stated that he was unable to support the exceptions.

Mr. Rolt, Q.C., now moved for leave to present a petition to dismiss the appeal.

The Right Hon. Dr. Lushington.—This application is unnecessary, as you are entitled, as of course, to move to dismiss, upon presenting a counter-petition for that purpose (see *In re* Ames, 3 Moore's P.C. Cases, 413).

Upon the appeal coming on for hearing (Nov. 30, 1855 †), Mr. R. Palmer, Q.C., Mr. Leith, and Mr. Maude, appeared for the Appellant; and Mr. Rolt, Q.C., and Mr. A. Gordon, for the Respondent.

When the Respondent objected to the hearing, as leave had been granted upon an erroneous allegation that the Appellant's Counsel had been absent at the hearing of the exceptions in the Court below, whereas the certificate of the Judges in India distinctly showed that Counsel was present, and that he declined to argue the exceptions.

The Lord Justice Turner.—We consider it a matter of the utmost importance that parties who come here for an indulgence upon an *ex parte* application, should

* Present: Members of the Judicial Committee.—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

† Present: Members of the Judicial Committee.—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

take care and speak the [209] truth. In this case, the Appellant in his petition for leave to appeal, has erroneously alleged as a ground for the indulgence of the Court, a fact to which the Judges in the Court below certify the contrary. Their Lordships are fully satisfied that this is so, and, that this case may operate as a warning in future, they dismiss the appeal with costs (see *Wilson v. Callender*, 9 Moore's P.C. Cases, 100, where the Judicial Committee, under similar circumstances, stopped the hearing of an appeal, and dismissed it with costs).

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an appeal lies generally*, 3. *Leave to appeal*. S.C. 9 Moo. P.C. 354.]

GUNGADHUR SEAL.—Appellant; SREEMUTTY RADDAMONEY DOSSEE.—Respondent * [Feb. 19, 1855].

On appeal from the Supreme Court at Calcutta.

The Judicial Committee have no jurisdiction to entertain an application for extension of time to appeal until the petition of appeal is lodged.

Where it appeared that an inquiry was pending before the Master in the Court below, arising out of the decree, which was the subject of the appeal, the result of which might render the prosecution of the appeal unnecessary, the Judicial Committee enlarged the time prescribed by Rule V. of the Order in Council of the 13th June, 1853, for prosecution thereof, until further Order.

This was an application by the Appellant for an extension of the time prescribed by the 5th Rule of the Order in Council of the 13th of June, 1853, by which the appeal stands dismissed unless steps for [210] prosecuting the same be taken within six months from the arrival of the transcript and the registration thereof. The affidavit filed in support of the application stated, that an inquiry was then pending before the Master of the Supreme Court at Calcutta, arising out of the decree appealed from, and that it was anticipated that the finding of the Master would render the prosecution of the appeal unnecessary, and that the Appellant was desirous of waiting the event of the proceedings in the Master's Office in India, before prosecuting his appeal, as he might be saved the expense attendant upon the prosecution thereof.

The transcript had arrived and was registered in the Council Office on the 12th of October, 1854, but no petition of appeal had been lodged.

Mr. Leith, for the Petitioner, was stopped.

The Right Hon. T. Pemberton Leigh.—We cannot entertain this application, as we have no jurisdiction until the petition of appeal is lodged. When it is lodged you may renew the application.

A petition of appeal was afterwards lodged, and

(March 24, 1855.†) Mr. Leith now renewed the motion.

The six months expire to-morrow, and unless the indulgence is granted the appeal will stand dismissed.

[211] The Lord Justice Turner.—Enough has been shown to induce us to retain the appeal, notwithstanding the new rules, and to direct that the Petitioner be at liberty to suspend proceedings thereon until further order.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice; a. Time and Extension Thereof*. S.C. 9 Moo. P.C. 411. Cf. *Seto Luchmeechund v. Seto Zorawur Mull*, 1854, 6 Moo. Ind. App. 204.]

* Present: Members of the Judicial Committee.—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

† Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

AMEER-OON-NISSA and Others,—*Appellants*; MOORAD-OON-NISSA and Others,
—*Respondents* * [July 18, 19, 20, 1855].

On appeal from the Sudder Dewanny Adawlat at Agra.

A Mahomedan of the Shiah sect, by a deed of dower charged his whole estate with a certain sum when demanded by his wedded wife, but did not im-pignorate his estate to secure the sum put in settlement. The dower was not demanded during the lifetime of the husband, and his widow at his death took possession of his estate in satisfaction of her claim. Held, by the Sudder Dewanny Court, and such decision upon appeal affirmed by the Judicial Committee, that the widow had a lien upon her deceased husband's estate as being hypothecated for her dower, and could either retain property to the amount of her dower, or alienate part of the estate in satisfaction of her claim.

Held also, upon appeal, that a demand during the lifetime of the husband was not necessary, and that, although more than twelve years had elapsed from the date of the deed and the time the widow set up her claim for dower, she was not affected by the provisions of Ben. Reg. iii. of 1793, sec. xiv., and that the limitation there provided for, formed no bar to her claim.

In a suit by the only brother and heir-at-law of a Mahomedan of the Shiah sect, claiming the whole of the deceased's estate, and for mesne profits, the issues raised by the pleadings were: first, whether a marriage had taken place between the deceased and the party in possession, who claimed to be his widow: and secondly, the validity of a deed of dower executed by the deceased in her favour. The Courts in India found these issues in favour of the widow, and dismissed the suit. The Judicial Committee in affirming the Courts' decrees upon these points, held, further, that although the estate of the husband was hypothecated for the dower, yet, as the heir-at-law would be entitled to the residue after satisfying the widow's claim, he was by right entitled to an account, but, as the plaint was so framed as not to admit of an account being taken, the appeal was affirmed, without prejudice to a suit being brought for administration of the deceased's estate, upon the footing of the marriage and deed of dower by the deceased being admitted in the suit.

This was a suit instituted by Seyud Abdoollah, the ancestor of the Appellants, in which suit he claimed as the full brother and heir-at-law of Seyud Moostefah, [212] and sought to recover very considerable real as well as personal estate belonging to his deceased brother, Seyud Moostefah, with mesne profits. The Respondent, Moorad-oon-Nissa, was in possession, and she claimed a lien upon the same as the widow of the deceased, under a deed of dower executed by Seyud Moostefah in her favour to the amount of Rs. 64,000. The other Respondents, Gholam Abbas and Sooltan Ali, claimed under the twofold character of adopted sons and as the grandchildren and heirs of the deceased Seyud Moostefah.

The circumstances of the case were as follows:—

Seyud Moostefah, late of Roostoomnugur, in the Zillah of Moradabad, in the North-Western Provinces, a Zemindar and a Mahomedan of the Shiah or Imma-meeah sect, was seised and possessed of the Zemindary of Mouza Roostoomnugur, Gundhoppoora, and other lands, situate in Pergunnahs Seondara and Kundurkhee, and of houses, besides moveable estate and effects of about the value of Rs. 70,000.

On the 4th of October, 1838, Seyud Moostefah died intestate, without children, but leaving Seyud Abdoollah, since deceased, his younger brother, and as such, by the Mahomedan law applicable to the Shiah sect, his sole heir. At the time of his death, Seyud Abdool-[213]-lah lived at Azeemabad, a distance of 800 miles from Roostoomnugur. In the house of Seyud Moostefah, and residing with him at the time of his decease, were the Respondent, Moorad-oon-Nissa, who had formerly been

* Present: Members of the Judicial Committee,—The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

a dancing girl, and kept in the house of the deceased at a monthly salary, and who claimed to be the widow of the deceased; and two other of the Respondents, Gholam Abbas and Sooltan Ali, who had been brought up by the deceased's first wife, Razeeah Begum, and who were, as they contended, his grandchildren, and had, moreover, been adopted by him in his lifetime. These persons possessed themselves of the whole of the estate, property, and effects of Seyud Moostefah, at Moradabad, and their title was recognised in the absence of, and without notice being given to, Seyud Abdoollah, by the Government authorities; Seyud Abdoollah being engaged in the District of Azeemabad, where he resided, and where some of the deceased's estates were situated, in establishing his title as sole heir-at-law to the deceased.

It appeared that soon after the death of Seyud Moostefah, a quarrel took place between the Respondents, Moorad-oon-Nissa, Gholam Abbas, and Sooltan Ali. In consequence, the two latter Respondents presented a petition to the revenue department of Government, praying that their names might be recorded in the Collector's Office (Moorad-oon-Nissa's name never having been so recorded) in place of the name of Seyud Moostefah, deceased, as owners of the lands aforesaid which had belonged to him, and whom they therein alleged to be their grandfather. Moorad-oon-Nissa presented a counter-petition, disputing their claim as heirs. By a proceeding of the Court of Commissioners, the parties were referred [214] to a Civil Court to establish their respective titles. Other proceedings took place before the Magistrates, in the District, when Gholam Abbas denied that Moorad-oon-Nissa was the wedded wife of the deceased, and alleged that she only cohabited with him. Ultimately a deed of compromise, dated the 7th of April, 1842, was entered into by Gholam Abbas and Sooltan Ali of the one part, and Moorad-oon-Nissa on the other, by which they agreed to divide the deceased's estate and property in equal moieties, Gholam Abbas and Sooltan Ali agreeing to take one-half and Moorad-oon-Nissa the other half.

The Respondents, Moorad-oon-Nissa, Gholam Abbas, and Sooltan Ali, while in possession, sold and mortgaged considerable portions of the real estate, and applied the produce to their own use.

On the 21st of August, 1843, Seyud Abdoollah filed his plaint in the Zillah Court of the Principal Sudder Ameen of Moradabad against Moorad-oon-Nissa, Gholam Abbas, and Sooltan Ali, and Kumpa Domnee and Gholam Basit as accessories, and Chowbay Bindrabun, Kunheya Lal, Ghaseeram, Bhojraj, Kheoraj, Nundram and Benee Sing, mortgagees and purchasers of different portions of the immoveable estate of Seyud Moostefah, deceased, and Nagur Mull, a party in possession of a house. By this plaint, Seyud Abdoollah, claiming as the full brother and heir-at-law of Seyud Moostefah, sought to obtain possession of the Zemindaries, estates, tenements, gardens, and lands, of the late Seyud Moostefah, in the District of Moradabad, with the mesne profits and interest, amounting to Rs. 72,290. 5. 7.; but did not include the estates in Azeemabad, which he had recovered, and he charged that the Respondents, Moorad-[215]-oon-Nissa, Gholam Abbas, and Sooltan Ali, had taken possession of the whole of the moveable estate and effects of the deceased, amounting in value to a very large sum of money, and also the whole of his immoveable estate and property, and that the Respondent, Moorad-oon-Nissa, was not the wife of Seyud Moostefah, deceased, and he charged collusion between her and Gholam Abbas and the Canoongos, in getting their names entered as proprietors, and submitted, that even if she had been the wife of Seyud Moostefah, still the name of Plaintiff ought to have been mentioned as an heir, because he was the full brother of the deceased, and under the Mahomedan law, though there be a widow, the brother is heir likewise; he also charged that Gholam Abbas and Sooltan Ali were not the grandsons of the deceased.

Moorad-oon-Nissa by her answer, for the first time alleged that she held a deed of dower, dated the 26th of July, 1818, executed in her favour by the deceased, Seyud Moostefah, on a stamp paper of Rs. 50, stipulating a dower of Rs. 46,000; and the answer averred that this deed of dower had been brought in operation; that it was a rule which the Shiah sect observed, that if an endowed widow be seised of the estate of her husband a residuary claim (usbeent) could not be entertained; that it was also a maxim that, as the dower gave the wife a lien on the property, if she be seised of that property, a residuary claim could not be entertained by a

Court of justice. The answer also submitted that the disputed property constituted the estate of the deceased, and that the Plaintiff as the heir would have been entitled to take the same had she not a claim for her dower, which, under the Mahomedan [216] law, took the precedence of, and was a bar to, her right of inheritance as wife of Seyud Moostefah: which dower she contended gave her a lien on the disputed property for the amount: and the answer admitted that mortgages and sales of portions of the real estate of the late Seyud Moostefah had been made by her to the Respondents, Chowbay Bindrabun and Kunbeya Lal, but alleged that they were made either to discharge debts contracted by Seyud Moostefah in his lifetime, or to discharge obligations created since his death.

The joint answer of the Respondents, Gholam Abbas and Sooltan Ali, set up that they were brought up by the former wife of Seyud Moostefah, who, they alleged, had made a deed of gift in their favour: and they further alleged that when Seyud Moostefah died, he left Moorad-oon-Nissa, and Gholam Abbas as the grandson in possession of his property: that from the death of Seyud Moostefah, Moorad-oon-Nissa was the proprietor and occupant of the estates of her husband by virtue of her dower, while Gholam Abbas continued to manage them.

The other Defendants put in their answers, which raised no point material to the principal questions at issue. The Plaintiff in his replication again denied the fact of the marriage and the validity of the deed of dower.

The pleadings having been closed, the Court thought that the only questions to be proved, were the marriage of the principal Defendant, Moorad-oon-Nissa, and the deed of dower alleged by her for the first time in her answer, and ordered the deed to be produced and witnesses to be examined.

Moorad-oon-Nissa put in evidence the deed of dower [217] which was registered and sealed by the Caze, the material part of which was as follows:—"I acknowledge myself justly a debtor for the dower of my said wedded wife, to the amount of Rs. 46,000 of the present currency, the moiety whereof is Rs. 23,000, and the amount I acknowledge to be justly due, and when demanded by my said wedded wife, in the payment thereof, I will raise no objection, no excuse make, but will deliver the same to my said wedded wife." This deed had the Caze's seal affixed, and, as it was obliterated and defaced by wet and age, the Defendant, Moorad-oon-Nissa, filed an office copy of the same from the registry of the Caze. She also put in evidence a copy of the register of stamp sales on the 24th of July, 1818, and in which there was an entry that Seyud Moostefah had bought a stamp of Rs. 50 value.

Witnesses were examined by the Plaintiff in support of his case, and also by the Defendant, Moorad-oon-Nissa, in order to prove her marriage and the execution of the deed and the amount of her dower. The effect of their evidence is set out in the judgment of the Principal Sudder Ameen, which was pronounced on the 11th of February, 1845, and, in substance, was in these terms:—"The evidence put in by the Defendant, to prove her marriage and the amount of her dower, having been taken into consideration, it appears the deed of dower, dated 26th of July, 1818 (corresponding with the 21st Ruzman, 1233 Hijree), which bears the seal and signature of Seyud Moostefah and of the Caze, also copy of the sale register of stamps sold on the 24th of July, 1818, which the Defendant filed, proves the declaration of the Defendant as to its being engrossed on a stamp of Rs. 50. Nagur Mull and [218] Iman Bukhsh, the witnesses who subscribed to the deed, have verified it. From the testimony of these witnesses it also appears that at the marriage, Hosein Beg, was the Vakeel of Moorad-oon-Nissa, and Munnoo Khan and Imam Bukhsh were the witnesses to the Vakalat. In their depositions, Munnoo Khan and Imam Bukhsh have distinctly proved the marriage. In addition to this, Caze Sumeehoodden and Gholam Hosein Khan, the Khansaman, witnesses to the marriage, have in their deposition declared that they were present at the time. Shaikh Ameeroollah and other witnesses have deposed, that Seyud Moostefah declared to them that Moorad-oon-Nissa was his wife. Referring to the proceeding of the Collector, dated the 9th of November, 1828, and to the Fowtenamah of Moostefah, it appears that Moorad-oon-Nissa is the wife and the heir of the deceased, and that a settlement for the payment of the revenue was made with her under the title aforesaid. By the Order of the Court, dated 8th June, 1839, issued in execution of a decree in favour of Moostefah, Plaintiff, it is proved that the decree was put in execution at the motion

of Moorad-oon-Nissa, after her right to inherit had been proved. Thus it is fully established that Moorad-oon-Nissa was married to the deceased, that her dower was fixed at Rs. 16,000, and that she is in possession under that title. The Plaintiff has caused the evidence of certain witnesses to be taken to show that Moorad-oon-Nissa was not married, but these witnesses profess to prove a negative. As the marriage of Moorad-oon-Nissa with Seyud Moostefah, the owner of the property, is proved on the grounds given above, and as her possession by virtue of her dower is established, no other person can under the Mahomedan law succeed to the property, and thus the acts [219] of Moorad-oon-Nissa, whereby certain property has been alienated to other parties in satisfaction of debts due to other parties by the deceased, are lawful. On these grounds it is ordered that the claim of the Plaintiff be dismissed, that all the costs of suit be paid by Plaintiff."

The Plaintiff appealed from this decree to the Sudder Dewanny Adawlut at Agra.

On the 9th of April, 1846, Mr. Benjamin Tayler, the Sudder Judge before whom the appeal came, thought it necessary to call for a futwa from the Cazee-ool-Coozat on the following points:—"If in a deed of dower it be not mentioned that any property is pigniorated for the dower, if from the record of the case the marriage and the settlement by dower be proven, can the wedded wife, according to Mahomedan law, applicable to the Imnameeah sect, take possession of her husband's effects by virtue of her claim for dower, supposing the effects to be less in value than the amount of the dower, and can she alienate any part of them?"

The futwa of the Mooftee was, that "In the Moofateeah-ool-Sherayeh and its commentary, books which treat of the Mahomedan law applicable to the Imnameeah sect, and are works of great authority, it is distinctly declared, that if any person have a claim against another, and the debtor deny the debt, the creditor is competent to take the debtor's property which is of the same description as the debt consists of. For example, if the debtor's property consists of cash, and the debt be also for cash, the creditor is justified in taking just so much of the property as is equal to the debt. If the matter of the debt and the debtor's property be of different kinds, for example, [220] if the debtor's property be immoveable, and the debt be for cash, the creditor is justified in taking so much of the property, the value of which covers the debt, or he may sell it and apply the proceeds to the liquidation of the debt, but in no case is it lawful to take more than the debt. It is not necessary to have recourse to the Public authorities in order to enable the creditor to take the debtor's property in payment of the debt, but it is better to apply to the authorities. Thus, under the authority of the above doctrines, the wedded wife referred to in the Court's question, is competent to take effects of her husband in kind, to the amount of her dower, in satisfaction thereof, or she may take the value of such effects to the amount of her dower, without resorting to the Courts. In no case, however, is she justified in taking more than the amount of her claim. Whatever remains over is divided among the heirs according to Mahomedan law, first satisfying claims which take the preference of inheritance."

The final judgment on the appeal was pronounced by Mr. Benjamin Tayler, on the 21st of April, 1846. The material part was in these terms:—"The state of the case is, that the determination of the suit depends entirely on the proof of the marriage of the Defendant with Seyud Moostefah, and on the question of her dower. Adverting to the evidence to these two facts, I am of opinion, that there are no grounds for disturbing the decision of the Principal Sudder Ameen. The Appellant pleaded that, although the Respondent set up her marriage, and the amount of her dower, amounting to Rs. 16,000, she has no claim to the property of her husband, because in the deed of dower there is no property [221] pigniorated. On this point, namely, that if the marriage be proven, and it be established that the dower of Respondent is Rs. 16,000, is she competent to sell the effects of her husband, which in value exceeds her dower? a futwa was called for from the Mooftee of the Court. The Mooftee, in answer, states that the Respondent is competent to take the property at the selling price, or to sell it, and that the surplus will belong to the heirs of her husband. Proceeding, therefore, on this exposition of the law, it is ordered, that so much of the decision of the Principal Sudder Ameen, dated the 14th February, 1845, which proceeds to dismiss the Plaintiff's claim, on the ground that it is not proven that the Respondent is not the wedded wife of Seyud Moostefah, is confirmed

and affirmed. As the Mooftie of the Court has given his futwa, clearly and distinctly, declaring that Respondent is competent to hold possession of the property, the Court cannot interfere. The costs of the Court, with interest from the date of suit to date of satisfaction, to be paid by the Appellant."

Seyud Abdoollah appealed against this decree to Her Majesty in Council. He died before the appeal came on for hearing, leaving the Appellants his heirs surviving, who were allowed by the Sudder Dewanny Adawlut to prosecute the appeal as Appellants in place of Seyud Abdoollah. The appeal was revived in England in their names. The Respondents not having appeared, the appeal was heard *ex parte*.

Mr. Leith and Mr. Fulton in support of the appeal. The Court in India has acted upon an erroneous assumption that the *onus probandi* lay upon the [222] Plaintiff. It was clearly upon the Defendants, and we contend that Moorad-oon-Nissa, the principal Defendant, failed to establish the two material issues of fact raised by the pleadings, namely, her marriage with the deceased and the genuineness of the deed of dower alleged to have been made in her favour by Seyud Moostefah. The evidence of her witnesses upon these points is unsatisfactory and wholly unworthy of credit.—[The Lord Justice Knight Bruce: The evidence of the marriage is strong.]—But, we submit, even if those issues of fact had been established in her favour, still the issues in law ought to have been determined in favour of the Plaintiff. He was the heir-at-law, and, as the deed of dower was disputed, he was entitled by the Mahomedan law to be put in possession of the deceased's real estate, *Moosummaut Wuzerun v. Mahomed Hossain Khan* (7 Ben. Sud. Dew. Rep. 34), Macnaghten's "Principles of Moohummudan Law," p. 290. Her remedy being to establish the deed of dower by a suit at law, *Ranee Bukhs Beebee v. Nadir Beebee* (3 Ben. Sud. Dew. Rep. 59). A fatal objection, however, lies to her claim. The deed of dower set up by her is of the class known by the Mahomedan law as exigible, or payable on demand, Hedaya, Vol. I., p. 150, Macnaghten's "Principles of Moohummudan Law," pp. 59, 278, and should have been demanded against her husband's estate within twelve years from the date of the execution of the deed, which was not done; her husband's estate is, therefore, exonerated, *Norunnissa Begum v. Nawab Syud Mooshin Allee Khan* (7 Ben. Sud. Dew. Rep. 40); *Meer Nujib Ollah v. Mussummaut Doordana Khatoon* (1 Ben. Sud. Dew. Rep. 103); her claim being barred by Ben. Regs. III., of 1793, sec. 14, and II. of 1805; Macnaghten's [223] "Principles of Moohummudan Law," p. 285. Another ground of objection is, that considering the means of the deceased, the dower was excessive and void, Macnaghten's "Principles of Moohummudan Law," p. 288-9. In no circumstances can the decree stand, as the Court ought to have directed a portion of the real estate to be sold, and after payment of the dower to the Defendant, Moorad-oon-Nissa, and the deceased's creditors, the surplus ought to have been handed over to the Plaintiff, who is clearly entitled to an account of the deceased's estate. A total dismissal of his suit was, therefore palpably wrong. The case of the other Defendants who claim by adoption is untenable; no such thing as adoption in this sense is known to the Mahomedan law. Macnaghten's "Principles of Moohummudan Law," p. 86. Finally, the mortgages and sales ought to have been declared invalid, as the widow had no power of alienation.—[Mr. Pemberton Leigh: There has been great laches. The deceased died in 1838, and the Plaintiff does not bring his suit till 1843, and during that time the Respondents have been in possession, and have dealt with the estate as their own.]—That arose from the fact of the Plaintiff's taking proceedings in his own District to establish his title to property there situate.

Judgment was delivered by

The Right Hon. the Lord Justice Knight Bruce.—Seyud Moostefah, a Mahomedan, in good circumstances, died on the 4th of October, 1808, in the North-West Provinces, intestate, without child or de-[224]-scendant, but a female, the principal Defendant, Moorad-oon-Nissa, lived in his house and passed as his wife, and now claims dower as his widow, and two young men, named Gholam Abbas and Sooltan Ali, the sons of Moshun Ali, in a sense members of his family, were living with him, and who appear to have been brought up by Razeeah Begum, the first wife of Seyud Moostefah, and claimed to be treated as adopted sons, although no power of adoption is known to the Mahomedan law. In these circumstances, the lady who lived with the deceased

appears to have entered at his death into possession of his property in the neighbourhood of the place where he died, and she was treated by the local authorities as administratrix. As a Mahomedan widow she would be entitled to a fourth part of the deceased's estate, the other three parts going to his heirs.

The two sons of Moshun Ali, for reasons not apparent, afterwards set up a claim to the property, as descendants of Seyud Moostefah, and contested the title of the widow, denying the fact of her marriage with the deceased. This led to quarrels and litigation, which ultimately, in 1842, ended in a compromise between them, upon terms sufficiently advantageous to these young men. By this arrangement they agreed to divide the property of the deceased in equal moieties, half to go to the widow and half to them.

Shortly after this compromise there arose the claim which has led to the present appeal. That claim was set up by Seyud Abdoollah, the full brother and heir-at-law of Seyud Moostefah, and he brought his suit in the year 1843, in the Zillah Court of the Principal [225] Sudder Ameen of Moradabad against the Respondent, Moorad-oon-Nissa, and others, seeking to obtain possession of the Zemindaries and other real and personal estate of the deceased, and for mesne profits; and by his plaint he charged Moorad-oon-Nissa, with not being the wedded wife of the deceased; and made other allegations which, as far as it appears to their Lordships, had better have been omitted. The Respondent, by her answer, set up her marriage with the deceased, and insisted upon her rights as his widow, and alleged that she held a deed of dower executed on her marriage, whereby the deceased settled upon her Rs. 46,000, and that she held the property as a lien for such dower. The reply impeached the deed as a forgery, and denied the marriage. Evidence was gone into, and the Principal Sudder Ameen, by his decree, decided against the claimant. An appeal was made from this decision to the Sudder Dewanny Adawlut, when Mr. Tayler, the presiding Judge, after consulting the Mooftee attached to the Court, as to the law relating to dower, came to the same conclusion and dismissed the claim. The present appeal is against that decree, and has been heard *ex parte*. The case has been here argued with great zeal and ability. There are four points upon which the case depends. First, marriage or no marriage; second, whether the alleged deed of dower is genuine or a forgery; third, the effect of Regulation of Limitation, III. of 1793, sec. 14, upon the deed of dower, which, as it created a debt demandable and payable immediately, it is said was a demand that was barred, more than twelve years having elapsed; and, fourthly, the Appellant urges that the decision is erroneous, and that there ought [226] not to have been a total dismissal of the suit, as the Plaintiff was the heir-at-law, and that there ought to have been an account taken of the deceased's estate, as he was entitled to the residue, after payment of the dower to the widow.

With regard to the marriage, much need not be said. The question is, did a marriage take place? Now the evidence is so very strong, that after the case had been gone into, it was suggested that it was scarcely possible to resist the fact of the marriage, she must, therefore, be taken to be the widow. The question of dower is less clear. The deed is dated the 26th of July, 1818, and considering the position of the Respondent, Moorad-oon-Nissa, at that time a dancing girl, the sum of Rs. 46,000, for dower seems excessive; but, then, there must be taken into consideration the circumstances of Seyud Moostefah. He had no family, was advanced in life, and appears to have formed a very strong attachment for this young woman, and, therefore, it is not improbable that he should make a very liberal provision for her by way of settlement. Seven witnesses are examined, and speak to this deed, and every one of them must be grossly perjured if there was no marriage; two of them are attesting witnesses. The deed is proved to be holograph of the husband, and, as he was a man well acquainted with business, and his handwriting well known in the neighbourhood, if any doubt existed, proof of forgery could have been given, but it is not attempted to be established by evidence that it is not his handwriting. The instrument itself, when produced, is found to be partly obliterated and defaced by wet and age, but a copy of the instrument from the registry of the Caze is [227] brought forward. This deed does not appear to have been registered during the lifetime of the husband; but their Lordships assume that the rules required by law were complied with by the Caze. If it was a forgery, it is a great probability

that a different time would have been selected, and all the circumstances seem to favour the likelihood of such a transaction having taken place. With regard to the marriage, it may be improbable, we admit, that a marriage had taken place at the sacred time alleged; but if no marriage had taken place these persons would not have selected that time, and alleged it to have taken place at that time. This deed of dower was, however, never brought forward during the intermediate time when the disputes arose between the Respondents and these two young men. There was a perfect silence during that time, and the excuse for not producing it is not very satisfactory, but it must be remembered that a copy was on the registry in 1839. I cannot say what reason actuated the Respondent, Moorad-oon-Nissa, or her advisers, in preventing the deed being produced, but that fact is not sufficient to raise a presumption of fraud, and to outweigh the direct evidence of the witnesses, and more particularly when a stamp of the value required for such a deed is proved to have been sold to the deceased a short time previous to the date of the deed, which makes the evidence, we think, preponderate in favour of the deed; and, considering that it is a mere question of fact, upon which no difference of opinion existed in the Courts below, it would require a strong case to justify us in reversing their decrees, and, therefore, we think, the marriage and deed must be held to be established.

[228] Then there arises the question as to the operation of the Regulation of Limitation, III. of 1793. It was contended that the form of the deed by the Mahomedan law was to make the dower exigible immediately, not only due but at once demandable, and that twelve years, the period of limitation, expired in 1830, during the lifetime of the husband. Upon this point a very great difficulty arises. It was never pleaded in the original proceedings by the Plaintiff before the *Sudder Ameen*, the objection was only taken in the *Sudder Dewanny Court*; and considering that it is an objection by the Plaintiff against the Defendant, that might perhaps be a ground for refusing to entertain it. Now, section 14 of the Regulation in question prohibits the Civil Courts from hearing or determining any suit whatever, "if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the Complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he should not proceed in the suit; or shall prove that either from minority, or other good and sufficient cause, he had been prevented from obtaining redress." This may probably be a case fit to be dealt with under the concluding part of this Regulation; there may be such "good and sufficient cause," but their Lordships do not desire to put their decision on that point. The terms of the deed are "when demanded [229] by my wedded wife." In this country various cases have arisen with regard to obligations payable on demand; a promissory note not payable on demand, is payable immediately. It is important, however, in some cases of negotiable securities, that the demand be made within a reasonable time, in other cases that the demand should be made immediately, and in some without any demand at all. *Carter v. Ring* (3 Camp. 459), *Gibbs v. Southam* (5 Barn. and Ad. 911), *Simpson v. Routh* (2 Barn. and Cr. 682). In the latter case Mr. Justice Littledale lays it down, that in the case of a bond with a penalty to pay a certain sum on demand, an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request. These authorities show that there may be cases where an action would not lie except where a request or demand is made, and others where such demand is not necessary. It is quite unnecessary that it should be any demand here. The deed of dower or settlement by the husband in favour of his wife, and the intention of the parties, was, that the wife was to have, as a dowry, the sum of Rs. 46,000; and it is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument; it would be full of danger to the happiness of married life; and we think, upon the true construction of this settlement, she had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately or in his lifetime. Their Lordships are,

therefore, of opinion that the Regulation does not apply as a bar to her claim, and that such defence entirely fails.

[230] Lastly, there remains the question of the distribution and administration of the deceased's estate. No such relief is asked by the plaintiff. The claim made by the Plaintiff is as sole heir against the Defendants, charging them with collusion in keeping him out of possession. He does not claim in the alternative, that if the marriage of the Respondent, Moorad-oon-Nissa, and the deed of dower are proved, then that he may have his share of the estate. It is possible it might have been competent to the Court below, in their discretion, to have entertained such a question, but it was a matter of discretion for the Judge of the Sudder Dewanny Adawlut. Independently of this, Moorad-oon-Nissa was in possession, by the consent of the local authorities, a possession very analogous to that of an executrix here. That fact, however, is not sufficient to decide the point of right, but the Plaintiff has not asked for an account. Again, he has burthened the record with a number of unnecessary parties who ought not to have been there, and that would have created very considerable inconvenience in taking accounts. He has also excluded all the moveable estate and that portion of the immoveable estate of which he himself obtained possession. We are of opinion, therefore, that the Judges before whom the case has been heard in India took the right and convenient course in dismissing his suit, and leaving him to bring another suit to obtain an account; that, no doubt, was the effect of their decisions, though not in terms. Under these circumstances their Lordships will add a recommendation in their humble report to Her Majesty, that the dismissal of the appeal be without prejudice to the Appellants' right to bring a suit for an account and administration [231] of the deceased's estate consistent with the establishment of the marriage and the deed of dower. Costs, if any, incurred in India by reason of the appeal, must be paid by the Appellants.

The following report, which was approved by an Order in Council, dated the 21st of July, 1855, was made by the Judicial Committee:—Their Lordships do agree humbly to report to your Majesty as their opinion, that the judgment or decree of the Sudder Dewanny Adawlut at Agra, of the 21st of April, 1846, ought to be affirmed, without prejudice to any suit which may be instituted for the recovery of the rights of the late Appellant, as one of the heirs of Seyud Moostefah, consistently with the establishment of the marriage of the Respondent, Moorad-oon-Nissa, and of the validity of the deed of dower alleged by her in the suit, both of which facts their Lordships consider to be proved in this case, and their Lordships direct that all costs, if any, incurred by the parties to the suit in India, by reason of this appeal, be paid by the Appellants.

[See *Mussumat Mulleeka v. Mussumat Jumeela*, 1872, L.R. Ind. App. Sup. Vol. 138, 139.]

[232] RAJAH BOMMARAUZE BAHADUR, and, on his Demise, his Son and Heir, KUMARA VENCATAPERMAUL RAUZE BAHADUR.—*Appellant*: RANGASAMY MUDALY,—*Respondent* * [Nov. 28, 29, 1855].

On Appeal from the Sudder Dewanny Adawlut, at Madras.

By the Act, No. XXXII. of 1839, extending the provisions of the Statute, 3rd and 4th Wm. IV., c. 42, sec. 28, to India, it was enacted, "That upon all debts or sums certain, payable at a certain time, the Court before whom such debt or sums may be recovered, may, if it shall think fit, allow interest to the

* Present: Members of the Judicial Committee,—The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

An instrument, in the nature of, though not strictly, a Bond, was executed in 1833, which provided for the liquidation of the amount therein specified by instalments, but no provision was made for the allowance of interest. The condition for payment not having been performed: Held, in an action brought in 1849, to recover principal and interest upon the Bond, that the Act, No. XXXII. of 1839, was retrospective in its operation, and authorised the allowance of interest, although it was not provided for by the Bond.

In proceedings by the obligee of the Bond before the Collector's Court in 1844, upon an application for a sequestration of the obligor's estates, the obligor filed an account of his liabilities, in which the Bond in question was entered and certain payments mentioned. Held, that such acknowledgment took the Bond out of the operation of the Mad. Reg. of Limitation, II. of 1802, sec. 18, cl. 4.

The examination of a material witness of the Plaintiff in the absence of the Defendant, his Vakeel having been removed and no other Vakeel then acting for him, is such an irregularity that if objected to at the proper time would be fatal to the reception of such evidence. But where no objection was urged during the trial, or until an appeal was interposed, the Judicial Committee held that the objection came too late, and could not be sustained, as, notwithstanding such irregularity and miscarriage, that fact did not taint the whole proceedings so as to prevent the Plaintiff recovering upon the other evidence which was sufficient to establish his case.

But, although the other evidence rendered the evidence improperly admitted immaterial, the Judicial Committee, as there had been an irregularity in the Court below, in affirming the judgment, refused to give the costs of appeal.

The Respondent instituted the suit out of which this appeal arose, in the Civil Court of Chittoor, on [233] the 21st April, 1849, to recover Rs. 66,384. 2. 10., the balance of principal and interest upon a Bond executed by the Appellant in favour of the Respondent's father, to secure the principal sum of Rs. 34,426. 14. 0. The plaintiff stated that the Respondent's claim to the amount due upon the Bond in question originated in the Appellant's late father having borrowed certain large sums of money of the Respondent's father, the repayment whereof was secured to him by six several Bonds, together with the deposit of a number of gold ornaments set with precious stones, and a mortgage of certain villages, forming part of the Zemindary of the Appellant's father, and of which the Appellant since his death had been in possession. The plaintiff also stated, that the Appellant personally entered into a settlement of accounts with the Respondent's father, when a balance was struck between them; that the gold ornaments were sold, and the proceeds, together with the amount which the Respondent's father had realised from the mortgaged villages, being deducted from the amount of principal and interest due to him, left a net balance in his favour of Rs. 34,426. 14. 0., for which the Appellant, on the 20th March, 1833, executed and gave the Bond sued on to the Respondent's father, wherein it was stipulated that the [234] amount so due should be discharged by annual instalments, as thereafter mentioned. That upon the execution of this Bond, the villages which had been mortgaged to the Respondent's father were given up by him to the Appellant, together with the several Bonds given by the father of the Appellant to the Respondent's father. The plaintiff further stated, that the Respondent, by letters and by the Plaintiff's agents, demanded of the Appellant the balance due upon the Bond; that he made several engagements to pay it, until his Zemindary was sequestered by the Collector of the District; who, in September, 1844, issued a proclamation and notices, calling upon the creditors of the Appellant to come forward and represent the extent of their dues; and that accordingly the Respondent, on the 4th November, 1844, presented a petition to the Collector, stating that the principal of the Bond, with interest equal to it, was due to the Respondent. That the Appellant filed an account before the Collector admitting the execution of the Bond, and Rs. 33,940. 11. 8. to be the balance due by him on account of the

principal thereof, after deducting payments made under it to the amount of Rs. 186 2 4, which was composed of muzzur, or presents, Rs. 35, and eight years' quit rent due from the Respondents from May, 1832, to the same month in 1839, on the village of Gopalapuram attached to the Zemindary of the Appellant, who had granted such village at an annual jodee of fifteen pagodas for the maintenance of a public choultry erected by the Respondent's grandfather. That the Appellant's Zemindary having been released from attachment, and the creditors directed to seek their own remedy [235] against the Appellant, the Respondent, by letter, demanded of him the balance due as aforesaid, and that he engaged to pay it in a short time, which he had failed to do.

The Appellant by his answer stated, that his minority ceased about the time of the date of the Bond in 1833; that he did not remember what balance was then struck by his agents after selling the jewels mortgaged to the Respondent's father, nor whether any document was executed regarding it; that the Appellant made no engagements either with the Respondent or his father, about the alleged balance due on the Bond; that the Appellant did not know what account was produced by the Respondent before the Collector in 1844, as to the amount of the Bond and interest; that the Appellant did not tender any account under his own hand admitting the execution of the Bond, and that a balance was due upon it; and that he did not enter into any engagements subsequently as alleged by the plaintiff. The Appellant, by his answer, also pleaded the Madras Reg. II. of 1802, sec. 18, cl. 4, in respect to suits, the period of limitation being twelve years from the time when the cause of action shall have arisen; and he submitted, by his answer, that the Bond in question was composed of interest as well as principal; and also that such Bond did not provide for the payment of any interest upon the sums therein mentioned, and that by the plaintiff the Respondent claimed a sum for interest equal in amount to the Bond; and he also pleaded that the Respondent's claim to such interest was contrary to the terms of the Bond and to Madras Reg. XXXIV. of 1802, sec. 5, whereby it is enacted, [236] that the Courts of Adawlut should not decree to creditors compound interest, and he finally pleaded that he was not liable to pay either principal or interest to the Respondent.

The Respondent replied, but as the reply contained no allegation of any new facts in support of the Respondent's claim, the Court, on the 18th of September, 1849, recorded that a rejoinder from the Appellant was needless.

The cause was tried before Mr. E. C. Lovell, the Judge of the Civil Court of Chittoor, who, pursuant to Madras Reg. XV. of 1816, sec. 10, cl. 3, directed and recorded the particular points in the suit which were to be proved; which were, that the Respondent should file the Bond and prove its execution by the Appellant and his payments and promises. No points were recorded by the Judge for proof by the Appellant.

The suit being at issue, evidence was entered by the Respondent in support of his case. The documentary evidence consisted; first, of the instrument in the pleadings called a Bond, dated 20th March, 1833, the material part of which was as follows:—

“ Amount of principal borrowed by my father from your father's agent, Perumal Mudaly, in the two years Swabhanu (A.D. 1823-4) and Tarana A.D. 1824-5) last past, under six Bonds mortgaging fifty-four different ornaments, made of gold and set with precious stones			Pagodas	16,800
“ Interest thereon up to 30th Masi of this year (11th March, 1833), as [237] per account (settled in your presence)			Pagodas	13,261½
Total Pagodas				30,061½

Deduct payments—

Amount assigned to you on account of, your dues, being the price of the ornaments which had been mortgaged to you, but which I took back and sold to Tiruvengadasamy Mudaly, of Arcot			Pagodas	13,869¾
Amount realised from the villages mortgaged on				

account of your dues, as per account settled in your presence	Pagodas	4,145 $\frac{1}{4}$	
Amount remitted by you under interest	Pagodas	2,210 $\frac{1}{4}$	
Total payment			20,225 $\frac{1}{4}$
Balance due to you	Pagodas	9,836 $\frac{1}{4}$	
			Or Rs. 34,426-14-0

"This balance due to you of Rs. thirty-four thousand four hundred and twenty-six, and annas fourteen, I shall discharge by annual instalments of Rs. (3500) three thousand and five hundred each, to be paid on the 30th Punguni (10th April) of each year, commencing from Vigaya (A.D. 1834). If I fail to do so, you may recover it according to judicial regulations.

[238] "Thus do I voluntarily execute this Bond, in the handwriting of Dhurjati Venkat Row Rayasum. RAZE BOMMARAUZE BAHADUR."

There were four witnesses to this Bond.

Second, a sunnud, or grant, dated the 20th of March, 1833, of the village of Gopalpuram, by the Appellant's father; third, a power of attorney, dated the 19th of July, 1844, given by the Appellant to Sainbarauze Venkata Row to act as his Vakeel; and fourth, copy of an account of the Appellant's liabilities, dated 7th November, 1844, which had been filed with the Collector by the Appellant's Vakeel in the proceedings relating to the sequestration.

On the 22nd July, 1850, the Appellant's Vakeel was appointed District Moonsiff, when, according to the practice of the Court, and in compliance with the provisions of Mad. Reg. XIV. of 1816 (a), a notice of that fact was issued by the Court, and served upon the Appellant on the 13th August following, requiring him to engage another Vakeel. The Appellant accordingly appointed a new Vakeel in the suit, who first appeared for the Appellant on the 24th of the same month of August. During the time which intervened between the 22nd July and 24th August, the Appellant was unrepresented, either personally or by Vakeel.

[239] For the purpose of orally proving the points recorded for proof by the Respondent, seven witnesses were examined; the first of these was the only surviving attesting witness to the execution of the Bond, a relation of the Appellant, who deposed that it was duly executed by him. The other three attesting witnesses were dead, but two witnesses identified the signatures of the deceased attesting witnesses. Two other witnesses deposed to being present at the settlement of the accounts and execution of the Bond in question. The remaining two witnesses deposed to having heard the Appellant promise to pay the amount of the Bond. With respect to the other three documents filed by the Respondent, no witnesses were called by him to prove them. No witnesses were examined by the Appellant. The first witness was examined upon affirmation, and finally dismissed on the 20th August, 1850, in the interval between the times when notice was given to the Appellant of the retirement of his former Vakeel and of the appointment and the appearance of his new Vakeel. No objection was taken to the reception of this evidence by the Appellant during the trial.

On the 30th of December, 1850, Mr. E. C. Lovell made his decree, which, after stating the pleadings and evidence, declared that the Bond was fully proved, and under the Act, No. XXXII. of 1839 (b), the Plaintiff [240] appeared to be fairly

(a) By Regulation XIV. of 1816, sec. 13, it is enacted, that "if a pleader should be unable to attend in the Court in consequence of indisposition, or other sufficient reason, he is to notify the same in writing to the Court, on unstamped paper; and the hearing of any cause in which such pleader may be employed is to be postponed to a future day, unless the party or his authorised agent shall commit the management of the cause to any other pleader of the Court, or unless the party himself shall be present, and willing to plead the cause in person."

(b) Act, No. XXXII. of 1839, entitled "An act concerning the allowance of interest in certain cases," was passed by the Honourable the President of the Council of India, in Council on the 30th December, 1839, and is as follows:--

entitled to interest upon the instalments from the dates of their severally becoming due, the total amount of principal and interest being, as above stated, Rs. 66,384. 2. 10., which he accordingly awarded to the Plaintiff, with costs of suit.

The Appellant appealed to the Sudder Dewanny Adawlut at Madras, and by his petition of appeal urged that the defective and irregular manner in which the Bond sued on was drawn up was sufficient to prove it not to be a *bona fide* document. That the evidence of the execution of the Bond was insufficient and worthless. That the sole attesting witness to the Bond was examined when Appellant had no Vakeel in Court, the party employed by him having been appointed to a Moonsiffship. That no points were given to Appellant for proof. That the circumstances under which Rs. 486. 2. 4. were alleged in the plaint to have been recovered in part payment of the amount sued for, were incredible. That the terms of the Bond did not admit of interest being charged. That the decree of the Lower Court was in opposition to sec. 5, Reg. XXXIV. of 1802, inas-[241]-much as it awarded interest upon interest, of which the amount of the Bond sued on was expressly stated to consist in part.

In his answer, the Respondent upheld the correctness of the Civil Judge's decree, disputing the several assertions and arguments advanced by the Appellant.

The original Defendant having died, the appeal was prosecuted by his son and heir, Coomar Vencatapermaul Rauze.

The Sudder Court's decree was pronounced on the 2nd of April, 1853. The material part was in these terms:—"On mature consideration of the merits of this case, the Court concur in the judgment formed thereupon by the Civil Judge. The bond sued upon is denied, and it is pleaded that the claim is shut out by the Regulation of Limitation. It appears to the Court that the copy of account put in by the Respondent at once removes this bar, and proves the justness of the Respondent's claim. The document was obtained from the Collector, and purports to be copy of an account of the Appellant's liabilities tendered by him to the Collector through a Vakeel when his Zemindary was under attachment; and copy of the power of attorney granted to that Vakeel, also authenticated by the Collector, has been likewise filed. In the account the Bond now sued on is entered, the sum and date thereof being specified, as also are eight items of receipt, being the jodee rent for eight years, from 1832-33 to 1839-40, of a village belonging to the Appellant, appropriated by the Respondent, and amounting to Rs. 486. 2. 4., which have been credited to Appellant as payments made upon the Bond, and [242] which are so deducted from the sum thereof in the said account rendered to the Collector.

"The reception of the above power of attorney and account by the Collector is a sufficient guarantee of the genuineness of these exhibits as having been put into his office by the authorization of the Appellant: and in effect nothing has been adduced to call these documents into question; nor could such a matter have taken effect and remained concealed and unprotested against by the Appellant had his name and authority on the occasion in question been made use of falsely and fraudulently.

"The above acknowledgment of the Bond and the payments credited against it occurred in the year 1844, or within five years of the institution of the suit, and

"Whereas, it is expedient to extend to the territories under the government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the Statute, 3rd and 4th Wm. IV., ch. 42, sec. 28, concerning the allowance of interest in certain cases:

"It is therefore hereby enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law."

upon the evidence to the claim arising thereout the Court consider the decree of the Civil Judge to be fully justified.

"The Bond itself appears to the Court to be a genuine document. It is inscribed on a stamp, and bears the seal of the Appellant, which could not easily have been surreptitiously made use of nor counterfeited, and nothing has been adduced to bring the integrity of this seal into question.

"In his answer in the original suit the Appellant admitted the previous heavy transactions between his father and the Respondent's father, out of which the Bond arose; and he has made no attempt to show how these were brought to a close otherwise than by the execution of the Bond sued on, as alleged by the Respondent; and as to this Bond, on that occasion the Appellant could not say that it had not been executed, a hesitation which cannot possibly be attributed to the want of recollection then pleaded, and is [243] only to be accounted for by the fact that the Bond really was executed, and that the Appellant then shrunk from absolutely denying his act.

"It has been objected that interest should not be adjudged upon the Bond, as the terms thereof make no provision for the same, and as the sum of the Bond is itself formed in part of interest.

"The Court consider both these objections to be unsustainable. The Bond provided for liquidation of the sum thereof by instalments; and as this condition was not kept, the charge of interest becomes fairly exactable; nor does the circumstance that the sum secured by the Bond is composed of interest prevent the exaction of such a charge, since this is plainly authorised by the very enactment (sec. 5, Reg. XXXIV. of 1802), which Appellant quotes as sustaining his objection.

"For the above reasons the Court confirms the decree of the Civil Judge, and dismisses the appeal with costs."

Against this decree the present appeal was brought.

Sir Frederic Thesiger, Q.C., Mr. Leith, and Mr. Blaine, for the Appellant. No fair trial has taken place, and the cause ought to be remitted to the Court below, as the Bond in question has not been sufficiently proved. There are, however, several fatal miscarriages and irregularities. First, there were no points recorded by the Judge, for proof by the Appellant, as required by Mad. Reg. XV. of 1816, sec. 10, cl. 3, and such omission is fatal, *Srimut Moottoo Vijaya Rajanadha Gowdy Vellabha Perria Woodia Taver v. Rany Anga Moottoo Natchiar* (3 Moore's Ind. App. Cases, 278). [244] Secondly, the Appellant had no opportunity of cross-examining the only surviving attesting witness to the alleged Bond; he being at that time absent and unrepresented. The irregularity in permitting such examination was contrary to Mad. Reg. XIV. of 1816, sec. 13, and to every principle of justice. Thirdly, documentary evidence was improperly admitted to be received. A copy of an account was admitted without proof of the loss of the original to let it in, or indeed any proof at all. Mad. Reg. XVII. of 1802, sec. 11.—[Mr. Pemberton Leigh: There appears to have been no objection to the admission of the copy in the Court below.]—It is not too late to urge it here. *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (3 Moore's Ind. App. Cases, 156). The evidence of the witnesses upon the alleged promise to pay the debt and interest is insufficient, and too vague to be relied upon. But, even if the Respondent had proved his title to recover, he was barred by Mad. Reg. II. of 1802, sec. 18, cl. 4. Lastly, No interest upon the debt ought to have been allowed, interest not being provided for by the Bond. *Motee Bahoo v. Khachik Arakel* (6 Ben. Sud. Dew. Rep. 67), *Foster v. Weston* (6 Bing. 709), *Higgins v. Sargeant* (2 Barn. and Cr. 348). The law in force at the date of the Bond, Mad. Reg. XXXIV. of 1802, sec. 5, must govern the right to interest, and not the Act, No. XXXII. of 1839, which we insist has no retrospective operation. Broom's "Legal Maxims," p. 28.

Mr. R. Palmer, Q.C., and Mr. Mackeson, for the Respondent. —None of the objections raised by the Appellant can prevail. The charge that the witnesses of the Re-[245]-spondents were unworthy of credit is unfounded, nothing was adduced in evidence to impeach their credit. Moreover, this Court, in a mere question of credence, treats it as one solely for the decision of the Court below, that Court having a much better opportunity of testing the credibility of the witnesses, *Muddoo Soondun Sundial v. Suroop Chunder Seekar Chandiy* (4 Moore's Ind. App. Cases, 431). The Bond sued on was fully proved, as well as the promise to pay. It is too late now to object to the irregularities. If that had been

done in the Zillah Court they could have been cured. The Appellant admitted the truth of the Respondent's demand upon this Bond in the account filed by him before the Collector on the 7th of November, 1844, which was within twelve years from its date to the filing of the plaint, and, as the debt secured was to be paid by instalments, the Bond is expressly within the proviso of cl. 1, sec. 18, of Mad. Reg. II, of 1802, which effectually disposes of the Appellant's objection on the Regulation of Limitations. Again, it is urged that the principal amount of the Bond sued on was for interest, and that interest could not be charged upon interest. The answer to this is, that the account set out on the face of the Bond shows that the balance on the previous transactions secured by the Bond was the residue of principal money which remained due after applying the credits in liquidation of the whole interest due. But even if the balance had been made up of the aggregate amount of principal and interest, compound interest is expressly allowed by cl. 5 of Mad. Reg. XXXIV, of 1802, where the former Bonds have been delivered up and cancelled. The remaining point is, that interest was not recoverable, as it was not provided for in the Bond, and that the case does [246] not fall within the Act, No. XXXII. of 1839. This Act, we submit, is retrospective in its operation, and authorises the allowance of interest, although not expressly provided for in a Bond. The Bond provides for liquidation of the amount by instalments, and as this condition was not performed, the charge of interest was fairly made.

Sir Frederic Thesiger, in reply, submitted, that there was not sufficient evidence that the Vakeel was authorised by the Appellant to make the admission he did in the account, *Medho Fow Chento Punt Gole v. Bhookun-das Boolaki-Das* (1 Moore's Ind. App. Cases, 351).

On the conclusion of his argument, judgment was delivered by

The Right Hon. Sir William H. Maule.—After giving due consideration to the learned arguments which have been addressed to us by the Counsel on both sides, their Lordships are of opinion that it is their duty humbly to advise Her Majesty that the appeal in this case should be dismissed. The ground on which their Lordships have come to that conclusion I will very shortly state.

This is an action for a pecuniary demand evidenced by an instrument which in the course of the argument has been called a Bond, and without being strictly in the nature of such an instrument, in the sense which belongs to it according to the law of England, is an instrument which recognises the existence of a debt payable with interest, and provides for its liquidation by certain instalments which have not been paid.

The case came on before the Zillah Court in India, [247] and on that occasion evidence was given which satisfied that Court of the justice of the Plaintiff's demand. In the course, however, of the proceedings there, it appears that a witness, the sole surviving attesting witness to the instrument in question, was examined for the Plaintiff without the presence of any Vakeel, or agent on behalf of the Defendant, and in the absence of the Defendant himself. Other evidence was also given; but this particular evidence was certainly very material evidence in respect of the Plaintiff's demand.

The objection which was suggested in the petition to the Sudder Dewanny Court, and which has also been urged in the argument before us, was that such examination could not regularly or properly have taken place, and their Lordships are of opinion, that that objection, if taken in the right time and in the right place, would (to what extent may be questioned, perhaps), be an objection which ought to prevail with respect to the evidence to which it was applied. It does not appear however that there was any objection taken to the reception of this evidence in the Zillah Court; not merely that no objection was taken at the time of the examination, because, as that was in the absence of anybody representing the Defendant, it might well be that it could not be observed as to him that he did not then object; but it appears very clear that there was ample opportunity of objecting afterwards, and requiring the Court to do what might be necessary to remedy the omission, or irregularity; but nothing of that kind appears to have taken place. It is true, that before the Sudder Dewanny Adawlut, as appears in the petition of appeal, there was some reference made to the examination of [248] the witness in the absence of the Defendant and those representing him. The Sudder Court, however, did not think fit to allow such

objection; and the way they dealt with it, and with the whole case, was this: the Sudder Court said, that notwithstanding there may have been an irregularity and a miscarriage in the Court below with respect to this evidence, that that did not taint the whole proceedings so as to prevent the Plaintiff from recovering, inasmuch as it did not show anything that was inconsistent with the right of the Plaintiff to recover the sum in demand; the Court then pointed out that the Defendant, in a regular proceeding before the Collector, whose business it was under a sequestration to seize and take possession of this Zemindary, had sent in an account, in which account the Bond in question was noticed in such a manner as clearly to identify it as the Bond under which the Plaintiff claimed; the account also contained payments which, if made, would take the case out of the Regulation of Limitations, which account was put in by a person shown to be an authorised agent of the Defendant.

Observations have been made with respect to the credibility of this transaction, and with respect to the sufficiency of the proof of the copy of that account, and of the authority of the agent who put it in: but it seems to have been thought by the Court below a regular and proper proceeding, and it is one of so public and important a nature that it is hardly conceivable that it could have taken place in the Collector's Court, and the document remain there so long as it did quite unimpeached, unless it was a regular proceeding. It would be very unsafe, if documents of that public nature, and taking place in the [249] regular course, could be treated, on mere suspicion, as having no weight at all. It is very fortunate when there is public and official written evidence of the matters in question, in a country where it is said that oral evidence may be easily procurable in a corrupt manner.

The Sudder Dewanny Adawlut treated, and we think rightly treated, that document as clearly showing a distinct acknowledgment on the part of the Defendant of the existence of this Bond, and also of the payments on which the Plaintiff relies to take the case out of the Regulation of Limitations. There is also other evidence in the case of the same tendency; the result of the whole of which seems to their Lordships, as it did to the Court of appeal below, to be, that supposing the document in question had never been produced in Court at all, there would be quite sufficient evidence to establish the claim, or at least to require an answer, and no answer is suggested to have been given, supposing the claim actually to exist.

That being so, we agree that the case cannot be said to stand precisely in the situation in which it would have stood if the document had not been produced at all; but having been produced, even though it be conceded to have been in an irregular manner, and having been admitted in evidence; taking all these circumstances into consideration, they were, we think, of sufficient weight to counterbalance the objection which I have previously described, upon which the Court below acted. In this state of things, their Lordships, as already intimated, conceive that justice has been attained, and that any probability of justice being attainable more perfectly by sending [250] the case again to the Court below, is so infinitely slight, that it would be doing injustice to give any weight to that probability. Still an irregularity does certainly appear to have taken place, and one of a serious nature in respect of the admission of evidence in the absence of the Vakeel of the Defendant, who ought to have been present in order to scrutinize such evidence; but as it turns out in the result, in consequence of the other evidence adduced, to be unimportant, and to have no weight as affecting the decision; the irregularity also being one which does not raise any material suspicion on the rest of the Plaintiff's case; their Lordships think they are bound to affirm the judgment of the Court below, that Court having come to the right conclusion; yet inasmuch as a miscarriage took place in the course of the proceedings, they think the affirmance should be without costs on either side. Their Lordships, therefore, will humbly recommend Her Majesty that the appeal should be dismissed, but without costs.

[251] RUGHONNAUTH SAHOI CHOTAYLOLL.—*Appellant*: MANICKCHUND and KAISREECHUND.—*Respondents* * [Feb. 1 and 2, 1856].

On appeal from the Supreme Court at Calcutta.

A wager contract in India (before the passing of the Legislative Act, No. 21, of 1818) upon the average price opium would fetch at a future Government sale, held legal, and an action thereon maintained.

The Plaintiff and Defendants, by contracts in writing, wagered as to the average price to be obtained for opium "of the 30th of November," "of the first lelaum, or public Government sale of opium." At the time when these contracts were entered into, the first Government sale had been advertised for the "30th of November, 1846." The sale on that day was prevented by a combination of opium speculators interested in similar contracts. The Government sale was again advertised, and took place on the 7th of December following, when opium of the quantity and description advertised for sale on the "30th November" was sold. Held: First, that the date mentioned in the contracts, the "30th of November," was a mere description of the period when the first public Government sale of opium usually took place, and formed no part of the risk contemplated by the wagers, the subject of the contracts, and was immaterial; and, secondly, that according to the true construction of the contracts, the first actual public Government sale of opium which took place next after the date of the contracts, satisfied the terms of the contracts; and upon a certain average being realised thereon, the event on which the Plaintiff had wagered was determined in his favour, and he was entitled to recover the differences under the averages.

The action in this case was brought upon certain wager contracts made between the Appellant and Respondents, as to the average price to be obtained on a future lelaum, or public Government sale of opium.

The facts of the case were these:—

The Respondents were merchants, trading in co-partnership together at Calcutta, and the Appellant, as well as the Respondents, were dealers and specu-[252]-lators in opium. At the time of the making of the contracts in question, the Appellant was a speculator for the high, and the Respondents were speculators for the low average price of opium, which should be obtained at the first public Government sale of the season.

The contracts entered into between the Appellant and Respondents were eleven in number, and all referred to the same day, the 30th of November, as the day of sale to determine the wager, the several instruments differing only as to the fixed limit or amount agreed upon to be the standard. All these contracts were reduced into writing, and the chittee, or writing of one of these contracts, dated the 30th of September, 1846, was as follows:—

"Marked in the Khattah on account of your house, the money of the 'Taijee' or rise is with you.

Taijee or rise on the average of 1600 of the first lelaum or public sale of the Patna.

1½ Sri Purmaissore Jee.

"1½ To Brothers Rughoonauth Sahoi Chotayloll. This is written by Manickchund Kissoreechund, with salutations, which they will peruse.

"Further, we have eaten the Taijee or rise on the average of one lot of 5 (in letters) five Paitees or chests of Patna opium of the 30th of November (Sumbut), 1903, Nineteen hundred and three, at the price of 1600, (in letters) sixteen hundred. If the average of the first lelaum, or public sale of the Company's sircar rises above sixteen hundred, according to that we will give you the 'bullun' or rise; if it falls

* Present: Members of the Judicial Committee.—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

below sixteen hundred, you have no 'dauwah' or claim. We will not give you credit for the [253] 'Nuzurannah ka roopia,' or bonus money that we have taken from you, Sumbut 1903, Mittee Mugsur or Ughum, the 5th day of the light side of the moon.

Signature of Kulean Mull,"

(Written on the back),

"Rughoonauth Sahoi Chotayloll,
Ubbeer Chund."

At the time when the contracts were entered into, the first public Government sale of opium by the East India Company for the season had been advertised in the *Calcutta Gazette* of the 29th of August, 1846, for the 30th of November, 1846. On that day the opium advertised to be sold by the Government was put up for sale by public auction at Calcutta, subject to certain printed conditions of sale; but, owing to the first lot put up for sale having been bid for to an exorbitant price by persons who attended the sale, no lot was knocked down, and the sale was postponed. On the 7th of December, 1846, the opium advertised for sale on the 30th of November was again put up for sale, subject to certain modified conditions of sale, which had been advertised by the Government between the 30th of November, 1846, and that day. On this last day the opium was sold, and realised the average price of Company's Rs. 1793, 5 annas, and 9 $\frac{3}{4}$ pie, per chest. After the sale, the Appellant claimed from the Respondents the sum of Company's Rs. 18,134, 13 annas, and 3 pie, being the amount of the differences between the sums mentioned in the contracts and the average price for which the opium sold, with interest thereon from the 7th of December, 1846; but the Respondents refused to pay, whereupon the Appellant, in October, 1848, brought an action upon promises in [254] the Supreme Court at Calcutta against the Respondents. The declaration contained eleven special counts, followed by a count for money had and received. Each of these special counts was laid upon a separate and distinct written contract, in the nature of a wager respecting the average price which should be thereafter obtained by the Government for Patna opium at a certain future public Government sale.

The Respondents pleaded first *non assumpsit* to the whole declaration, also several pleas traversing its allegations; and further setting up fraud on the part of the Appellant.

Issue was joined upon these pleas. Afterwards the Respondents obtained leave to plead additional pleas, which set up in substance the same defence.

The cause came on for trial on the 21st of July, 1852. Evidence was given on behalf of the Appellant and Respondents, and, by consent, the depositions of witnesses in another action, entitled "*Chotayloll v. Uggerchund and Hurruckchund*," being the same Plaintiff against other Defendants upon similar wager contracts, were used as evidence. The Appellant proved the contracts upon which the action was brought, and also that the first lelaum, or public Government sale of opium, was advertised for the 30th of November, 1846, and that there was an attempt to hold the sale on that day, but that it went off owing to parties trying to run up the bids to an immense amount; and that the first actual lelaum, or public Government sale of opium for the season, took place on the 7th of December, 1846, when the same number of chests of Patna opium, and of the like quality as advertised for the 30th of November, 1846, were sold, and produced the average price [255] before mentioned. Upon this evidence the Court found a verdict for the Respondents on the pleas of *non assumpsit* to the special counts, and a verdict for the Appellant on all the other issues; damages, Company's Rs. 5775, on the common counts for money had and received; leave being reserved to the Appellant to move to increase the verdict by the amount claimed on the special counts, and to the Respondents to move to enter a verdict for them. This sum was the amount of the premiums, or bonuses, paid by the Appellant to the Respondents, and which the Court thought the Appellant entitled to recover.

The Appellant obtained a rule to show cause why the verdict for the Respondents, on the plea of *non assumpsit* to the special counts, should not be set aside, and a verdict entered for the Appellant on that issue, with damages contingently assessed; namely, Company's Rs. 18,134, 13 annas, and 3 pie, in substitution for the verdict

for the Appellant upon the money counts; and the Respondents also obtained a rule to show cause why the verdict for the Appellant on the first plea, as applicable to the twelfth count of the declaration, should not be set aside, and a verdict entered for the Respondents; and why the verdict entered for the Appellant, on the fifth plea, should not be set aside, and a verdict entered for the Respondents; and why the verdict entered for the Appellant, on the sixth, seventh, and eighth pleas, should not be set aside, and a verdict entered for the Respondents.

Both these rules were argued before the Supreme Court on the 20th of August, 1852, and were, after argument, discharged without costs. The judgment [256] of the Court in this and two other cases, including the case of "*Chotaylo v. Uggur-chund and Hurruckchund*," was as follows:—

"These cases are in substance the same, and our judgment in one case is applicable alike to all. The contracts declared upon are gambling contracts, on the average price to be obtained on a future public Government sale of opium. At the time when these contracts respectively were entered into, the sale was advertised to take place on a certain day in November. The sale was attempted on that day by the vendors; but the sale was prevented by a combination, and by the machinations of certain persons interested in similar contracts, who had taken the low average, and who, to avoid losing their bets, were bent on preventing any sale on that day.

"The sale not having taken place, a sale was advertised by the vendors for a day in the ensuing month of December, under conditions somewhat different from those under which the defeated sale was advertised to take place. In these contracts which are now under consideration, though there is some variation of expression as to the sale, yet the expressions in all as to the time of the sale are inconsistent with the substituted day. In one, which is the case most favourable for the Plaintiff's argument, the term 'the first opium sale' is used; but that expression is preceded by a statement of the day; and we think that the true way of construing that, also, is to take the two expressions together, and as meaning the first sale now advertised, for the reference to the day in the contract seems to be in that sense. In one contract, the very day of the defeated sale is named, and the sale is described as a sale of that [257] day; in the other, the sale is described as the sale of November.

"The language, we think, refers plainly to the sale, and is no stipulation that the very identical opium should be sold; which, indeed, the vendors, on the evidence of the witness Welsh, never bound themselves to, not selling opium specifically described, but taking indiscriminately from their stores opium of the quality described in their advertisements. In construing contracts by natives, an adherence to the letter, without regard to their style, is to be avoided; the expressions in all, we think, denote the day or time of sale.

"These contracts differ, therefore, materially, from the case before the Privy Council, and from the former case in this Court, as here the then intended day of sale, which was a fixed day rarely departed from, is mentioned by reference to it in the contracts. In this Court it was held that the change of day on certain of those gambling contracts did not defeat the bets because in those contracts the time named for the sale was general, namely, 'the first opium sale;' and as the first advertised sale proved abortive, that which next followed fulfilled the terms of the bets. The Privy Council have so decided in contracts thus generally worded. But these contracts contain, by reference to the day and the month respectively, a description of the sale, which is particular and limited in terms; and the question is, whether we are at liberty to treat that part of the contract as mere description and nothing else, and to read the contracts, as bets on the result of the next first opium sale, whenever it might be. There are, certainly, no express words of warranty or condition; still, the nature of the contract [258] is such that time, if named, would, upon legal principles, be of the essence of the contract: for it is a contract on a contingency or risk, which the alteration or retardation of the day might materially vary. In such cases, the question is, not whether in the particular case such alteration has, in fact, increased or diminished materially the chances of winning; but the rule where it prevails is a general one not dependent on the actual result in an individual case. It is obvious, for instance, that if a wager is with a capitalist, on the ability of that capitalist to influence a market price to a rise by means of his money, or credit, and transactions; that the retardation of the day on which the bet is to come off may give him an

important advantage, as its acceleration might place him under great disadvantages, and various casualties might have the most important influence on the risk on such a bet as the present. The description of the day of sale in the contract cannot, therefore, in the reason of the thing, be regarded as mere surplusage.

"There is no evidence why the description was inserted in these particular contracts, nor do the rules of evidence permit the parties to explain by oral evidence the reason of their inserting the time. If such evidence were admissible, and it appeared that one side meant, in fact, the day to be material, and that the other did not, the contract would fail on the ground of want of mutual assent to the same agreement. The unwarrantable and successful attempt to frustrate the first sale would have been merely a purposeless wrong to the vendors, unless some, at least, of the contracting parties thought the day a material term in their contract. As, then, there is no ground in the reason of the thing, or in the surrounding cir[259]cumstances, to treat the description as unmeaning surplusage, it must stand, and it denotes a sale which never took place; consequently, the event on which these particular bets hinged never took place, and, consequently, the bets were not lost. This view of the case appears to us to be supported by the language and reasoning of the Court in the case of *Daintree v. Hutchinson* (10 Mee. and Wels. 85), especially by the judgment of Mr. Baron Alderson. That learned Judge says, in substance, that the day, if it had been a fixed day, would have limited the bet to a match on that day. The Court does not there say that the parties should have introduced words of express warranty or condition to that effect, but simply that the day should have been fixed. In that case, the Newmarket Meeting was considered on the evidence to be in the nature of a moveable feast, a time fluctuating with weather and other circumstances. But here the evidence shows only one change of day in many years, and that not recent. No doubt the wording of a contract, and its nature, might be such as to give rise to a confident belief that the mention of a day, or time, was merely descriptive of a thing as it then stood, an expression in its own nature, having, and intended to have, no limitation to time; but viewing the nature of the contract and the surrounding circumstances, we think it would be merely assumption of the point in dispute to adopt this view of the matter. There are no merits, and the demerits seem equally balanced. It is a mere question, whether a bet on a sale in a certain month, or on a certain day in that month, means a bet on a sale at any indefinite time.

"We cannot vary the terms which they have used, [260] and we do not feel justified in rejecting any of them. On the other ground, we think that the Plaintiff is entitled to a return of the premium. It is ingeniously argued, that it was part of the risk whether the sale would take place or not, at the appointed time; but we think, that was no part of the risk: the risk was whether at a sale to take place in the prescribed time the price would rise above a named sum, consequently, we think the risk was not run. Had this argument been sound, then, of course, the wager would have been decided against the Plaintiff. The pleas of fraud, as they are framed, not being in any of the cases supported by the evidence, we think it unnecessary to enter upon a consideration of their validity in law. Therefore, the rules in all the cases will be discharged, and the verdicts supported as they were found."

The present appeal was from this judgment, so far as it related to this action.

Sir Fitz-Roy Kelly, Q.C., Mr. Serjeant Channell, and Mr. W. H. Clarke, for the Appellant.—At the time when these gaming contracts were entered into, they were legal. It has been so held by this Court, *Ramloll Thackoorseydass v. Soojimnull Dhonnull* (4 Moore's Ind. Ap. Cases, 339), *Doolubdass Pettamberdass v. Ramloll Thackoorseydass* (5 Moore's Ind. Ap. Cases, 109). The Act of the Legislative Council of India, No. 21, of 1848, for avoiding wagers had not then passed, and, therefore, does not apply to this case. The question, then, is simply one of construction. The terms of the contracts are similar in their nature, and they must be determined [261] upon legal principles, by endeavouring to discover what was the real meaning of the parties. Now, we submit, that the true construction of the term "the 30th of November," was intended as a mere description of the period at which the lelaum, or first public Government sale of opium usually took place, and that whether such public Government sale did or did not take place in the month of

November, 1846, that circumstance formed no part of the risk contemplated by the wagers. The actual time of sale was immaterial, the subject of the contracts being a sale of the quantity and description of opium advertised in the *Calcutta Gazette* of the 29th of August, 1846, at the next Government sale, whenever such sale should be effected. Although, therefore, the month of November, 1846, was mentioned in the contracts, the sale contemplated by the contracts was not limited to that month only. Suppose the 30th of November had been a Sunday, or a fast-day, that fact would not have avoided the contracts. —[Sir William H. Maule: Your argument is that the language of the contracts import that the opium was to be the opium of the 30th of November, 1846, and not that the sale is to be on the 30th of November?]

—The contracts clearly mean that construction. Mr. Pemberton Leigh: Does the contract mean more than that it should be the opium that would be for sale on the 30th of November?]

—The first actual public Government sale of opium, namely, that of the 7th of December, 1846, which took place after the making of the contracts, satisfied the terms of the contracts, and upon a certain average being realised thereon, the event on which the Appellant had wagered was determined in his favour, and he was [262] entitled to recover the difference between the bonuses or premiums paid him under the contracts and those averages.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Respondents. —No sufficient grounds are shown for disturbing the verdict or altering the judgment appealed from. The construction now put by the Appellant is unsound, for it cannot with any reason be argued that the description of the day of sale mentioned in the contract is to be regarded as mere surplusage. In *Daintree v. Hutchinson* (10 Mee. and Wels. 85), which was an action upon a wager upon a coursing match, Baron Alderson lays it down, that if a specific day be fixed for running a match, that would have limited the match to the day. Now, the Government sale, which was to have taken place on the 30th of November, never took place; the wagers were, therefore, off.

Sir Fitz-Roy Kelly, replied.

Their Lordships reserved judgment, directing the following appeal, which arose under similar circumstances, to be argued.

RUGHONAUTH SAHOI CHOTAYLOLL,—*Appellant*; UGGERCHUND and HURRUCKCHUND,—*Respondents*.

This case differed in no respect from the former appeal, the facts being similar, except as to the form [263] of the contracts and the parties. In the view their Lordships took of the case, the distinction was immaterial, and it is unnecessary to state the particulars of the case.

Sir Fitz-Roy Kelly, Q.C., Mr. Serjeant Channell, and Mr. W. H. Clarke, appeared for the Appellant; and Mr. R. Palmer, Q.C., and Mr. Leith, for the Respondents.

Their Lordships' judgment in both appeals was delivered by

The Right Hon. Sir John Patteson.—These cases are in substance really one of construction only, as to the meaning of the contracts which the parties have entered into upon certain opium wagers. Undoubtedly, there is hardly anything which is more difficult than to arrive at a certain conclusion with regard to the meaning and intention of the parties to a written contract, if the words of the contract are in any way capable of more than one interpretation. It is very difficult to do so; but still their Lordships are, in this case, obliged, as well as they can, to ascertain from the contracts themselves and the surrounding circumstances, what was the meaning of the parties.

Now, looking at the words of the contracts, and at the surrounding circumstances of the case, their Lordships are of opinion, that the contracting parties intended to make a wager as to the average price of opium at the first Government sale, without any pro-[264]-vision that such sale should necessarily take place on "the 30th of November," and no other day. The 30th of November had been advertised in the *Gazette* of the 29th of August, 1846, as the intended day of the first sale; and it appears that it really happened that no alteration was made in the day so advertised. The parties, therefore, would naturally in their contracts refer to the advertisement in the *Gazette* by way of description. If they had intended to confine their contracts

to what should happen on the 30th of November, and no other day, they certainly would have used some words of limitation so confining it, but no such words are to be found. The words are, "the first public sale," the addition of "the 30th of November" being introduced, as we are of opinion, only as a description, as if it had been, which sale is advertised now on the 30th of November. It appears by the evidence that no particular chests are marked or set apart for any particular sale, therefore it seems hardly likely that the parties intended by the words "the 30th of November," to describe the particular opium, then to be sold, and not to refer to the day of sale. It appears by the evidence of the witness Welch, that sufficient opium had not arrived for all the sales contemplated in that year, though there was then sufficient for the first sale.

Such being the construction to be put upon the contracts when made, does the alteration made in the conditions of sale, after the attempted sale of the 30th of November proved abortive, do away with the contracts? Their Lordships think not. Their Lordships so thought in *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass* (5 Moore's Ind. App. Cases, 109), and there is nothing in the present case lead-[265]-ing to the conclusion that the parties contracted with express reference to the conditions which are published in the Gazette of the 29th of August. In truth, the only material addition to the conditions of the sale on the 7th of December was the twelfth condition, guarding against the mischief which had rendered abortive the intended sale of the 30th of November.

The case of *Daintree v. Hutchinson* (10 Mee. and Wels. 85) is no authority on the point raised. There the day was decided to be immaterial, and the *dictum* of Mr. Baron Alderson in that case merely shows that where parties make a specific day essential in their contract they must abide by it. But the question here is, whether the parties did make a specific day essential, and their Lordships think that they did not. There is an expression in that case which is adopted in the judgment of the Court at Calcutta, which, perhaps, it is as well to mention. The Court there say, "In that case, the Newmarket Meeting was considered on the evidence to be in the nature of a moveable feast," not fixed definitively for a particular day, but dependent in some degree on circumstances. Now, certainly, we do not feel disposed to agree with that, because, in truth, a moveable feast is as well known and as fixed at the beginning of the year, as any feast which is not moveable. All moveable feasts depend upon Easter. It is known what day Easter will be in the years 1857 and 1858, and for years to come, if it is calculated. Therefore, all feasts which depend upon Easter, are as well known as Christmas or any other day which is not commonly called a moveable feast. That expression, therefore, seems to us to be incorrect. Under these [266] circumstances their Lordships will recommend Her Majesty that the verdict should be entered for the Plaintiff on the issue of *non assumpsit*, and on the special counts for the damages which have been found in each case. And we think the verdict should be entered for the Defendants in each case on the counts for money had and received.

Mr. R. Palmer.—Your Lordships did not say what your intention is about the costs. I believe, under the present Rules, if nothing is said the Appellant gets the costs of the appeal (see, however, upon this point, *Lindo v. Barrett*, 9 Moore's P.C. Cases, 456, where their Lordships held that to entitle a successful Appellant to costs, application must be made at the hearing for their allowance).

The Right Hon. T. Pemberton Leigh.—All we can do is to give the costs according to the ordinary rule.

By the Order in Council made upon the appeal, it was ordered, that the appeal be allowed with costs.

[Mews' Dig. tit. VENDOR AND PURCHASER, A. 3. *Time when of the essence of the contract*, a. *By original stipulation*. S.C. 10 Moo. P.C. 124; 4 W.R. 317. See note to *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass*, 1850, 5 Moo. Ind. App. 136.]

[267] JOHN DOE, on the demise of RAJAH SEEBKRISTO and Others.—*Appellant*: THE EAST INDIA COMPANY. *Respondents* * [Feb. 2 and 4, 1856].

On appeal from the Supreme Court at Calcutta.

The East India Company, as representing the Indian Government, have a freehold in the bed of navigable rivers in India, and to the land between high and low-water mark.

Land formed by gradual accretion belongs to the owner of the adjacent soil.

By the Hindoo law a verbal grant of real estate is good, if followed by possession by the grantee.

The grantors of real estate were Hindoos, and the grantees, the East India Company. Held, that as the Hindoo law which governed the grantors' rights allowed a verbal grant, the law of the grantees regulated the matter, and, as there was possession under the grant by the grantees, the grant was valid.

Ejectment by the Appellant against the Respondents for recovery of a piece of land situate at Hautollah, in Calcutta, bounded and abutted on the north by a ghaut known as Ahereetollah ghaut, or Rajchunder Doss's ghaut; on the south by land in the possession of the Commissioners for the town of Calcutta; on the east, partly by land belonging to the lessors of the Appellant, and partly by the Strand Road; and on the west by the river Hooghly. This piece of land was claimed by the lessors of the Plaintiff as an accretion to certain land which they asserted to be their property.

The Appellant, the lessors of the Plaintiff in the Court below, were Rajah Seebkristo, Rajah Kalee-[268]-kristo, Rajah Dabeekristo, Rajah Opoorbokristo, Rajah Nreepaindorkristo, and Rajah Noraindorkristo, sons of the late Rajah Rajkissen, Kistnochunder Ghose and Kistnosokah Ghose, Woomasoondery Dossee, Bohoo Rane, the widow of Rajah Madubkissen, a son of Rajah Rajkissen and Gopaullohl Tagore, as executor of the Will of Rajah Jaudubkissen, another son of Rajah Rajkissen.

The Respondents, who took up the defence as landlords, pleaded simply "Not Guilty," and thereupon issue was joined.

The action was tried before the full Court on the 22nd and 23rd of March, 1854, when it appeared from the evidence that the river Hooghly was a navigable tidal river, subject to the daily flow and reflow of the tide; that at different times the Respondents had taken measures for the public improvement of the town of Calcutta, and in the year 1824, took steps with that object through a Committee, which was called the "Lottery Committee," in consequence of the funds required for the intended improvements having been provided by means of a lottery. That previously to the year 1824, a narrow and inconvenient road followed the course of the Hooghly on its left or eastern side, as it flowed from north to south, and the "Lottery Committee," acting on behalf of the Respondents, altered and improved this road through the whole length of the town of Calcutta; and at the place in question widened, and in parts straightened, the old road. At that place the new road thus formed was called the Strand Road. In executing these improvements, the "Lottery Committee" raised the ground to the west, and built along the west side of the Strand [269] Road a strong retaining wall, with a paved embankment sloping off to the west into the river, and bounding the river by a defined line. This wall, with its embankment, adjoined the piece of ground in dispute. The case set up by the Appellant at the trial was: that in the year 1778, the Respondents made a grant to Nubkissen, the grandfather of the principal lessors of the Plaintiff, of the Talookdarry of Sootalootee, which, on the death of Nubkissen and Rajkissen, his son, passed to Rajkissen's sons: that this grant passed to the lessors of the Plaintiff the freehold of the lands within Sootalootee: that the place where the retaining wall was built by the Respondents, the Talook Sootalootee extended on its western bound-

* Present: Members of the Judicial Committee.—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

dary to the high water-mark of the river Hooghly: that between the old road and the river Hooghly there was, in 1824, a strip of ground within Sootalootee, which was let out as golahs for bamboos brought down the river Hooghly for sale; that in 1824, Rajkissen's sons allowed this piece of ground to be taken for widening and improving the road; but that, by so doing, they did not part with the soil on which the additional width of the new road was made, and still retained in themselves the property of the same: that the terms on which the owners of the Talook consented to the land being so used by the Respondents were mentioned in a communication, partly verbal and partly written, which passed at the time between the "Lottery Committee," who then represented the Respondents, and Rajah Seebkissen and Kistnoochunder Ghose, the executors of Rajah Rajkissen. The only evidence at the trial of what was stated in this communication was the deposition of a witness named Kistnoochunder Ghose, who deposed that [270] Roopnarain Ghosaul, a person on behalf of the "Lottery Committee," came to him and Rajah Seebkissen, and said "the Lottery Committee were desirous of getting the ground for the purpose of constructing a road. I said the land belonged to our estate, that there was no objection to take the land provided all our right and title in the land belonged to us, and that no loss or injury inured to us. We gave some land to make the road, reserving the bamboo-market to ourselves, and all other ghauts should not be encroached upon, but reserved to us, and the hauts that were there, and land was given up for the road. We did not give up the land on the river side; there was a little portion of the land given where these bamboos were placed. Had we given the land on the river side, the bamboo mart would be injured;" and in a letter dated the 16th of June, 1824, by the Secretary to the "Lottery Committee" to Rajkissen's executors, they said that the new road would not interfere with the haut at Hauteollah, nor with the advantages derived from their private ghauts in Sootalootee, of the nature of which the "Lottery Committee" however had no means of judging, nor any authority to decide upon them; that as far as their operations were concerned, they had the satisfaction of knowing that all their property in that neighbourhood would be greatly enhanced in value in consequence of them. This letter then proceeded, "in exchange for the high ground which was occupied by your tenants on the river side, and is required for the new road, you will receive all the surplus that may remain between it and the land in your possession on the east side of it;" that afterwards, the waters of the river Hooghly gradually retired opposite and adjoining the [271] land which had been so taken for widening the road, and that the piece of ground in question having been left by the gradual retirement of the river, was an accretion to the adjoining land, the property of which they insisted was still in the family of Rajkissen, and, as a consequence, belonged to the lessors of the Plaintiff; and in support of their case, they relied on the fact that no written conveyance of the soil of the land for widening the new road was forthcoming, and that after the completion of the Strand Road, the whole space between the retaining wall and the eastern boundary of the Strand Road had not been used for traffic, but a strip of land on the west side of the Strand Road, and adjoining the wall, had been marked off by posts, so as to separate it from the part actually used for traffic: and that the family of Rajkissen had been allowed to use or let out places on this strip as golahs for bamboos, which were still sold there. The Respondents met the case of the Appellant by evidence to show that the piece of ground in question had not been formed by an ordinary change in the bed of the river, but by acts done by conservators, with the object of forming new ground: and they brought evidence to disprove any title in the lessors of the Plaintiff to the adjoining strip of ground, or to the site of the boundary wall; by proving, that the whole space between the retaining wall and the eastern boundary of the Strand Road was, in 1824, paved in a corresponding manner, and that the subsequent use of the strip of land along the wall for bamboos had been by the express permission of the Respondents. They also contended that the character and nature of the improvements made, and the subsequent enjoyment by them, were [272] inconsistent with the suggestion that any property in the freehold was in the lessors of the Plaintiff, and submitted that the evidence adduced by the Appellant did not establish any of the facts, on the ground of which his claim was made, nor warrant in law the consequences attempted to be deduced from them.

The Court found a verdict for the Appellant, leave being reserved to the Re-

spondents to move to set aside the verdict and to enter a nonsuit, or a verdict for the Respondents instead. The Respondents afterwards moved for and obtained a rule to show cause on those terms, which was, after argument, by an Order bearing date the 4th day of April, 1854, made absolute, for entering the verdict for the Respondents, with costs, against the Appellant.

The judgment of the Court, on making the rule absolute, was delivered by the Chief Justice, Sir Lawrence Peel, as follows:—"We are of opinion that the lessors of the Plaintiff have not made out their title to the land, which is the subject of this action of ejectment. The land is part of that which was the bed of the river, and the lessors of the Plaintiff can have no title to it unless by accretion. Whether the ownership of the soil of the bed of the river is in the Crown, or in the Defendants, is unimportant with regard to the decision of this cause. The title by accretion cannot be made out, unless it be shown that the land to which the accretion adhered is the land of the lessors of the Plaintiff. To establish this they made out their claim thus. They proved that a grant had been made to a party, under whom they claim by the Defendants, of a Talookdarry, the boundary of which they proved to be the high-water mark of the [273] river. Then, under this grant, they made claim to the soil down to that boundary, and claimed this land over which the water once flowed as an accretion to that adjacent land. The waters retired gradually: it was not a case of derelict land; and though that withdrawal of the waters was aided by the acts of Defendants in various parts of the river contiguous, yet the proximate and not the remoter cause is alone looked to, and the lands were still gained by accretion, though that accretion was aided by human agency. If the waters had been bounded out, the character of an accretion could not have been given to this land. It was urged for the Defendants, that as they made the wall on their own soil, the accretion was an accretion to their soil. This in a certain sense is true; but the consequence would by no means have followed, if the lessors of the Plaintiff had established the rest of their case, that they could not, therefore, claim this accretion. Any one who possesses land on the banks of a river (and there is no difference in this respect between navigable rivers and rivers not navigable), has a right to the flow of the water in its usual course; subject to that right, the owners or conservators of the river have the right of repairing the banks and improving the course of the river. The erection of a wall or other bound between the land on the edge of the water, and the water intercepting the actual flow, must either be an invasion of the right of the landowner to the usual flow of the water, or a mere repair and support of the banks. In the latter case it would not infringe on his rights, and in the former it would; but in the former case, as no one can take advantage of his own wrong, the right could not be affected by the circumstance, unless by the [274] laches of the sufferer. In a navigable river the erection of anything in the bed of it would be a nuisance if it impaired the free course of the navigation; the mere erection without that consequence would not be so. In *The King v. Russell* (6 Barn. and Cr. 566), which case, though it was disapproved of and overruled on one point, namely, the question whether a set-off, as it were, could be made of public benefit against public detriment, in considering the question of nuisance or no nuisance by such an erection, which, in fact, impeded the course of navigation; yet it has never been questioned as to the general position, that nuisance or no nuisance by such an erection is a question of fact, which the mere fact of the erection alone does not solve in favour of the existence of the nuisance. In like manner, where the soil belongs to the owners of the land on either bank *ad medium filum aque*, as it does in general by the English law in non-navigable rivers, where the tide does not flow, the right of either proprietor on either side of the river to his own soil, though it be the bed of a river, is not restrained, unless in so dealing with his own he interfere with the rights which are as it were of common right, to the flow and use of the water. If he do so interfere, then it is an actionable wrong. In this case, however, there is no ground for saying that any wrong was done either designedly or actually, in the erection of this road and its adjuncts: that which was done was done with the full consent of the owners of the soil adjacent; nor is there any proof of any interference with the navigation, or of any encroachment on any private right to the flow or use of the water. The whole question turns then on this, namely, the ownership of the soil immediately next to

[275] the accretion as it began. X The lessors of the Plaintiff admitted a gift of the land to the Defendants (a) by [276] them for the purpose of making the road. It was at the trial at first contended that the gift was intended to [277] be merely a gift of an easement, a dedication of a way to the public with a reservation of the right of property in this soil itself; but the witness did not state it so, and though he may have meant to give with a reservation of other rights, yet the subject of accretion was not in fact present to the minds at that time either of donor or donees, and the accretion in fact has been attributable to the acts and cost of the Defendants. This distinction between the gift of the property in the soil and the gift of a right over it is now abandoned, and it is candidly admitted that the distinction was not likely to be, and was not present to the mind of the donor. X Then the question is, what is the validity in law of this gift, and what was its extent! for if it was a good grant and left no space belonging to the donors intervening between the ground given and the then high-water mark, the [278] accretion would then be an accretion to the Defendant's own soil under the circumstances of his case. Now the donors are Hindoos; it is true the donees are the East India Company, that is, British subjects, and they are Defendants, and where the Plaintiff is a Hindoo, and the Defendant a British subject, the law to be applied to the case, in the absence of agreement to the contrary, is the law of the Defendant. By the Hindoo law there

(a) Mr. Ritchie, the counsel for the lessors of the Plaintiff, after the delivery of the above judgment, handed to the Court the following paper in explanation of the admission referred to by the Court, as having been made by him:—"My admission was not intended to extend to an admission of an actual gift of the land by the lessors of the Plaintiff to the Defendants, or to an abandonment of the distinction between the gift of the property in the soil and the gift of a right over it, as might be inferred from the passages of the judgment in question. I fully admitted on showing cause, that the distinction was not likely to be and was not present to the mind of the executors. But I contended that that circumstance did not of itself give the right in the soil to the Defendants, that the distinction would have been called to the attention of the executors if they had been required to execute an actual grant or gift, in which case they probably would not, without compensation, have parted absolutely and for all purposes with the soil, especially as they were mere executors and trustees for infants; that it was clear that the executors, although they intended to give up to the East India Company full possession of the land for the purpose of making a public road, had no intention of giving it to the Company for any other purpose; that the use of the land for any other purpose would have been wholly unauthorised by what took place between the Lottery Committee and the executors; that if within a month or other short period after the commencement of the road the Defendants had applied the land to any other purpose than that of a public road, as, for instance, by building go-downs or inclosing it, the lessors of the Plaintiff might have maintained trespass or ejectment; that the only ground on which they could now be precluded from doing so would be the adverse possession of more than twenty years of the soil over which the actual road passed; and that the legal effect of the Defendants taking possession of the land, and constructing the road without any more definite understanding than that disclosed by the executor's evidence, could not be carried further than a possession for a particular purpose by licence, which possession, it might be admitted, had become adverse by reason of the impression under which the Lottery Committee entered, viz. that the Rajahs intended to give them the land itself, for the purpose of making the road; and which possession having continued for more than twenty years, could not now be displaced by the lessors of the Plaintiff, as proprietors, even if a trespass or encroachment, of which the public could complain, had been committed by the Defendants; and I certainly did urge under another head of the argument, while contending that the rights of the Company, whatever they were, were limited to the particular portion of the ground actually used as a road, that even admitting an actual grant to the Defendants, of the land over which the road passed, that grant would carry nothing with it but the land used as a public road, and would leave the whole land between the road and river not required for the purposes of a road, but used all along by the lessors of the Plaintiff's tenants, the property of the lessors

is no distinction between moveable and immoveable property as to the mode of granting it. It, therefore, resembles the case of a grant by the English law, of chattels real or personal, before the Statute of Frauds, which then might as to both have been without writing or deed. (See *Shepherd's Touchstone*, tit. "Grant.") The grantor, then, has capacity to grant, and the thing is grantable without deed or writing by the law of the grantor, and can pass out of him by such a grant as this; and by the English law a grantee can gain the subject of the grant by his assent to the grant. Here there has been also possession, which *quodam modo* the Hindoo law requires. Whether by the English law delivery, or what is equivalent to it, is essential to the validity of a gift *inter vivos*, must be treated as a doubtful point. *Irons v. Smallpiece* (2 Barn. and Ald. 551) decided that without deed, or delivery, or possession, the grant was invalid against the personal representatives of the grantor. Doubt was always entertained about that decision, and these doubts have been strengthened by the observations of a learned reporter, Serjeant Manning, and by some late judicial *dicta*, for the case does not appear to have been overruled. There are not wanting, however, analogies in the English law to support the decision in *Irons v. [279] Smallpiece*, which is certainly in harmony with the provisions of many bodies of law. But here there is possession under the gift, and, therefore, the requisitions of both laws are fulfilled, supposing *Irons v. Smallpiece* to be law. Therefore, it appears to us that the grant, though not in writing or by deed, was

of the Plaintiff, there being, as I contended, no evidence of a grant to the Defendants, except that derived from the user, coupled with the letters of the Lottery Committee, and any grant, therefore, that could be presumed, being co-extensive with and not more extensive than the user in point of quantity: but this admission was made, or at least was intended to be made, for the sake of argument only, and without any intention to make an admission of a fact which, on another branch of the argument, I, with Mr. Welch (the junior Counsel), who was with me, contested."

In consequence of this explanation, the following note was added by the Chief Justice to the judgment:—"Mr. Ritchie, the leading Counsel for the lessors of the Plaintiff, has stated to me, and from the confidence which I repose on his word I have no doubt that he has truly stated, that in that part of the judgment which is marked between the marks X X, I have mistaken the extent of the admission which his argument involved. I have, therefore, annexed to the judgment of the Court his statement, including an argument in support of it of the extent to which he meant his admission to go.

"The Court adheres to the opinion which it expressed that the grant was of the land itself, and not merely of a right over the land, though no doubt the grantors meant the land to be used for a road. This was intended also by the grantees, and it was not altered until the arrangement took place, by which the land marked by the saul posts spoken to in the evidence was devoted to the purpose of laying the bamboos. As this was done by mutual consent, it worked no breach of condition or forfeiture. And it appears to the Court to be really immaterial whether the grant to the East India Company bore the limited character now contended for, or that which our judgment ascribes to it, because in either view of it, it equally is pregnant with evidence of assent to the road-making, and consequently the construction of the road, that is, of part of it, on the Defendants' own soil, which the evidence for the defence we think clearly establishes, involved no violation of any right of the lessors of the Plaintiff, and unless it did, or unless it could be treated as a mere erection of a river bank or mound, we think the accretion must follow the title to the land in that part.

"Our view may be explained thus:—

"A. gives to B. either the soil itself or the right for the public to pass over the soil as part of a public road between C. and D.; B. incorporates with that for the same purpose, with the assent of both, his land between D. and E.; then a portion of what would have been such public road is taken out of it for the use of A. and his tenants, but leaving on the side towards the river a small portion belonging to B.: how is B.'s title to that land got out of him by any dealing with the part so taken out, whether that dealing be viewed as founded on right, or as adverse possession?"

valid, notwithstanding the character of the Defendants. We know of no authority opposed to this view, and on principle we think that where the grantor means to grant by his own law, and can grant effectually by his own law in the way in which he makes the grant, and where the grantee can take by his law under a grant, without execution of any deed or writing whatever, that the oral gift is valid, though the law of the grantee is to regulate the matter. Every Court should labour to support rather than to defeat the acts of the parties *inter se*, where they involve no violation of the law. Parties may waive their own law, and act under another by mutual consent, where the law contains no prohibition to such a course of dealing. And it cannot be laid down as any part of the English law, that a British subject cannot accept a gift unless it be made him by the donor in that mode in which he himself, if donor, must grant a thing of the like nature. The gift, then, being in our opinion valid, what was the extent of the land given? We pay all proper attention to the argument, that there was no consideration for this transfer, and certainly we should not be justified in stretching it. But the contemporaneous acts of the parties afford, we think, a sufficiently clear light as to the extent of the grant. The cases cited by the Defendants' Counsel have much reason for their support, and they are undoubtedly law. The making of [280] this road was one continuous act, and the line marked out above and below this particular land, and the acts done on that line in laying down the guns which were to be the support of the lamp-posts, are all important; there is no ground for imputing encroachment, for the evidence shows enough in the propinquity of the grantors, the interest they took in the matter, and the publicity of the matter, to forbid any such supposition. Mr. Gray speaks to the foundation being made for these guns, and the object of them. The argument as to the width of the road, and the evidence also furnished by the inspection of the map, both lead to the conclusion, which is also confirmed by the evidence as to the making of the road, that the road as it was originally designed and made, really passed beyond the limits of the land, which was the subject of the gift, and that it was made partly on the given land, partly on the land adjacent.

"It is in evidence that soil was brought from a distance, and thrown down where the water ordinarily flowed; the road was a raised road, formed so as to be safe from the assaults of the river: in any proper mode of making such a road, it would be made as the evidence for the defence says that it was. Consequently we think that in reality the road, as marked out, extended beyond the given land, and that no intermediate space belonging to the Plaintiff existed, to form a nucleus for an accretion, as the lessors of the Plaintiff contend. Then the subsequent possession of the lessors of the Plaintiff as to the land covered by the bamboos is explained by the evidence. It proceeded on an arrangement made after the line was traced out, by which part of that which was taken for road, and would, if dedicated, have become so, was [281] reserved for the lessors of the Plaintiff. The public, in fact, never acquired a right to pass over the soil where the bamboos have been placed, for the arrangement and the use preceded, from the evidence, the opening and occupation by the public of the road; but this arrangement cannot be extended beyond its object, and the use is the measure of that right; the use, however, is not over ground co-extensive with the ground originally taken and marked out; so that in any way of viewing this matter, either as a regrant of the soil, or as an adverse possession by the lessors of the Plaintiff; still the soil so occupied, not reaching down to the water line, but having another boundary, cannot be the nucleus for an accretion.

"We have viewed this case, adopting the version of the lessors of the Plaintiff as to their original ownership, which the evidence in our opinion confirms. The Defendants contend, that the lessors of the Plaintiff had no land along the river line here, unless it were the old road. But that is quite inconsistent with the acts of the Lottery Committee. A particular complainant complains to them that he has been wronged by their taking part of his ground for the road; they write to the lessors of the Plaintiff to this effect:—'We considered his claim as groundless, and thought he had no title in it, and appeal to you whom we consider as the proprietors.' But would they have answered in this way on the application of a man like this Petitioner, had he put forward the impudent assertion, that he was proprietor of the old road, which now the Defendants say was all that the lessors

of the Plaintiff possessed! Very probably the rights between the Talookdar and the Pottahdars were not undisputed, or at all clear; indeed the case quoted [282] seems to show as much; but if the Committee had recognised the lessors of the Plaintiff as having a bare seignory, or nothing in the character of land but the bare soil in an old road, they would hardly have expressed themselves as they did. Probably there was much land occupied along the line, and probably some under disputed title, and probably some vacant, or disputed as to its being vacant or occupied. The grant of the Company, in our opinion, confers a title, in express terms, to all lands within the limits of the Talook, which were in the nature of waste or unoccupied lands, over which no rights existed in any persons occupying or claiming by title derived from or superior to the preceding Talookdars, that is, the grantors. This is, at all events, good against them, and it would be vain to attempt to struggle against the words of such a grant by arguments founded on the original or present character of Zemindarry or Talookdarry rights, even if well founded. The deed of grant and the acts of the grantors, the East India Company, show that they treated the Talookdar, their grantee, as having some rights in the soil; and neither a Talookdarry or Zemindarry right has anything in its nature repugnant to such a supposition. Rule absolute, and verdict entered for Defendants."

The present appeal was from this judgment.

Sir Frederick Thesiger, Q.C., Mr. Bovill, Q.C., and Mr. Paterson, for the Appellants.—The accretion in question pertained to land which was, at the time the accretion began, the property of those under whom the Appellants claim. It was an imperceptible accretion, and, therefore, belonged to them as proprietors of the adjoining soil. This is so [283] by the Hindoo law, *Mussamat Iman Bandi v. Hurgovind Doss* (4 Moore's Ind. App. Cases, 403), as well as by the law of England. *The King v. Lord Yarborough* (3 Barn. and Cr. 91. S.C. nom. "*Gifford v. Lord Yarborough*," 5 Bing. 163), Woolrych "*On Waters*," p. 26. Before the new land was gained by accretion, the lessors of the Plaintiff, the Appellants, had a right to the soil of the land along the river Hooghly, a navigable river, and that included the river bank. No evidence has been given to show that such right had ever been taken out of them. It was necessary for the Respondents, in order to displace the Appellants' right, to have shown either a valid grant of the soil of such land, or an adverse possession thereof for twenty years and upwards, which they failed to do. The verdict was the result of a misapprehension of the Court as to the admission by Counsel of the grant (see *ante* [6 Moo. Ind. App.], p. 275). There was only a consent to the taking and using the land for a road, and a dedication of it to the public for that purpose, and the acts of ownership done by the Respondents and relied upon by them as acts of ownership, were done only with the consent of the lessors of the Plaintiff, and were not adverse to their title to the soil of such land. The verbal grant to the Respondents, even supposing that the grantors intended to convey to them an interest in the soil, is invalid by reason of its not being a conveyance by deed or writing, or founded on any consideration to pass the proprietary right in lands situate in Calcutta to the Respondents, a British corporation; the law of England being the law applicable to the case. It is true that by the Hindoo law [284] land is considered as a chattel, there being no difference in that law between real and personal estate, 1 Strange's "*Hindu Law*," p. 17; yet, by the English law, a verbal gift of a chattel without actual delivery does not pass the property to the donee, *Irons v. Smallpiece* (2 Barn. and Ald. 551). Assuming it to be a valid gift, it was only a grant of land for making a public road, and would carry nothing with it but land actually used as a public road, and would leave the whole of the land not so used the property of the lessors of the Plaintiff.

Mr. Wigram, Q.C., Mr. Forsyth, and Mr. Melvill, for the East India Company, Respondents.—The chief and only question really is, to whom the ownership of the bank and soil immediately adjacent to the land which has been gained by accretion, belongs. The East India Company, as representing the Indian Government, are owners of the freehold of the bed of the river Hooghly, subject to such rights as the public have to the use of a navigable river. They are also owners of the land under the grant of 1824, adjoining to the land in question, and, the

accretion being imperceptible, the land so acquired would belong to the Respondents as owners of the adjoining soil. Ben. Reg. XI. of 1825, sec. 4; Hale "*de Jure Maris*," pp. 5, 142, who refers to Bracton, lib. 11, cap. ii.; Woolrych "*On waters*," p. 26, The Institutes, lib. ii., tit. 1. In fact, the ground, which was part of the bed of the river Hooghly, was formed by the acts and works of the Respondents. The *onus* of proof lay upon the lessors of the Plaintiff, who having failed to prove a title, the verdict ought not, upon a question of fact, to be disturbed.

[285] Sir Frederick Thesiger replied.

The Right Hon. Sir William W. Maule.—This is a case apparently of considerable intricacy, and has the appearance of raising some questions of difficulty, both in point of law and of fact. But ultimately, upon being closely looked into, and the documentary and parol evidence being considered, particularly with reference to the judgment of the Court below, the question appears to their Lordships to turn upon a matter of fact which was the subject of inquiry in the Court below, and of the most unhesitating decision of that Court.

The land claimed has become land by way of gradual accretion. A question of law was raised, whether, supposing the accretion (granting it to be gradual) was one which had been contributed to, or even purposely contributed to, by the act of the Defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law.

The question, then, comes to this: assuming it to be such an accretion as that it belong to the proprietor to whom the adjacent land belongs, who was the person to whom the adjacent land belonged in this instance? Now, with respect to that point, the Court below in their judgment have given a clear opinion, particularly taking into consideration the explanatory part of the judgment: for some doubt having been raised, or some difficulty expressed by the Counsel for the lessors of the Plaintiff as to some [286] concession, or supposed concession, in his argument, being misapprehended, an explanation is given by the Court with respect to that circumstance, and the Court takes that opportunity, apparently, of describing explicitly, and so as to be unmistakable, the ground upon which their judgment actually depends, showing, that any misapprehension which there might be, of such concession, did not make any difference in their judgment; for even granting the Court had misapprehended this supposed concession, their conclusion ought to have been the same, and that for two reasons: the first, that notwithstanding Counsel retracted, or explained, the concession which the Court supposed he had made, the Court would have come to the same conclusion whether that concession was made or not, because they themselves would infer from the evidence, that there was a grant on the part of the Rajahs of the land to the East India Company, that is to say, about the year 1824 a grant of the land which is the subject of the transaction between the Rajahs and the East India Company. The Court came to the conclusion that if such a grant or Hindoo transfer of the land had taken place, it would make no difference in their judgment, upon the supposition that the land to which the accretion took place was land that never was the land of the Rajahs, but was the land always of the Defendants, the East India Company; and they say, the evidence shows that the new road and the new embankment, which was made about the beginning of the year 1824, by the East India Company, was made extending westward beyond the western boundary of the old road, and beyond the high-water mark. They say the evidence, combined partly with measurements and [287] partly with the statements of the witnesses, shows that the new work, that is, the upper surface of it, including that part which is used as a traffic road, and that which was constructed in continuity of the traffic road, and which now is used for bamboo golahs, the whole of that land was shown by the evidence to extend considerably to the westward of high-water mark. The perpendicular retaining wall was itself built upon land between high and low water mark, that is, upon the East India Company's land, a portion, therefore, as to the rest, which may properly be called a wall (because a wall made against a river on the sea very commonly

nas, and ought to have, on the side which is next the water, a slope more or less gradual), would still more be upon the East India Company's land.

Then the Court discusses the question, whether the East India Company, who must be taken to be the owners of the soil, could properly do this; the answer is, that they might properly do it except so far as they might interfere with the navigation of the river (which no one seems to have suggested), and except so far as they might interfere with the rights of parties adjoining the river. Now it appears that they dealt with some private persons and paid them for their land; as far as the Rajahs had any interest in respect of their being the owners or lords of the Talook of Sootalootee, they obtained their consent probably because their property would be improved by the new works. That is the way in which the Court explains the East India Company's doing this, and shows that they did it rightfully; and that being so, the case then is, that the East India Company, being the owners in fee of a certain portion of land between the high and low water [288] mark which was subject to certain curvatures for navigation and otherwise, with the leave and consent of those who were interested, altered the character of the land. Instead of making the land a portion of the bed of the river, they made it permanent dry land: there is, therefore, a portion of permanent dry land westward of high-water mark, and forming a part of what was anciently the bed of the river, which is now part of the bed of the river, and that portion of land, according to the judgment of the Court below, which we think is well supported by the evidence, is the part to which the accretion in question has taken place.

The question, therefore, is reduced to this: who is the owner of the land immediately contiguous to the high-water mark in the river at this place? The answer is, those persons who were owners of that portion of the bed of the river which now constitutes dry land, and they are the Respondents, the East India Company.

We think, therefore, it is clear enough that the Court below came to a right conclusion upon that matter of fact: at any rate Sir Frederick Thesiger could hardly in his reply carry the case so far as to say, that it was clear the other way. When we find that a Court having jurisdiction to try matters of fact have determined a matter of fact in a certain way, particularly a matter of fact of a local description, and to which their local knowledge might very much assist them, we should not be disposed to reverse the decision of the Court in determining that fact because we do not quite see our way to the same conclusion. Taking the evidence as it stands, illustrated as it is by the argument of the learned Chief [289] Justice in the judgment, and more particularly by the explanation which was elicited by Mr. Ritchie the Counsel, and by the argument before us, their Lordships have no doubt that it is their duty to advise Her Majesty that the judgment in this case should be affirmed, and with costs.

[Mews' Dig. tit. INDIA, 1. ADMINISTRATION AND GOVERNMENT: tit. SEA AND SEASHORE, 1. OWNERSHIP OF, ETC. S.C. 10 Moo. P.C. 140. See *Hindson v. Ashby* (1896), 2 Ch. 1; *Ecroyd v. Coulthard* (1897), 2 Ch. 554, 569; (1898) 2 Ch. 358.]

BAMUNDOSS MOOKERJEA,—*Appellant*; OMEISH CHUNDER RAEE and Others,—*Respondents* * [Feb. 11 and 12, 1856].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Upon the adjustment of an account of the principle and interest due upon a Bond, a Kararnamah or deed of agreement, was entered into by the parties, in which, besides the original sum, a further sum for interest accrued

* Present: Members of the Judicial Committee,—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

thereon was declared due and agreed to be paid off by instalments before a given time. Payments were made at irregular periods, which payments the Bondholder claimed to appropriate to keeping down the interest upon the whole sum composed of both the original principal sum as well as the sum mentioned in the Kararnamah as accrued thereon for interest. Held, upon the construction of the instrument, that the principal sum alone carried interest, and that all payments made in pursuance of the stipulations were to be applied in the first instance to satisfy such interest, the excess of the payments only being appropriated towards the liquidation of the principal sum due.

Costs awarded a successful Appellant, upon appeal and in all the proceedings in India from the commencement of the suit. The costs incurred in India to be recovered there.

This was an appeal from a decision of the Sudder Dewanny Adawlut at Calcutta, dated the 23rd September, 1850, made on an appeal from a decree of the Principal Sudder Ameen of the Zillah Court of Nuddeah, in a suit in which the Appellant was Plaintiff and the Respondents were Defendants. The suit was founded upon a written agreement called a Karar-[290]-namah, made in July, 1833, between the Appellant and the Respondent, Omeish Chunder Rae, by which he, on his own account, and as guardian of the other Respondents, bound himself to pay to the Appellant, in the manner and at the times therein mentioned and provided, the sum of Rs. 34,628. 8a., together with interest. The Appellant claimed in the suit the sum of Rs. 35,703. 4a. 10g. as the amount of the balance of the principal and interest then remaining due and unpaid, after crediting in account certain payments made at various unequal and irregular periods by the Respondents, or on their account, to the Appellant, after the making, but not in accordance with the terms and conditions of the agreement, and without any directions having been given by the Respondents as to the application thereof respectively.

There was no dispute between the Appellant and Respondents as to the fact of the making and execution of the agreement, or as to the sum of Rs. 34,628 being the actual amount due at the time of the making thereof, or as to the amount of the several payments subsequently made on account by the Respondents. The only question was upon the construction of the Kararnamah, after-mentioned, and whether the principle insisted on by the Appellant of appropriating and applying the payments towards the liquidation of the principal monies and interest due upon this instrument was right and proper.

The facts of the case were as follows:—

Anund Chunder Rae, the father of the Respondents, a Hindoo inhabitant of Bengal, borrowed from the Appellants on the 20th Bysack 1237, B.E., the sum of Rs. 30,000, and executed a deed mortgaging part of his immoveable estate and property to the Appellant to secure the repayment of that sum, together with interest [291]—rest thereon at the rate of R. 1 per cent per mensem. He died without having repaid that sum, and indebted to the Appellant not only in the amount of principal money, but also in a further sum on account of arrears of interest accrued due thereon, leaving the Respondents his sons and co-heirs and Lukhee Dibah, his widow, since deceased.

The amount of principal and interest at that time due was, by agreement between the parties, calculated up to the 30th Assar 1240, B.E., (July 1833,) and the aggregate amount was ascertained and admitted by the Respondents to be, Rs. 34,628. 8a. On the same day the Respondent, Omeish Chunder Rae, for himself and as the manager of the joint family, and guardian of his brother, Purnoo Chunder Rae, and Bhogoban Chunder Rae, the other Respondents, who were then minors, and Lukhee Dibbah, in order to release the estate and property, voluntarily entered into and duly executed the Kararnamah, or agreement, upon which the suit was brought, which was as follows:—

“I, Omeish Chunder Rae, my father, and I, Lukhee Dibbah, my husband, Anund Chunder Rae, deceased, on the 20th Bysack 1237, pledged to you his 5 annas 6 gundahs 2 cowrees 2 krants share of Talook Turf Marm Jowanee, and executing a mortgage bond, borrowed the sum of Rs. 30,000, agreeing to pay interest

thereupon at the rate of R. 1 per cent. per mensem, and having appointed us as guardians and managers of his minor sons Bhogoban Chunder Raee and Purnoo Chunder Raee, died on the 10th Bysack 1239.

"We are unable at present to pay at once the money due under the Bond, with interest, and by redeeming the Bond release our property, and are also unable to pay interest at the rate of R. 1. You [292] have, therefore, remitted 4 annas per cent. per mensem of the interest of the money, and have agreed to take interest after the rate of 12 annas per cent. On making up the accounts, therefore, of what is due, by calculation of interest upon the above-mentioned sum of the Bond from the date of the Bond up to the 29th Poos 1237 at the rate of R. 1 per cent. per mensem, and from the 1st Maugh of the above year up to this date at the rate of 12 annas per cent. per mensem, after adjustment of the accounts, including interest, there appears to be due, together with interest, after deducting payments, that principal sum of Rs. 30,000 and Rs. 4,628. 8a. as interest, total Rs. 34,628. 8a. principal and interest, for which this Kararnamah is executed: that we will pay out of the said sum the sum of Rs. 4,628. 8a. due as interest on the 25th Maugh 1240, and from 1241 to 1250 within these ten years we will liquidate of that principal, Rs. 3000 per annum, and interest on whatever amount of principal remaining in balance each year at the rate of 12 annas per cent. per mensem, and having paid up the principal and interest we will redeem that Bond and this Kararnamah. Having concluded an arrangement on these conditions, we have of our own free will executed this Kararnamah. Whatever sum we shall pay at any time, it will be credited on the back of this Kararnamah. If we make any claim of payments other than those specified on the back of the Kararnamah, it will be inadmissible. The original Bond, signed by the late Anund Chunder Raee, remains in your hands. After having paid up the money we will take back that Bond. Upon these stipulations we have executed this Kararnamah."

After the making of this agreement the Respondents made several payments, on account of the Ap-[293]-pellant's claim, and which were respectively endorsed on the back of the Kararnamah, or agreement; but the Respondents did not pay the Rs. 4628, the amount of the arrears of the old interest, on the 25th Maugh 1240, B.E., nor did they pay the instalments of the Rs. 30,000 at the times and in the manner provided by the agreement; and on the expiration of the period of ten years mentioned therein there was due and owing to the Appellant a large balance. The Respondents disputed the Appellant's mode of calculating the balance as well as the amount thereof, and thereupon the Appellant brought this suit in the Zillah Court of Nuddeah against Omeish Chunder Raee himself, and as the guardian of Purnoo Chunder Raee and Bhogoban Chunder Raee, the other Respondents.

The plaint set forth the facts above stated, and made out the Appellant's claim to the balance in the following manner:—First, he claimed the original principal sum of Rs. 30,000, lent to the father of the Respondents, and agreed to be paid by the Respondents as aforesaid. Secondly, the Rs. 4628, the amount of the old interest admitted to be due at the time of the making of the agreement with the Respondents. Thirdly, interest on the principal sum of Rs. 30,000 at 12 annas per cent. per mensem up to the end of the ten years mentioned in the agreement, and from the expiration of that period, further interest on this principal sum after the original rate of R. 1 per cent. per mensem. And fourthly, interest on the Rs. 4628, being the amount of old interest due at the time of the making of the agreement, at the rate of R. 1 per cent. per mensem from the 26th Maugh 1240, B.E., up to the 27th Maugh 1241, at which date the last-mentioned sum of Rs. 4628, the amount of the old inte-[294]-rest, was cleared off. The Appellant, in his plaint, allowed against these sums the payments made on account, appropriating and applying those payments in the first instance in keeping down the interest from time to time as it accrued due.

The Respondent, Omeish Chunder Raee, by his answer, stated that he owed the Appellant the sum of Rs. 13,953. 14a. 15g. only, under the agreement sued on; he alleged that the Appellant was bound to apply the amount paid in each of the ten years, after the first of these years, to the reduction of such balance of the principal sum of Rs. 30,000 as remained due in each year, and that he was entitled to charge interest on such balance only after such deductions; that taking the accounts in

this way, the amount of the principal sum of Rs. 30,000 would appear to have been overpaid by the sum of Rs. 1202 at the end of the ten years; that this last-mentioned sum of Rs. 1202, and the amount paid in 1240, B.E., the first of the ten years, ought to be applied towards the reduction of the Rs. 4268 acknowledged to be due for interest at the time of the agreement; and that this Respondent was not bound to pay any interest except on the amounts of the balances and principal remaining due taking the accounts in the above-mentioned manner. Afterwards, by a supplemental answer, this Respondent set up that there had been a mistake in his answer in allowing interest on the balances of the principal debt of Rs. 30,000 remaining due in each year, and alleged for the first time that he was not bound to do more than pay interest on the instalments of Rs. 3000, made payable in each year by the agreement.

The cause came on for hearing before the Principal [295] Sudder Ameen of the Civil Court of Zillah Nuddeah, and judgment was delivered by him on the 5th of February, 1846, as follows: "It becomes necessary to take into consideration the following points:—1st. Has the Plaintiff any right to get interest on the sum of Rs. 4628. 8a. entered in the bond as interest? 2nd. Can he get interest upon the principal, Rs. 30,000, after the 30th Assar 1240, up to the end of that year? 3rd. Has the Plaintiff any power to deduct from the sums paid up by the Defendant from the year 1241 the interest upon the entire principal from year to year? 4th. Is the claim which the Plaintiff has set up to charge interest at a higher rate than that mentioned in the Bond, after the expiration of the period of the Bond, just or not? 5th. Is the objection urged by the Defendant in his supplemental answer of the 1st December last, that the sum of Rs. 3000 ought in each year to be considered as the principal, and the Plaintiff should only get interest upon the balance of that, after deducting from it such sums as had been paid by Defendant, and not upon the balance of the entire sum, admissible or not?"

"First. In my opinion the Plaintiff cannot get interest upon the sum of Rs. 4628. 8a. entered in the Bond as interest; for the parties have not entered into a distinct Bond with regard to that sum, and it has not been consolidated with the principal, but has been entered in the Kararnamah as money due on the score of interest. The claim for the interest of that sum, therefore, cannot be maintained under sec. 7, Reg. XV., 1793.

"Secondly. I can see no objection against giving the Plaintiff interest upon the principal after the month of Assar 1240, for the remainder of that year; [296] for in the agreement which has been entered into between the parties with respect to this debt, there is a condition to the effect that interest would be paid on this principal, Rs. 30,000, at the rate of 12 annas per cent., and a computation having been made upon this sum up to 30th Assar 1240, the interest has been specified in the Kararnamah. Nor does there exist any condition in the deed to the effect that Plaintiff would not get interest upon the principal from the month of Assar. The agreement contained in the Bond, that both principal and interest should be paid from 1241 to 1250, can mean nothing more than to fix a rule for paying up the principal and interest, and does not destroy the right of the Plaintiff to get interest for the year 1240.

"Thirdly. The Plaintiff, in support of his claim to deduct in the first place his interest from the payments made by the Defendant, has filed a copy of a decision of the Sudder Dewanny Adawlut, decided by Messrs. Courtney, Smith, and Sealy on the 5th September, 1827, in the case of "*Goverdhan Dax v. Waris Ally*." (4 Ben. Sud. Dew. Rep. 261.) From that it appears, that when there is a stipulation for interest, the Mahajan (money-lender) can in the first place deduct his interest from the payments made by the debtor; consequently, since it has been considered proper that the Plaintiff should be allowed the interest prayed in his plaint, there is no reason why it should be deemed unjust to permit him, according to the above decision, to deduct in the first place his interest from the money paid; especially as in the deed there is an explicit agreement that interest should be paid on the balance remaining due in each year at the rate of 12 annas per cent.

[297] "Fourthly. The Plaintiff, alleging that the period of the Kararnamah, the foundation of his claim, had expired, sues for interest at a rate higher than that fixed in it. This claim is contrary to sec. 5, Reg. XV., 1793; and moreover the Bond contains no condition that after the expiration of the fixed period a higher rate

of interest will be charged. The Plaintiff is, therefore, not entitled to be allowed interest at a higher rate than the rate stated in the bond.

"Fifthly. It has been urged on behalf of the Defendant, in the supplementary answer, that as the principal, Rs. 30,000, had been agreed to be paid up in the course of ten years, the Rs. 3000 per annum should be reckoned as the principal, and interest accordingly charged only upon the balance of that remaining due in each year. This objection of the principal Defendant is not tenable on various grounds. First, This objection has been repeatedly urged by him, accompanied by a discussion, both in his answer and in his rejoinder, and it cannot therefore be supposed that there should be any mistake with regard to it. Secondly. On reviewing the whole contents of the Bond, it evidently seems to have been written with two motives: (first), because the Defendants could not pay the whole sum of Rs. 30,000 at once; (second), because they were unable to pay interest at the rate of 1 R. per cent.: and it does not appear from any part of the Bond that the Plaintiff relinquished the interest of the Rs. 30,000, and agreed to take only the interest of the Rs. 3000; on the contrary, it is clearly written in the Bond that the principal will be paid up in the course of ten years, at the rate of Rs. 3000 per year, and that whatever part of the principal remains due for each year, interest will be [298] paid on that at the rate of 12 annas per cent. per mensem, and the principal and interest thus liquidated; thus the word "usl" (principal) cannot be regarded as denoting anything besides the entire sum of Rs. 30,000, and not the annual sum of Rs. 3000. The objection in the supplementary answer of Defendant is merely an excuse.

"On making up a separate account on this footing, namely, that the sum of Rs. 4628. 8a. mentioned in the Bond, which was agreed to be paid on the 25th Maugh 1240, be deducted from the sums paid up by the Defendants as receipted on the back, and that the sums received by the Plaintiff from 1241 to 1250, amounting to Rs. 28,876. 8a., be carried to the account of the interest of the principal, Rs. 30,000, due to Plaintiff; and of the principal there falls due to the Plaintiff, up to the date of plaint, a principal sum of Rs. 25,997. 12a., and interest, Rs. 5134; total, Rs. 31,131. 12a. The claim of the Plaintiff to all sums in excess of this is inadmissible.

"As the above sum and interest on the balance of principal from the date of plaint up to this day, at the rate of 12 annas per cent. (or Rs. 2742. 11a.) total Rs. 33,874. 7a., are considered proper to be awarded to the Plaintiff; it is ordered, That this suit be decreed in favour of the Plaintiff, who will recover from the Defendants, out of the amount claimed by him, Rs. 33,874. 7a., and interest thereon, according to practice, from to-morrow's date up to the date of realisation, also costs in proportion to the sum of Rs. 31,131. 12a., with interest thereon from to-day to the date of payment. The Defendants will pay their own costs in proportion to the same amount, but their costs upon the excess amount [299] will be paid by Plaintiff, and the Plaintiff will be answerable for his own costs in proportion to the excess amount."

The Respondents appealed from this decision to the Sudder Dewanny Adawlut at Calcutta.

The case was referred, by Mr. A. Dick, before whom the appeal came in the first instance, to the full Bench of the Court, consisting of Messrs. A. Dick, W. B. Jackson, and J. A. F. Hawkins, who, on the 11th of August, 1847, gave the following judgment on the appeal:—"The Court, on a full consideration of the conditions of the Bond, and the conduct of the parties throughout, find that on the part of Appellants (the present Respondents) the conditions have not been kept; and, again, the Respondent (the present Appellant) received the several payments made to him, and endorsed them on a Bond, without specifying whether those sums were on account of principal or interest, and moreover that the Bond has not a word about the interest payable annually. The debt, however, has been clearly admitted, as also the several payments. The Court, therefore, deem it proper and equitable to adjudge to Plaintiff (the present Appellant) the sum of Rs. 4628. 8a., payable by agreement on the 25th Maugh 1240, B.E., with interest at 12 per cent. per annum, to the date of the institution of suit, provided it exceed not the principal; and the principal sum of Rs. 30,000, with interest at 9 per cent. per annum from the date of the Bond till date of institution of suit, after deducting the several payments endorsed on

the Bond, with interest on them at 9 per cent. per annum from their respective dates as endorsed till institution of suit, and 12 per cent. per annum on the balance of this latter account [300] from the date of institution of suit to the date of the decree of the Court, and with interest at 12 per cent. on the consolidated sum due on the latter date until day of payment, with costs in proportion."

An application was then made for, and a review of, the judgment admitted, on the ground that the decision was contrary to the true construction of the Karar-namah, and the case was reheard on the 30th May, 1850, before a full Bench of the Judges of the Sudder Court, consisting of Mr. A. Dick, Sir R. Barlow, Mr. W. Jackson, Mr. J. R. Colvin, and Mr. J. Dunbar.

The joint judgment of Sir R. Barlow and Mr. J. R. Colvin upon the rehearing was as follows:—"We think that this suit must be disposed of under its own specialities, and the terms of the particular agreement in the case. We differ from the former decision, both because we think, in opposition to what is therein set forth, that the Bond or agreement, clearly intended that there should be a calculation, and a demand of interest payable at the close of each year, and because the adjustment which the decision directs is not founded upon any endeavour to interpret and apply the conditions of the agreement, but upon a principle of adjustment assumed by the Court, merely on its own view of what would be fair between the parties. The meaning and intention of the agreement, by which exclusively we must be guided, do not to us appear open to material doubt.

"One point seems to us certainly established in the proceedings, namely, that an annual adjustment was agreed to. This is apparent from the figured statement in the answer of the Defendant, in which the calculation of balance in one year being adjusted, [301] is carried on with interest to the next, and the next successively.

"As to the other conditions of the agreement, we consider that it was stipulated that in each year from 1241 to 1250, B.E., payments to the extent of Rs. 3000 should first be carried to the credit of the principal debt, then, upon a balance of principal being struck at the close of each year, an immediate claim of interest at 9 per cent. per annum was to arise from that date upon such balance. If at the close of any year more than the aggregate of instalments payable up to that date at the rate of Rs. 3000 per annum should have been paid to the Plaintiff, then (there being no special condition, except as to the particular annual payment of Rs. 3000 on account of principal), we consider that the Plaintiff was entitled upon general principles to carry such excess to credit, at his discretion, in reduction of any arrear of interest, instead of in further reduction of the principal. There appears to have been an excess of this kind in the fourth and seventh years of the term, and these sums we would accordingly allow to be deducted from the total of the interest then over due. Adopting this as the governing principle in the construction of the agreement, we would dispose of the other minor points arising on the details of the claim as follows:—

"Interest at the usual rate of 12 per cent. per annum should be calculated on the sum of Rs. 4628. 8a., the balance of the old interest, acknowledged as new principal debt by the present agreement, from its due date up to the dates at which that amount was made good to the Plaintiff. If, in addition to the above sum of Rs. 4628. 8a., and [302] the interest so due on it, any sum were paid, as seems to have been the case to the extent of a few hundred rupees before the close of 1241, B.E., at which the first instalment of Rs. 3000 became due on the main principal debt of Rs. 30,000, such excess sum being paid before any claim of interest could arise by the agreement on the Rs. 30,000, should be credited in diminution of that principal debt. After the expiration of the stipulated term of ten years, the claim of interest, at the usual rate of 12 per cent. per annum, on the balance of principal then remaining unpaid, must be considered as revived, and the calculation must be made accordingly on that amount from the expiry of the term."

The other Judges, Mr. Jackson and Mr. Dunbar, concurred in this judgment, so far as it related to the interest upon the Rs. 4628. 8a., but differed upon the other points. Mr. A. Dick abided by the original judgment of the full Court; and there being, therefore, no decision for want of a concurring majority, the case was referred to the Agra Court, and the Judges of that Court, Messrs. Deane and Begbie, having concurred in opinion with Sir R. Barlow and Mr. Colvin, final

judgment was given by the Sudder Dewanny Court at Calcutta, on the 23rd of September, 1850, in the following terms:—"It is ordered, that in conformity with the opinion of the majority of the Judges, namely, Sir R. Barlow and Mr. Colvin, Judges of the Calcutta Court, and Messrs. Deane and Begbie, Judges of the Agra Court, the decision of the lower Court be modified in the manner set forth in the opinions recorded by Sir R. Barlow and Mr. Colvin, given above. Costs of Court to be charged to Defendants in pro [303] portion to the amount decreed; that is, the Appellants are to pay the costs of this Court upon the amount decreed, as per account prepared by the accountant, with interest from this day to the date of payment. If Respondent has not yet recovered costs of the lower Court, he must present a petition for the recovery of the same in the said Court, when an order will be passed for payment to him, in conformity with the Circular Order, dated the 4th March, 1836."

The Appellant appealed to the Queen in Council, and submitted that the final decision of the Sudder Dewanny Adawlut of Calcutta, and also the decision of the Principal Sudder Ameen of the Court of Zillah Nuddeah reducing the amount of the Appellant's claim as before-mentioned, were respectively erroneous, and ought to be set aside, for the following reasons:—

First. Because the Appellant was entitled to apply in the first instance the payments made by the Respondents towards the keeping down of the interest accruing due, from time to time, as aforesaid.

Second. Because there was nothing in the agreement binding the Appellant in any way to apply in each of the ten years, from 1241, B. E. to 1250, B. E. such payments as were made as aforesaid to the extent of Rs. 3000, to the credit of the principal money.

Third. Because, according to the true construction of the agreement, the Appellant was entitled to interest on the principal sum of Rs. 30,000 after the month of Assar 1240, B. E. up to the end of that year (nine months), the Appellant not having agreed in [304] any way to remit the interest for that period; and that the disallowance of this interest was inconsistent with the first decision of the Judges of the Sudder Dewanny Adawlut, a decision which, in this particular, had not been complained of by the Respondents.

Fourth. Because the Judges of the Sudder Dewanny Adawlut, in holding that the Appellant was bound to apply in each of the ten years after the making of the agreement, payments to the extent of Rs. 3000, to the credit of the principal debt, and that he was only entitled to apply any excess over such payments towards the reduction of interest, did not act consistently upon this rule, for they omitted to credit the interest payments in excess of Rs. 3000, made in the years 1243, B. E. and 1250, B. E.

The Respondents, on the other hand, submitted that the above judgment of the Sudder Dewanny Court ought to be affirmed, though if any alterations were to be made in the judgment of the Sudder Dewanny Court, in respect to which the same was favourable to the Respondents, they submitted that the whole effect of the Order made on the judgment ought to be reconsidered, and such Order made as should be just; because the decision of the Sudder Dewanny Court on the material point in question was consonant with the terms of the agreement under which the payments were made, and with the rules of law applicable to the case.

Mr. R. Palmer, Q.C., Mr. Leith, and Mr. Maude, for the Appellant, relied on the reasoning and conclusion of the Zillah Court, as containing the true construction of [305] the Kararnamah. They insisted that the payments admitted to have been made, from time to time, by the Respondents were to be taken as payments on account of interest only, and were not entitled to be applied in any degree towards the liquidation of the principal. They relied on the case of *Goverdhun Das v. Waris Ally* (4 Ben. Sud. Dew. Rep. 261), in which it was held that interest exceeding the principal debt might be awarded when the excess had accrued subsequent to recourse being had to law for recovery of the debt. They cited also *Gholam Ahmud Khan v. Munohur Das* (1 Ben. Sud. Dew. Rep. 294), *Rajah Bommarauze Bahadur v. Rangasamy Mudaly* (ante [6 Moo. Ind. App.], p. 232), Act, No. 32 of 1839, and Ben. Reg. XV. of 1793, secs. 5, 6, and 7, regarding interest on loans.

Mr. Field, for the Respondents, contended that the suit not being upon the original

Bond, but upon the Kararnamah subsequently executed, the question was not as to the form of the contract, but the true meaning of the parties as disclosed in the agreement. He maintained that the final decree of the Sudder Court was consistent with the law and equity of the case. Upon the doctrine of appropriation he cited and commented upon *Devaynes v. Noble* (1 Merr. 604), *Simson v. Ingham* (2 Barn. and Cr. 65), Dig. lib. 46, tit. 3, qu. 1, 3.

The Right Hon. Sir William H. Maule.—Their Lordships during the argument in this case [306] intimated their opinion on the main question, namely, whether the payments made should be ascribed exclusively to principal, and no part of them to interest: expressing their opinion that the course adopted was the ordinary one, and that the construction of this instrument is one which does not point out any other, namely, that the payments should be applied in the first instance to interest, and to principal only so far as those payments exceed the interest due.

That is the main point in question, and their Lordships entertain no doubt at all about it.

With respect to the subordinate points, the first question made was, from what time interest is to be calculated? Now it appears, upon the terms of the Kararnamah, the instrument in question, that interest is to be calculated on the Rs. 30,000 from the time therein mentioned. There seems no reason why the sum which is lent at interest, and which continued at interest, with no difference except the modification of taking away one-fourth of the interest, and reducing the R 1 per mensem to 12 annas per cent. per mensem, should be exempt from paying interest at one rate or another during the whole time that it remains unpaid, and that time will be taken from the time up to which the interest is calculated. Now, the interest is calculated up to the 30th of the month Assar, in the Hindoo year 1240. From that time the sum of Rs. 30,000, or so much as remained from time to time unpaid, is, in their Lordships' opinion, to carry interest at the rate agreed upon in this instrument, namely, at the reduced rate of nine per cent. per annum.

[307] Then, secondly, as to the sum of Rs. 4628, which is described as the result of the calculations of interest up to the 30th of Assar, and stipulated to be paid as such on the 25th Maugh; with respect to that it is carefully distinguished in the instrument from the Rs. 30,000, which are called principal. It is evident that the parties intended that the sum of Rs. 4628, which is made up of interest, should retain that character. There is an express stipulation that on the principal sum of Rs. 30,000, interest shall be paid at the rate of 12 annas per cent. per mensem, that is, at the rate of nine per cent. per annum; there is no such stipulation with respect to the Rs. 4628, which seems to their Lordships to evince a clear intention by the parties that this sum should not carry interest. What would be the effect if there were a clear calculation of interest, and a stipulation or covenant to pay it without any other part of the instrument affording an explanation of those legal expressions, it is not necessary to say, for it seems very clear, that the express and precise provisions with respect to the sum, called principal, namely, Rs. 30,000, which is to carry interest, excludes any idea of the sum of Rs. 4628, which is interest, also being intended to carry interest. With respect to that, it seems that the parties themselves intended that if the creditor thought fit to exact this sum on the principal day, the 25th Maugh 1240, he might do so; but if he did not, he could not lie by and charge interest upon it. Therefore, this sum, in the opinion of their Lordships, does not carry interest. I may observe, also, with respect to interest on the Rs. 4628, supposing that there was a discretion to grant it or not, which there is [308] some question about, upon the terms of the Regulation, their Lordships are of opinion they would probably exercise their discretion in refusing to grant interest upon that sum.

Another question is raised on the Regulation XV. of 1793, whether, after the expiration of the tenth year, the interest should be twelve per cent. or nine per cent. It is said the Regulation of 1793 applies so as to exclude that question, because the interest for the ten years would be at the rate of one hundred and eight per cent., and that Regulation hinders persons from recovering arrears of interest of more than one hundred per cent. But that applies only to arrears which have not been any part of them paid. That is not so here.

Now, it appears to their Lordships upon this agreement very clear, that after the expiration of ten years the interest is not to recur to the old rate of twelve per cent., but to be reduced to the new rate of nine per cent. under the stipulation by which alone the Defendants were made personally liable.

Then, with respect to the amount of costs, it appears here that the Plaintiff is entitled to succeed in the substance of his demand, and that being the case, there is nothing in the Regulations in force in India any more than in this country to hinder the Plaintiff from recovering his costs. Their Lordships are of opinion, that the Appellant ought to have judgment to recover his debt and to recover his costs.

Their Lordships will, therefore, advise Her Majesty to reverse the decree of the Sudder Court, [309] and to restore the judgment and order of the Zillah Court, with costs here, and liberty to the Appellant to recover his costs in India.

NAGALUTCHMEE UMMAL.—*Appellant*: GOPOO NADARAJA CHETTY and Others,—*Respondents* * [Feb. 4, 5, 6, and 7, 1856].

On Appeal from the Sudder Dewanny Adawlut at Madras.

A Will by a Hindoo, without male issue, kinsman or coparcener, after providing for the maintenance of his widow, daughters, and female relations, devised ancestral as well as other real and personal estate to trustees upon certain charitable trusts; was impeached by reason, first, that the Testator had authorised his widow, in an event which happened, to adopt a son, which act would have rendered him incompetent to exercise a testamentary power; secondly, that at the time of the execution of the Will the Testator was not of sufficient mental capacity to make a testamentary disposition; and thirdly, that the Testator being a Hindoo had no power by law of devising ancestral estate by Will.

Upon appeal held, affirming the decree of the Sudder Court in India,—

First, that although, in the absence of male issue of the deceased, there was a strong presumption, arising from religious considerations, in favour of a delegation by the deceased to his widow, of authority to adopt a son for him, yet that the evidence entirely failed to prove that fact;

Secondly, that the evidence established his mental capacity at the time of executing the Will; and

Thirdly, that by the Hindoo law prevailing in Madras, a Hindoo in possession, without issue male, kinsman, or coparcener, had power to make a Will disposing of ancestral as well as acquired estate.

After an appeal had been asserted from a decree of the Sudder Court at Madras, the Appellant applied to that Court, under Sec. 4 of Reg. VIII. of 1818, and the Circular Order of 21st September, 1826, for an order calling upon the Respondents, who had been in possession of the estates in dispute before the institution of the suit, to give security as prescribed by the Regulation. The Sudder Court refused the application as not being within the provisions of the Regulation. Upon petition the Judicial Committee declined to interfere, as there was no allegation of waste by the Respondents in the petition.

Quære. Whether there is any jurisdiction in the Judicial Committee under Sec. 4 of Mad. Reg. VIII. of 1818, to call for security from the Respondent when put in possession.

The principal question in this suit was, whether the Appellant's deceased husband, Appacooty Jyen, a Hindoo native of Madras, who was without male [310] issue, kinsman or coparcener, was competent, by the Hindoo law in force in Madras, to make a Will disposing of ancestral property. Two other questions also arose, first, whether the Testator was of mental capacity at the time of executing the Will in question,

* Present: Members of the Judicial Committee—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

and, next, if he had authorised his widow to adopt a son for him in the event of the child, of which his wife was then pregnant, not being a male child.

The facts of the case which gave rise to these questions were these:—

Appacooty Jyen, the deceased husband of the Appellant, of Govindacoody in the presidency of Madras, was the adopted son of Rajappier, otherwise called Venekataswami Jyen, and was the owner of considerable property, both real and personal, partly inherited from the family into which he had been adopted, and partly acquired by himself. He had no son, and only one daughter. In the month of August, 1844, he was attacked by the illness which terminated his [311] life. At that time he had none but female relatives existing, whom he supported out of his estate, but his wife was then pregnant. On the 28th of August, 1844, he executed the following Will:—

"Finding myself in a failing state of health, my infirmity increasing, and apprehending that this may endanger my life, and being also without male issue, having only a daughter, a wife, a maternal aunt, grandmother, and paternal aunts, Ponnamm and Purvatee, who have been under my protection up to this time, I appoint Kistnayan of Saloovanpatay, and Samee Jyan of Govindacoody, to continue as heretofore to manage the affairs connected with my estate in the Talooks of Combaconum and Valangeman, consisting of Merasi villages, houses, jewels, ready money, utensils, etc., and to collect and pay all debts due to and by me. All the females shall take what may be necessary for their household purposes, and live together. The charities of the Chootry Pagoda and other places shall be performed as usual, and accounts rendered every year of all receipts and disbursements to my uncle Chinnappayan of Teroovavoor and to Gopoo Nadaraja Chetty of Combaconumpettah. Any expense, even to the extent of one rupee or one callum of paddy, can only be defrayed upon their authority, and an account of such expenses be kept under their signature. If my wife, who is now pregnant, should give birth to a boy, the provisions herein contained shall be conformed to until that boy attains his proper age, but should a daughter be born, such daughter, as well as the other daughter now living, shall be given in Cannecadanum marriage (without any consideration being received from the bridegroom), to families of respectable [312]-bility and well circumstanced, with the consent of the parties aforesaid. After deducting the expenses of the charities from the estate, they shall support themselves with the remainder as heretofore. After the lifetime of my grandmother, stepmother, and paternal aunts, a portion of the estate being set apart for the purposes of charity to be conducted as heretofore, the residue shall be allotted as dowers to my daughters. If the females do not agree among themselves, they shall receive what will suffice for their expenses, and live apart from each other. They are also to receive the ornaments as allotted to them, respectively in writing by my father. Thus do I execute my Will." This Will was witnessed by six witnesses.

As the above Will did not determine the proportions which the female relatives were respectively to enjoy in case they should disagree amongst themselves, and prefer to live separate, the Testator, on the 3rd of September following, the day before his death, executed a Codicil to his Will as follows:—"If my wife, who is now pregnant, give birth to a son, both the paternal aunts shall receive the income (of the lands left to them) during their lifetime, and after their decease their lands shall go to that son. If a daughter be born, she also shall have 2 valies of land set apart to her out of the lands now allotted for charitable purposes, and Rs. 1000 shall be laid out for her wedding. Chinnappayan Teroovavoor and Gopoo Nadaraja Chetty, of Pettah, shall as Dharmakartas, or trustees, continue to manage all the aforesaid affairs in accordance with these provisions, the village karyacars, or agents, and the females obeying their instructions. In the event of a son not being born, all the lands except that set apart to Ganapati Jyan, shall after the lifetime re-[313]-spectively of those to whom they are now bequeathed, be appropriated to purposes of charity." This Codicil was witnessed by several witnesses.

Appacooty Jyen caused information to be given to the authorities of the District, that he had executed these instruments, and died on the 4th of September, the day after the date of the Codicil, leaving the Appellant, his widow, and a daughter, four years old, him surviving.

The Appellant afterwards gave birth to a daughter. The Respondents, Gopoo Nadaraja Chetty and Chinnappavien, administered the estate according to the terms

of the Will and Codicil, and after some adverse proceedings by the Appellant, who asserted a right to possession on the ground that Appacooty Jyen had authorised her to adopt a son in the event of the child she was pregnant with being a female, they were put in possession of the deceased's estate; the Appellant being referred by the Sub-Collector, to whom she preferred her claim, to establish her right by a civil suit.

Accordingly, on the 28th of December, 1847, the Appellant filed her plaint in the Civil Court of Combaconum against Gopoo Nadaraja Chetty, Chinnappavien, Krishnien, and sixteen other Defendants, including amongst them the other female members of the deceased's family. By the plaint she asserted that the lands and other property in dispute were not acquired by her late husband, but inherited by him from the ancestors of the family into which he had been adopted; that at the time of his death, she being then pregnant, he had authorised her to adopt a son in the event of her giving birth to a daughter, and that she and her two [314] daughters were according to the Hindoo law entitled to her husband's estate, and that in the event of her adopting a son the title would pass to him. She also asserted that the alleged Will and Codicil were forged by the Respondents, subsequently to the death of Appacooty Jyen; and alleged that Appacooty Jyen was in a state of insensibility from the 23rd of August to the 4th of September, 1844, the day he died.

The Respondents, Gopoo Nadaraja Chetty and Chinnappavien, the two substantial Defendants in the suit, put in a joint answer, and therein stated the above facts as to the execution by Appacooty Jyen of the Will and Codicil. They further stated that they had not undertaken the trusteeship either to usurp the family estate or to earn their livelihood by it, but in consideration of the friendship which had existed for generations between the families of Appacooty Jyen and Gopoo Nadaraja Chetty, and the promise which they gave him of duly enforcing the arrangements made by him before his death: and they denied that the deceased had authorised the Appellant to adopt a son, as it was inconsistent with the Codicil, which provided that the whole of his family estate should be appropriated to objects of charity in the event of the Appellant, who was then pregnant, not giving birth to a male child. The answer moreover alleged, that the other Defendants, being aware of the execution of the Will and Codicil, as well as of the other facts of the case, and some of them being attesting witnesses of those documents, had been included as Defendants with the view of preventing them from giving evidence.

The other Defendants, by their answer, supported the allegations in the answer of the above-named first [315] two Defendants, and insisted that Appacooty Jyen was in possession of his faculties until three hours before his death, and that he never authorised the Appellant to adopt a son.

The Appellant, in reply, reiterated the allegations in the plaint, and submitted that the estate of Appacooty Jyen being ancestral, and not self acquired, ought, according to the Hindoo law, to descend after his death to his heirs, and that he was utterly incompetent to dispose of it according to his discretion, as the Appellant and her daughter were his heiresses at the time of his death, and the Appellant, who was pregnant, might have been delivered of a boy, that such boy would have become heir to the deceased, or the Appellant might have adopted a son and constituted him heir. She also alleged that the Defendants, Gopoo Nadaraja Chetty and Chinnappavien had admitted, in a petition presented by them to the Sub-Collector, the fact that her husband had authorised her to adopt a son, and had requested the Sub-Collector to induce her to make the adoption. She also objected that the Will and Codicil were not written on stamped paper, and were not genuine instruments.

The Defendants, Gopoo Nadaraja Chetty and Chinnappavien rejoined at considerable length, going through and controverting the assertions of the Appellant. With respect to her allegation that Appacooty Jyen could not have executed the Will and Codicil, or made over the estate to them, inasmuch as he had continued in a state of insensibility for twelve days preceding his death, they said the falsity of this allegation needed no other proof than the Appellant's own statement in a petition made by her to the Sub-Collector for possession of her husband's estate, [316] namely, that her husband delivered over the estate to the first Defendant, on his promising to manage it faithfully. They also contended that the Will and Codicil were in perfect accordance with the Hindoo law and the usage of the country,

and denied the statement in her reply regarding a petition to the Sub-Collector, in which her authority to adopt a son was admitted.

The different parties entered into evidence. The evidence was conflicting. On the part of the Appellant, twenty-eight witnesses were examined, but only three of them spoke to the fact of Appacooty Jyen having authorised the alleged adoption. The account they gave was, that while Appacooty Jyen was lying on his death-bed, he said to the Appellant, in the presence of twenty or thirty persons assembled together, "Why do you grieve, you are now pregnant, and will give birth to a boy; if not you can adopt a son." Of these three witnesses, one was a common labourer, and he deposed that the occurrence took place "about nine o'clock in the morning." The next, who called himself a merchant, declared that when Appacooty Jyen spoke the above-mentioned words, giving authority to adopt, "it was between eight and nine o'clock at night." The third witness, deposed that the occurrence happened, "about two or two and a half hours after sunset." To prove the alleged forgery of the Will and Codicil, two witnesses were examined by the Appellant, who deposed to their having been separately asked three or four months after the death of Appacooty Jyen by Chinnappavien, in the presence of Gopoo Nadaraja Chetty and several other persons, to attest what purported to be a Will and Codicil of the deceased, which they refused to do. [317] The evidence of the other witnesses was immaterial. The Appellant also put in evidence the following letter, marked A, from Gopoo Nadaraja Chetty to Krishnien, one of the Respondents: "I have sent Nagalutchmee Ummal in my palankeen: on her arrival you must take care that all the females, Pommammal, Ambalammal, and others, should be on as friendly terms with her as formerly, but not as they were when at this place. Let nothing pass there regarding the matter of adoption. I shall call four days hence, when we can speak about all affairs. Until then you must take great care that no dispute occurs, and such steps should be taken as may induce Nagalutchmee Ummal, of her own accord, to make an adoption. After my arrival we can discuss the above-mentioned matters." Also a petition, marked K, addressed by the two Defendants, Gopoo Nadaraja Chetty and Chinnappavien, in March, 1845, to the Sub-Collector, in which, after mentioning the fact of the Will and Codicil having been executed, they said that Appacooty Jyen left verbal instructions before he died, that if his wife were delivered of a daughter they should cause a boy to be adopted, and deliver over to him the property on his coming of age; and they requested the Sub-Collector to make an order directing the Appellant and others to abide by the provisions of the Will and Codicil, and to adopt a son in accordance with the instructions left by Appacooty Jyen. Also a petition, marked J, of the great-grandmother of Appacooty Jyen to the Sub-Collector, in which she mentioned that he left verbal instructions with his wife for the adoption of a son in the event of his wife not giving birth to a boy.

The Respondent, Gopoo Nadaraja Chetty, was per-[318]-sonally examined by the Court, and was asked to explain the allusion to adoption contained in the above letter and petition. He said that shortly after the Appellant's confinement, Appacooty Jyen's mother and great-grandmother requested him and Chinnappavien to get a boy adopted to the Appellant; they answered that as no mention had been made of adoption by Appacooty Jyen, they should not permit the adoption; but the females, if they wished it, might make it themselves. Upon this the females told them that Appacooty Jyen had authorised them to adopt a boy in the event of his wife not giving birth to a son, and that he and Chinnappavien replied that if such was the case they might adopt a boy. The Appellant, however, subsequently refused to make the adoption, and the mother and great-grandmother of Appacooty Jyen suggested that as disputes existed amongst the females, if they mentioned that Appacooty Jyen had permitted an adoption, an order would be passed for making one, which would put a stop to the quarrel, and they, therefore, made the statement about the adoption. Another of the Defendants was also examined on the same subject, and gave a similar explanation.

The Respondents' witnesses proved that Appacooty Jyen, while in full possession of his faculties, executed the Will, and two or three days afterwards the Codicil in question, and that not a word was said about adoption. It was also proved that he continued sensible until a few hours before his death. The Respondents also put in evidence a petition presented by the Appellant to the Sub-Collector in February.

1845, in which she had stated as follows:—"Being destitute of brothers or other kinsmen, Appacooty [319] Jyen entrusted the whole of his property, including ready cash, ornaments, and bonds, to one Nadala Setty, son of Gopee Setty, of Combaconum Pettah, who from the days of his (petitioner's husband's) ancestors had maintained a trustworthy and respectable character, and he enjoined him and the agent and curmum of his villages not to deceive the Petitioner in consequence of her sex, but faithfully to manage the entire estates, and restore the same to her on her demand, according to the accounts."

Before finally deciding the suit, the Civil Judge directed the following case and questions to be put to the Pundits of the Sudder Dewanny Adawlut at Madras:—"A Brahmin dying without male issue, left a Will, in which he bequeathed to his wife five valies of nunjah land, with the poonjah belonging to it, and all the jewels she was in the habit of wearing; to his daughter two valies, together with her jewels and Rs. 1000 for the expenses of her marriage; fifteen valies of nunjah, etc. to four others of his female relations; and to all of them a place of residence and such household utensils as they might require. There were also some other small bequests; and he then left the rest of his property, partly derived from inheritance and partly from purchase, to various religious and charitable institutions, appointing two of his friends executors of his Will and managers of the charities. He likewise provided that if his wife, then pregnant, were delivered of a son, the estate should in due time revert to him; but if a daughter were born, the same provision was to be made for her as for his other daughter, the residue going to the above-mentioned charities. The widow of the deceased was delivered of a girl, and now contests the validity of [320] the Will, claiming a right to succeed to the whole of her husband's estate.

"1st. Is the Will valid?

"2nd. Supposing the deceased gave his wife verbal instructions to adopt a son in the event of her bearing a daughter, would her compliance with these instructions operate to invalidate the Will, in which no mention is made of adoption?"

To these questions the Pundits answered: "The Will referred to in the question is valid, under the Hindoo law, the Testator having thereby bequeathed a portion of his estate for the maintenance of his wife and other members of his family, whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife, who was then pregnant, not being delivered of a son. If the Testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the Will according to the Hindoo law, it being incompetent for the Testator, who authorised the adoption of a son, to alienate the whole of his estate, and thereby injure the means of the maintenance of his would-be heir."

On the 20th of January, 1849, the Judge of the Civil Court of Combaconum made his decree in the cause. After stating the pleadings and evidence, he proceeded thus:—"I have no doubt that the Will, and Codicil to it, were executed by the deceased, and that he was in the full possession of his senses at the time. These documents are attested by several persons of respectability, and their evidence to the point is clear, and for the most part unexceptionable. The first Defendant also, who, as an old [321] friend of the family, is appointed one of the executors, is himself possessed of large property, and was selected by the late Judge to serve as an assessor in criminal trials, which circumstances dispose me to regard him as an unlikely person to engage in forging a testament, by which he personally gains nothing but the management of the charities. On the other hand, the testimony brought forward by the Plaintiff to prove that her husband was senseless and speechless from the 10th to the 22nd is inconclusive, the 15th, 16th, and 17th witnesses having only seen him the day before his demise, and the 18th, two or three months before; moreover, if he were really delirious from the 10th, it is impossible to suppose that they would have delayed removing him to his house at Combaconum, where the best medical advice was to be had, until the 20th. The evidence of the 24th and 25th witnesses, to prove the forgery, is, in my opinion, entitled to no credit, their statements being of the most improbable nature."—[After setting out the case and answers of the Pundits, the learned Judge proceeded]—"The Pundits have decided the first question in the affirmative; and with regard to the second, they observed,

that if the Testator had given instructions to his wife to adopt a son, her compliance with those instructions would invalidate the Will. This, therefore is the next question to be considered:—The 19th, 20th, and 21st witnesses speak to the fact of the Plaintiff's husband having given her permission to adopt a son, but they are of inferior condition in life, and the reasons they assign for visiting the deceased at that juncture are very unsatisfactory. The deceased was a person of considerable estate; and it may reasonably be inferred that if he had been really desirous that his widow should [322] adopt a son, he would have taken care to convey the injunction to her in the presence of respectable persons, and provide that the boy to be affiliated should be selected from among his own kindred; and as a proviso is made in the Will that his estate is to go to his posthumous son, if one were born, it is to be supposed that a similar proviso would have been made in favour of an adopted son if he had given instructions on that point.

“In further proof of her husband's order to adopt a son, the Plaintiff has filed three documents, marked A. J. K., and these are certainly strong arguments in her favour. The first is a letter written by the first Defendant to his agent, the third, about four or five months after the demise of Appacooty Jyen, in which he desires him to treat the Plaintiff with the customary respect, and not to say anything to her about the adoption for the present. J. is a copy of a petition forwarded to the Sub-Collector by the grandmother and stepmother of the deceased, in which they allude to his having ordered his wife to adopt a son. K. is a copy of a petition addressed to the Sub-Collector by the first and second Defendants, in which a similar allusion is made to the order of the deceased for adoption. Here are distinct admissions on the part of the Defendants that the deceased enjoined his wife to adopt a son; but notwithstanding this, I am disposed to think that no such injunction was really given, and that the circumstances under which these admissions were made, are sufficiently explained in the deposition taken from the first Defendant. From this it would appear, that after the Plaintiff had given birth to a daughter, the female relations of the deceased, desirous of seeing a representative of the family, intimated to the executors the [323] propriety of the Plaintiff adopting a son; they, however, declined to interfere in the matter, as no mention was made of adoption in the Will, and deceased had said nothing to them on the subject; but added, that if they could settle it among themselves, no obstacle would be offered on their part as executors. Preparations were accordingly made for the affiliation, and the ceremony would have taken place but for the interference of the Plaintiff's mother and uncle, who persuaded her, that if she adopted a boy, selected by the relations of the deceased, she would have no control over the property, and so the affair was broken off. The object of the subsequent petition to the Sub-Collector was to forward the adoption, under the impression that it was the only means to put a stop to the quarrels that had now sprung up between the women.

“The explanation is, of course, open to objection, but I am inclined to regard it as a probable solution of the circumstances under which these exhibits were written, and in the absence of any other evidence that can be relied on, I cannot admit them as sufficient proof that the deceased left behind him any injunctions to adopt a son; and I am of opinion that his last wishes and intentions are contained in the Will and Codicil to it, and I, therefore, dismiss the Plaintiff's claim with costs.”

The Appellant appealed from this decree to the Sudder Dewanny Adawlut, and in her petition of appeal she for the first time urged as an objection that the Will and Codicil were altogether void, under Regulation V. of 1829 (a).

[324] The Respondents in their answer objected that until the Appellant had made an adoption she was not competent to maintain the suit, but the Court overruled that objection and heard the appeal.

The Sudder Court pronounced its decree on the 27th of November, 1851. In delivering judgment, the Court said:—“With regard to the first point urged by the Appellant, that the Will and Codicil are forged documents, the Court would observe

(a) Mad. Reg. V. of 1829 enacts, that “Wills left by Hindoos within the territories subject to the Government, shall have no legal force whatever, except so far as their contests may be in conformity with the provisions of the Hindoo law, according to the authorities prevalent in the respective Provinces, under the Presidency.

that the evidence to their execution is clear and satisfactory. It is true, as pleaded by the Appellant, that all the attesting witnesses were not cited and examined, but two to the first, and five to the second instrument, and the writer of both were so, and their testimony has, in the opinion of the Court, fully and incontrovertibly established their genuineness and authenticity. It must also be admitted that these documents were neither engrossed upon stamped paper, nor afterwards registered; but the Court attach no great importance to these facts, as the circumstances under which they were executed, and the distress of the family and friends of the Testator at the time, are sufficient to account for the first omission, and the unpopularity of registration and the unwillingness of the natives to resort to the measure were most probably the reason of the second.

"The argument of the Appellant that a Brahmin would hardly constitute Soodras to be the trustees of his property and charities, is done away with by the [325] admission of the Appellant herself, in her address to the Sub-Collector, under date the 17th of February, 1845, in which she allows that the first Respondents' family had been entrusted by her deceased husband with the control of his property.

"With respect to the second objection, that the Will and Codicil, even if proved to have been duly executed, are void, because authority to adopt a son was given, the Court would remark that no proof entitled to the least credit has been produced to this point. The witnesses that speak to the circumstance, irrespective of other objections to their evidence, are not in that position of life which entitles them to be selected by a wealthy and influential Brahmin on his bed of sickness, surrounded as he was by his own immediate friends and relatives, as the depositaries of his wishes, regarding an heir to his large estates. It is almost impossible to imagine that the deceased, who entered into so many details in his Will and Codicil for the respectable maintenance of all the females of his family, and the right disposal of the residue of his property after his death, would have neglected to have taken similar precautions for the adoption of a son in the event of his posthumous child proving a female; but this the Appellant wishes the Court to believe he did.

"The documents A. J. and K. are certainly strong in favour of the Appellant's plea; but the Court do not attach that weight to the admissions they contain regarding the adoption to the extent of setting aside the strong evidence to the contrary. The first incidentally alludes to an adoption, and suggests that the Appellant should voluntarily mention it herself; and the second is written by the great grandmother and [326] aunt of the deceased, both advocating the Appellant's cause, in which also the permission to adopt a son is spoken of. Neither of these allusions can very much aid the Appellant's case. The third, however, is a letter written by the first Respondent himself to the Sub-Collector, in which he distinctly admits that the deceased Appacooty ordered the Appellant to adopt a son in the event of a child, of which she was then pregnant, being a daughter. This is an admission which the first Respondent has been at much pains to explain away; but the Court thinks that he has done this in his deposition given before the Civil Judge, and to which that Judge particularly refers in his decision.

"The third objection taken by the Appellant is, that the Will is illegal, because the widow is the party to whom the law gives the estate.

"The Court have referred to all the authorities quoted by the Appellant in support of this position, and find that although the opinions regarding Wills of Hindoos generally are conflicting, yet that the majority of them are against the argument of the Appellant. It is unnecessary to cite all the opinions given on the subject, and the Court will content itself by referring to the case of *Ramtoonooy Mullick v. Rungpaul Mullick* (1 Morley's Dig., p. 39, No. 3), in which it was held that a Hindoo might and could dispose by Will of all his property, moveable and immoveable, and as well ancestral as otherwise, and this decision was affirmed on appeal by the Privy Council.

"Questions, however, regarding the legality of the Will now under discussion, were referred to the law officers of the Court, to whom the Legislature have assigned the duty of declaring the law on such matters, and they distinctly stated their opinion that it is [327] a valid and good instrument. The arguments, therefore, of the Appellant that it is not recognizable under the provisions of Regulation V. of

1829, cannot be sustained." The Court, for the above reasons, affirmed the decree of the Civil Court, and dismissed the appeal with costs.

The Appellant afterwards presented petitions for review of judgment, and also for security from the Respondents for the mesne profits pending the suit, which the Sudder Court refused to entertain.

From the decree of the 27th of November, 1851, the Appellant appealed to Her Majesty in Council.

After the arrival of the transcript in England, the Appellant presented (Nov. 30, 1854 *) a petition under the provisions of Madras Reg. VIII. of 1818, sec. 4, for an Order calling upon the Respondents to give security for the mesne profits, or, in the event of the Respondents not giving security, that the Appellant might be put in possession upon giving security, or in the alternative that the property might be attached pending the appeal. The petition, after stating that the Appellant had applied to the Sudder Dewanny Court, that pending the appeal, the Respondents might be required to give security, as prescribed by the 4th section of Mad. Reg. VIII. of 1818, and setting forth the Circular Order of 1826, which the Court refused, as they were of opinion that the provisions of that Regulation did not apply to the case; alleged that as considerable time must necessarily elapse before judgment could be obtained upon the pending appeal, the Appellant had reason to fear, that unless security was directed to be given by the Respondents, the Appellant would be unable to reap the benefit of Her Majesty's decision, if in her favour, the Respondents having already, as the Appellant was informed and believed, mortgaged part of the estate, though they were still in possession of the greater portion of the same; and the Appellant prayed that the Respondents might be ordered, within six weeks from the service of an order to that effect upon such of the Respondents as should be in possession of the property in dispute, to give full and sufficient security, in accordance with the above Regulation and Circular Order; and that the calculation upon such Order might be made from the date of the property coming into possession of the Respondents, and that the Appellant might have leave to come in at the beginning of each succeeding year and demand additional security for the net proceeds of the past year, or, in the event of the Respondents not giving the required security within the period prescribed, that the property might be given over to the Appellant, pending the appeal, upon her giving such security, or, in default of the Appellant giving security within the like period of six weeks from the date of the expiration of the period to be assigned to the Respondents for giving their security, then that the estates might be attached, pending the appeal.

Mr. E. J. Lloyd, Q.C., and Mr. Coryton, in support of the petition.—The present application, though novel in its nature, is founded upon the case of Rajah Vassareddy Lutchmepetty Naidoo (5 Moore's Ind. App. Cases, 300), where the mischief now sought to be averted occurred, the property, *pendente lite*, being sold and the mesne profits lost. The refusal of the Sudder Court to exercise the discretion conferred on the Court by Mad. Reg. VIII. of 1818, sec. 4, will operate most prejudicially to the Appellant in the event of the decree being reversed, as no security for the mesne profits have been given.—[The Lord Justice Knight Bruce: Does that Regulation apply in this case? The Respondents were put in possession by the Collector, not by the Court.]—We submit that the Judicial Committee, under this Regulation, in its ministerial, if not in its judicial character, has power to make the order sought for.

The Lord Justice Knight Bruce.—The Regulation under which this application is founded does not, in their Lordships' opinion, apply to the present case, and, therefore, it will not be necessary to decide whether they have such a discretion as the Appellant concludes we possess, of directing securities to be furnished by the Respondents. There is, in fact, no allegation in the petition that the Respondents have committed or are committing waste, only a rumour of a mortgage of part of the estate. The case of Rajah Vassareddy Lutchmepetty Naidoo [5 Moo. Ind. App.

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

300], has nothing to do with such an application as this, as their Lordships in that case only ordered their decree to be effectually carried into effect by the Court in India.

The appeal now came on for hearing.

[330] Sir Frederick Thesiger, Q.C., Mr. E. J. Lloyd, Q.C., and Mr. Coryton, for the Appellant. Two questions are involved in this case; first, whether Appacooty Jyen gave the Appellant authority to adopt a son in the event which happened; and, secondly, whether the Will and Codicil set up by the Respondents are valid and legal instruments.

First. The presumption is strongly in favour of the supposition that Appacooty Jyen, being without a son, authorized the Appellant, his widow, to adopt one from their family in the event of the child of which she was then pregnant being a female, his spiritual welfare depending upon his being represented by a son, *Huradhu Mookurja v. Muthuranath Mookurja* (4 Moore's Ind. App. Cases, 414). This necessity is strongly shown by writers of the highest authority in India, 1 Strange's "Hindu Law," pp. 7, 73, 76 (2nd Edit.), 1 W. H. Macnaghten's "Hindu Law," p. 63, Inst. of Menu, ch. IX., pl. 107, Daya Bhaga, ch. XI., s. 1, pl. 31, F. Macnaghten's "Cons. on Hindoo Law," p. 176, 3 Colebrooke's "Dig. of Hindu Law," pp. 291, 5, *Crastnerao Wassadewji v. Ragunath Harichandarji* (Perry's "Oriental Cases," 150). The verbal authorization of the Appellant by her husband, which is sufficient, 1 Strange's "Hindu Law," p. 93, to adopt a son, is proved by the evidence of three witnesses, and the admission of that fact by the Respondents themselves in the exhibits filed. They even admit that they urged the Appellant to exercise the power so conferred on her. Upon the adoption taking place, the child becomes heir of the deceased, and the widow's title to her [331] husband's estate merges into that of guardian of the child, 2 Strange's "Hindu Law," p. 127, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229). As power had been given to the widow to adopt a son, Appacooty Jyen was, by the Hindoo law, incompetent to make any testamentary disposition.

Second. Neither the *factum* of the Will and Codicil, nor the mental capacity of the Testator, are sufficiently established by the evidence. The witnesses prove that the state of his health was such as to affect his mind, rendering him incapable of exercising testamentary power at the very time when it is alleged he executed these instruments; he, at that time, being in a state of delirium and insensibility. In such a condition, even if he executed the Will and Codicil, he must have been under such influence as would make the instruments void if to the prejudice of the Appellant. Decisive proof of the complete absence of influence and excitement must be proved, *Dodge v. Meech* (3 Hagg. Ecc. Rep. 620), *Cartwright v. Cartwright* (1 Phill. Ecc. Rep. 99), Instit. lib. 2, tit. 12, sec. 2. The evidence of the execution by the Respondents' witnesses, moreover, is contradictory and inconclusive; and considering the facility of obtaining evidence, and the value of Hindoo testimony, is quite unworthy of credit. Three only of the attesting witnesses are produced, and their testimony, which is contradictory in itself, fails to establish the validity of these documents; the Appellant's witnesses depose to these papers being forgeries. The *onus probandi* undoubtedly lies upon the Respondents, who set up these instruments. Assuming, however, that the Will and Codicil were [332] actually executed, they are void at law, a Will or testamentary power being wholly foreign and repugnant to the Hindoo law prevailing in Madras, 1 Strange's "Hindu Law," p. 254, Mad. Reg. V. of 1829. The Sudder Courts in Madras have decided that such an instrument is illegal and void (Decisions Sudr. Udalut, Mad., vol. i. pp. 27, 111). There is, besides, another fatal objection, which is, that Appacooty Jyen had no power to alienate the ancestral property; without the consent of his heirs he could not do so by deed, much less so could he by Will, which is not known to the Hindoo law. By the Hindoo law, ancestral property of an undivided family belongs to the family in common, and not to the head of it alone, 1 Strange's "Hindu Law," pp. 2, 17, 19, 199, 349; the Mitashara, ch. i., s. 1, Daya-Crama-Sangraha, fo. 94. The distinction as between ancestral and self-acquired property, as affected by Wills, is fully recognised by the Courts in Madras (Decisions Sudr. Udalut, Mad., vol. ii. pp. 61, 193, 271). In the event of the Respondents defeating her right to adopt, the Appellant, as widow of the deceased without male issue, is sole heir to his movable

and immovable property, as she takes before the daughters. 1 Strange's "Hindu Law," p. 133, *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331), *Cosse-nauth Bysack v. Hurrosoondery Dossee* (Morton's Dec. 85).

Mr. Wigram, Q.C., and Mr. Forsyth, for the Respondents.—First. The title of the Appellant to maintain this suit is founded upon the alleged adoption. Now, there is no evidence, or even an allegation in the [333] pleadings, that she has adopted a son for her deceased husband. If she had adopted a son, she has no title, as widow, to institute this suit, as, by the Hindoo law, the act of adoption divests the property from the widow and vests it in the adopted son, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229), *Rungama v. Atchama* (4 Moore's Ind. App. Cases, 1); her title to sue could only have been in the character of guardian of the son. In any view she cannot succeed in this suit, as it is not shown that she is her deceased husband's heir. We admit that a widow may, in some circumstances, succeed to her deceased husband's property, 1 Strange's "Hindu Law," p. 121, but the case of *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331), cuts it down to a life estate; but here the husband, by the exercise of a testamentary power, has defeated her title altogether.—[Sir William Maule:—The Appellant does not treat the case as one of adoption, but as having the power to adopt.] The question of the Appellant having adopted a son is only raised here upon the petition of appeal.—[Mr. Pemberton Leigh:—It is not pleaded that she exercised such a power, supposing she had the authority of her husband to adopt. Upon a record so framed we cannot, upon appeal, determine the question of adoption, even if such a power had been given.]

Second. Then the sole question remaining is the validity of the Will and Codicil. The evidence establishes the due execution of these instruments. The position and character of the Respondents, who are mere trustees, and have no interest under the Will, but to carry into effect the charitable intentions of the Testator, their readiness to sanction an adoption, [334] if power to adopt could be shown to have been given, at once proves their disinterestedness and their conviction of the genuineness of these instruments. The charge of forgery as against them, or undue influence in obtaining the execution of the Will and Codicil, is not entitled to any credit, being contrary to probability as well as fact. It is perfectly competent, by the Hindoo law, as at present prevailing, for a Hindoo to make a Will. *Mulraz Lachmia v. Chalekany Vencata Rama Jayyanadha Row* (2 Moore's Ind. App. Cases, 54), *Maulrauze Vencata Vurdiah v. Maulrauze Lutchmia* (1 Mad. Decisions, 438), are express authorities upon that point, and relate to the Presidency of Madras. It is also recognised by Mad. Reg. XXV. of 1802. A distinction is attempted to be made by the Appellant between acquired and ancestral property, and it is argued that the Testator could not by Will alienate ancestral property. No such distinction, however, exists. The foundation of the testamentary restriction rests upon the Hindoo law of an undivided family; kinsmen and coparceners having a right which cannot be divested without their consent. The Mitacshara, ch. i., sec. 1, pl. 30. But here the Testator was without kinsman or coparcener, and, in the absence of male descendants, he provides for the maintenance of his wife and daughter, and some female relations. In such circumstances it was competent for him to make a Will, devising ancestral property. The Pundits who have been consulted, and the Courts in India, have held upon their exposition of the law, that he had such a power, and this Court will not willingly reverse such decisions, operating as it does so beneficially by recognising the power of a Hindoo disposing of pro-[335]-perty by Will in Madras. We concede that where the Mitacshara governs, a father cannot by Will exclude his son. In considering the validity of a Will, it is necessary to look to the disposing power a Hindoo has over his property, whether ancestral or otherwise. In Bengal, a Hindoo may leave by Will, or bestow by deed of gift, his possessions, whether inherited or acquired. 2 Strange's "Hindu Law," p. 438, *Mullick v. Mullick* (1 Knapp's P.C. Cases, 245). 1 Morley's Dig., tit. "Will," pp. 612, 616. The only restriction, according to Colebrooke, a great authority, 2 Strange's "Hindu Law," p. 435-6, is, if the Testator has sons. So in Madras he can dispose by act, *inter vivos*. *Rungama v. Atchama* (4 Moore's Ind. App. Cases, 1). There is no reason why the Will of a Hindoo devising ancestral estate should not be treated as a conveyance. It is of little importance by what name the instrument or declaration by

which a Hindoo governs the disposition of his property after his death is, whether it is called a Will or a deed. In Scotland (see Bell's Dict. of Law of Scotland, tit. "Will") heritable property cannot be devised by Will, it must be by a trust disposition; which is, in fact, a conveyance. In the like manner it is competent to a Hindoo to make a gift of his property by deed, *inter vivos*, which is in the nature of a Will. 1 Strange's "Hindoo Law," pp. 17, 18, 258. *Eshanchund Rai v. Eshorchand Rai* (1 Ben. Sud. Dew. Rep. 2), *Sreenarani Rai v. Bhya Sha* (2 Ben. Sud. Dew. Rep. 29). It would not perhaps be good if given to one son to the exclusion of the other sons. *Sham Singh v. Mussumat Maraster* (3 Moore's Ind. App. Cases, 191). Now if a Hindoo can give, sell, or run in debt, so as to affect his ancestral property and render it liable to an execution, he surely must have a power of disposing of [336] it by Will. Such power was recognised here in *Baboo Janokey Doss v. Binduban Doss* (3 Moore's Ind. App. Cases, 745). The Mitaeshara, ch. i. sec. 1, pl. 27. If the decision of the Court below be reversed, it will go to the extent of holding that in no circumstances in Madras can a Will by a Hindoo devising ancestral estate be valid.

Mr. E. J. Lloyd, in reply.—It is inconsistent with, and repugnant to, the spirit of the Hindoo law which is in force at Madras, to allow such a testamentary disposition as this. The Hindoo law, in fact, knows no such instrument as a Will. 1 Strange's "Hindu Law," p. 251. Mad. Reg. V. of 1829 expressly prohibits the exercise of such a power. The cases referred to by the Respondents relating to Wills do not apply, as they are either founded upon the authorities prevailing in Bengal, which are not received as law in Southern India, or, as in the case of *Mulraj Lachmia v. Chalekany Venkata Rama Jagganadha Row* (2 Moore's Ind. App. Cases, 51), relate to self-acquired property, 1 Strange's "Hindu Law," p. 268, which point is not now in contention. The objection here is confined to the validity of a Will devising ancestral estate. It has been recently held in Madras that such a Will is a nullity and of no force (Decisions Sudr. Udalut. Mad., vol. i. p. 27). Such a restriction is not peculiar to Southern India: an instrument devising real estate would be void by the law of Scotland. And so it would be by the English law, as in this case there is a devise of real estate to charitable purposes, which would be void by the Statute of Mortmain. The judgment of the Court below is founded upon the opinions of the [337] Pundits, who, contrary to the Regulations, have cited no authorities to support their opinions, which, in a case of such importance as the present, shows the necessity of the Court being governed by the ancient and undoubted law of India, which restrains alienation by a testamentary power.

Their Lordships took time to consider their judgment, which was now delivered by

The Right Hon. T. Pemberton Leigh (April 3, 1856).—The question to be decided in this case is the right of succession to the property, movable and immovable, partly acquired and partly ancestral, of a Hindoo named Appacooty Jyen. He died on the 4th of September, 1844, at Combaconum, within the Presidency of Madras: and by the Hindoo law, as it prevails in that Province, the questions which arise in this case are to be determined.

The Appellant, who was Plaintiff in the Court below, is the widow of Appacooty Jyen, and it is not disputed, that, as such, she is the sole heir to his property, both movable and immovable. The Respondents, however, insist that the Appellant's title, as heir-at-law, is displaced by a Will and Codicil, executed by her husband before his death: and the genuineness of those instruments, and their validity in point of law, if genuine, are the material questions for their Lordships' consideration. It is contended by the Appellant that both these instruments are forged; that at the time when they are respectively alleged to have been executed, the supposed Testator was insensible; and that if they are held to be established by the evidence as genuine, [338] they are, by the Hindoo law, as it prevails in the Presidency of Madras, inoperative as to all ancestral property of the Testator.

Another matter was put in issue in the Courts below, with respect to which their Lordships intimated at the hearing, that they could not upon this record pronounce any direct decision. It is alleged by the Appellant in her plaint, that her husband enjoined her, in the event of the child with which she was pregnant, at his death,

not proving to be a male, to adopt a son to be chosen by herself. As no adoption according to this power was ever suggested in the Courts in India to have been actually made, their Lordships were of opinion that the question, whether the power to adopt had been really given, could not be decided upon this appeal. It was thought, however, by the Counsel on both sides, that the adoption and the testamentary dispositions were so inconsistent with each other that they could not stand together. To the extent to which the adoption, if proved, may affect the evidence as to the testamentary instrument, it will be necessary for their Lordships to examine the proofs in support of it. The *onus* of proving the Will and Codicil is, of course, upon the Respondents, who rely upon them.

Appacooty Jyen himself was an adopted son. At the time when the disputed instruments are said to have been made, he was in his twenty-second year: he had a wife, the Appellant, and one daughter, about four years of age; and his wife had been for some months pregnant with another child, born after his death; he had several female relations living in his house, widows of different [339] members of the family into which he had been adopted; he had some considerable property, movable and immovable, and of that portion of the latter which had come to him from his ancestors a part had been regularly applied by them to the maintenance of certain religious and charitable establishments, which it seems they had founded. This usage had been continued during his life by Appacooty Jyen, and one of the gentlemen afterwards named as trustees in the alleged Will had been entrusted by Appacooty Jyen with the superintendence of these charities.

In this state of his family and circumstances, in the month of August, 1844, he was attacked by the illness which terminated in his death. Astrologers had foretold that his life would be in great danger in the twenty-second year of his age, which he had then attained; and it is alleged by the Respondents that the sick man, anticipating his death, made, on the 28th of August, the Will, the validity of which is now to be decided. By that instrument he directed that the agents then in the management of his estates should be continued, and, in substance, he appointed the Respondent, Nadaraja Chetty, and a gentleman named Chinnappavien (who has died since the institution of the suit), trustees of his property: he directed provision to be made for the maintenance of his widow and his female relations; for his daughter then born, and for the child to be born according as it might prove to be a boy or a girl; and he directed that the several charities which he was in the habit of supporting should be continued by his trustees, but he made no provision for the event of any boy [340] being adopted by his widow, nor any allusion to his having given her any such power of adoption.

By this Will, though he had provided for the maintenance of the several female members of his family, he had not made provision for their residing apart from each other in the event of their disagreement; this not improbable contingency was suggested to him, and it is said, that on the 3rd of September, 1844, the day before his death, he executed a Codicil to his Will by which he allotted separate residences to his wife and other female relations, and bequeathed to charities a larger portion of his property than they could have claimed under his Will; but as regards the adoption, the Codicil is equally silent with the Will.

The trustees under these instruments take no personal interest whatsoever under them, unless the administration of the charities can be considered as such: they are persons in a respectable station of life, of good property, connected with the Testator, trusted by him in his lifetime, and who, after his death, so far from showing any improper eagerness to maintain these instruments, were willing, and indeed anxious, that the widow should exercise her supposed power of adoption, by which their operation would have been in a great measure defeated. This power they state that, from the representations made to them, they at one time believed her to possess, although they were afterwards satisfied that such belief was erroneous. The transaction, in respect of which an imputation is attempted to be cast upon Chinnappavien, appears to their Lordships fully explained.

The Will and the Codicil are attested: the first [341] by seven, the latter by ten witnesses, including the individual who wrote them; many of those witnesses, though not all, have been examined; they are several of them of a class superior to that from which Hindoo testimony generally proceeds; their evidence seems open to no other

objection than may reasonably be accounted for from the length of time which had elapsed between the date of the transactions deposed to, and the period when the witnesses were examined, and there are not wanting incidental circumstances noticed in the argument at the Bar, which strongly confirm the accuracy of the accounts which they give. Now these witnesses, one and all, depose to the fact of the signature of these papers, to their being written from the dictation of the Testator, and to his perfect mental capacity at the time when they were executed.

Against this testimony, there is really, when it comes to be examined, no evidence whatever. Three witnesses are called, who say that they saw the Testator in the afternoon or evening of the day on which he died, and one says he was then insensible, and that he, the witness, was told that he had been insensible for ten or fifteen days: another swears, that when he saw the Testator he was not insensible, for he says, that the Testator desired the witness to feel his pulse, who did so, and told him that he would come and feel it again when the fever had abated: the third says, that when he called to see Apparooty Jyen, between two and three in the afternoon, he was lying speechless, and that the witness was told by Chinnappavien that he had been insensible for several days. That [342] the Testator became insensible some hours before his death, which occurred in the evening of the 4th of September, is stated by the Respondents' witnesses, and not one of the Appellant's witnesses affects to say that he had any personal knowledge of the state of the Testator at the time when either the Will or the Codicil was executed.

The evidence of two witnesses, who state that they were invited to attest these instruments after the death of the Testator, is wholly unworthy of credit, and has been treated by the Judges in the Court below with proper disregard.

There appears, therefore, not the slightest reason for dissenting from the opinion of the Judges in the Court below, who had, both in the Zillah and the Sudder Court, been satisfied of the genuineness of these instruments, unless it can be found on clear proof of the power of adoption and the inconsistency of such power with the contents of these instruments.

But their Lordships have sought in vain for any such proof. There is no doubt that, at some time after the Testator's death, the female relatives of the Testator represented that a power had been given by the Testator to the widow to adopt a boy of their family, and that the trustees, believing it, had wished such adoption to be made, and that the widow refused to make it; but of evidence that any such power was really given by the Testator, there is none worthy of the least attention.

The allegation in the plaint by the Appellant is, "that in the early part of the month of August, 1841, when she was eight months pregnant with a second child, her husband had a severe attack of [343] fever and ague; and in order that he might obtain happiness in the next world, he authorised her, in the presence of certain parties, to adopt a boy to be chosen by herself, in the event of her expected child being born a girl." This religious feeling is so much in accordance with the tenets and prevailing sentiments of Hindoos, that the statement in itself bears no mark of improbability. But, when the evidence is referred to, it is quite of a different character from that which the plaint alleges. It consists of witnesses who depose to hearing the Testator say, by way of consoling his widow, who was deeply distressed at the prospect of his death, that she should not be so much grieved; that she would produce a son, and, if not, she could adopt one. Surely this is not the language which would be used by a person who, on the prospect of death, with a view to the salvation of his soul, was at that moment laying injunctions on his widow for the performance of a solemn and important duty. It is not necessary to impute perjury to the witnesses; they are speaking after the lapse of several years to words which they probably misunderstood, or had forgotten, if such words ever were used at all, which is very doubtful; they could not have been intended to give the authority, but must have referred to something either already done, or thereafter to be done, by the Testator.

The question at present only is, whether their Lordships can say that the evidence as to the power of adoption is so strong as to induce them, upon that ground, to disbelieve the testimony in favour of the Will and Codicil, which certainly are not [344] very consistent with it. Their Lordships can come to no such conclusion. If an adoption has been or should be made, and any claim should be advanced by the

person so adopted, such claim will have to be decided upon the evidence which may then be produced. It is sufficient for the present purpose to say that their Lordships do not mean in the smallest degree to invite or to encourage any such claim.

The Will and Codicil being established as the acts of the Testator, must, without doubt, take effect as to all property of his not ancestral; the question is only as to their operation on that which is ancestral, and this, in truth, is the only point upon which any reasonable doubt can be raised.

It must be allowed that in the ancient Hindoo law, as it was understood through the whole of Hindostan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown; and it is stated by a writer of authority (Sir Thomas Strange) that the Hindoo language has no terms to express what we mean by a Will. But it does not necessarily follow, that what in effect, though not in form, are testamentary instruments, which are only to come into operation and affect property after the death of the maker of the instrument, were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man who is the absolute owner of property may now dispose of it by Will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the judicial authorities in Calcutta, as well of the Supreme as of the Sudder Court. No [345] doubt the law of Madras differs in some respects, and, amongst others, with respect to Wills, from that of Bengal. But even in Madras it is settled that a Will of property, not ancestral, may be good; a decision to this effect has been recognised and acted upon by the Judicial Committee, and, indeed, the rule of law to that extent is not disputed in this case.

If, then, the Will does not affect ancestral property, it must be, not because an owner of property by the Madras law cannot make a Will, but because, by some peculiarity of ancestral property, it is withdrawn from the testamentary power.

It was very ingeniously argued by the Respondents' Counsel, that in all cases where a man is able to dispose of his property by act, *inter vivos*, he may do so by Will; that he cannot do so when he has a son, because the son, immediately on his birth, becomes coparcener with the father: that the objection to bequeathing ancestral property is founded on the Hindoo notion of an undivided family; but that when there are no males in the family the liberty of bequeathing is unlimited.

It is not necessary for their Lordships to lay down so broad a proposition; they think it safer to confine themselves to the particular case before them. Under the circumstances of Testator's family, when he made his Will and Codicil, and having regard to the instruments themselves, the Pundits, to whom this question was properly preferred by the Court—the Pundits of the Sudder Dewanny Adawlut—have declared their opinion, that these instruments are sufficient to dispose of ancestral estate; that opinion has been affirmed by two Judges successively, of whom it is [346] but justice to say that they appear to have examined the subject very carefully, and, after much consideration, to have pronounced very satisfactory judgments, though in one or two incidental observations which have fallen from them, their Lordships may not entirely concur.

Their Lordships must advise Her Majesty to affirm the decree complained of, with costs.

SREEMUTTY RABUTTY DOSSEE. *Appellant*: RADANAUTH SEIN and Others,—*Respondents* * [April 12, 1856].

On appeal from the Supreme Court at Calcutta.

An appeal was allowed in October, 1854, by the Supreme Court at Calcutta to England. After the allowance of the appeal no further steps were taken by the Appellant. In March, 1856, the Judicial Committee, upon a certificate of the Registrar of the Supreme Court that no further proceedings had been taken after the Order allowing the appeal, dismissed the appeal, at the instance of the Respondents, for want of prosecution.

This was a petition by the Respondents to dismiss the appeal for want of prosecution. The appeal was allowed by the Supreme Court at Calcutta on the [347] 26th of October, 1854, but no further proceedings had been taken since that time by the Appellant. A certificate of the Registrar of the Supreme Court certifying that no steps had been taken since the date of the order granting the appeal was filed.

Mr. R. Palmer, Q.C. (with whom was Mr. Leith), in support of the motion, insisted, that as a year and a day had elapsed, the appeal must be taken to have abated.—[Mr. Pemberton Leigh: Have we jurisdiction? There has been no petition of appeal presented, and no reference of the appeal to us.]—The Supreme Court considers itself *functus officio*, after leave to appeal to England has been granted.

The Right Hon. Dr. Lushington.—Their Lordships would have felt very great difficulty in this application if this petition had not been referred to us, but as it has been referred, we are of opinion that we can dismiss the appeal for want of prosecution, which we hereby order.

[348] ARDASEER CURSETJEE.—*Appellant*: PEROZEBOYE,—*Respondent* † [April 12 and 14, 1856].

On appeal from the Supreme Court at Bombay.

The Bombay Charter of Justice (Dec. 1823) gives the Supreme Court "full power and authority to administer and execute, within and throughout the town and Island of Bombay, and the limits thereof, and the factories subordinate thereto, etc., upon all persons so described and distinguished by the appellation of British subjects, as aforesaid, there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London, in Great Britain, so far as the circumstances and occasion of the said town, island, territories, and people shall admit and require."

Suit on the Ecclesiastical side of the Supreme Court at Bombay by wife against husband for restitution of conjugal rights and for maintenance. Protest by the husband, that the parties were Parsees professing the religion of that sect, and that the Court had no jurisdiction to administer towards them the Ecclesiastical law as at the date of the Charter was used and exercised in the Diocese of London. Upon appeal, Held: (reversing the judgment of the Court below, and maintaining the protest) that the Supreme Court of Bombay, on its Ecclesiastical side, had no jurisdiction to entertain such a suit, as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the Court, if it made a decree, had no means of enforcing it, except according to the

* Present: Members of the Judicial Committee.—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan. Assessor,—Sir Lawrence Peel.

† Present: Members of the Judicial Committee.—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan. Assessor,—Sir Lawrence Peel.

principles governing the matrimonial law in Doctors' Commons, which were in such a case incompatible with the laws and customs of Parsees.

Quære: Whether, in such circumstances, the Supreme Court can, on its civil side, give relief to the wife?

In this case the appeal was brought from a judgment of the Supreme Court at Bombay, which overruled a protest entered by the Appellant against the competency of that Court to entertain a suit instituted against him by the Respondent, his wife, for restitution of conjugal rights. The Appellant and Respondent were Parsees, and natives of the Island of Bombay.

On the 7th November, 1853, the Respondent filed a libel against the Appellant on the Ecclesiastical side of the Supreme Court of Bombay, pleading, first, that in the month of May, 1830, a marriage according to the laws and usages among Parsees, and agreeably [349] to the rites and ceremonies of the Parsees' religion, was duly had and solemnised between the Respondent and the Appellant, the Respondent being a daughter of the late Framjee Cowasjee Banajee of Bombay, Parsee merchant and inhabitant, deceased, and the Appellant being a son of Cursetjee Ardaseer, late of Bombay, Parsee merchant and inhabitant, deceased. Secondly, that after the celebration of the marriage, the Respondent, by reason of her tender years, continued to live and reside with and under the protection of her father, and separate and apart from her husband, until the month of February, 1833, when the Respondent, having attained her age of puberty, quitted her father's roof, and she and her husband then came together, and the marriage was then consummated between them. Thirdly, that some time in the course of the year 1835, the Respondent paid a visit to her father, with the consent and approbation of her husband, and while on such visit was taken seriously ill, when she was visited by her husband, and was treated by him with conjugal kindness, and that, on her recovery from her illness, she returned to the house of her husband, and was received and treated by him then as his lawful wife; but that after a short residence and cohabitation with him, the Respondent, with the consent of her husband, paid another visit to her father, with the intention of returning to her husband when requested by him so to do, [350] and that the Appellant, while his wife was on such last-mentioned visit to her father, having neglected to invite her back to his house for a considerable period of time, and the Respondent being desirous of returning to her husband, her father requested him to send for his wife, which he refused or neglected to do; that subsequently, the Respondent, through her relations and friends, applied to her husband to the like effect, and that especially her father, on the 3rd of July, 1843, wrote to the Appellant's father a letter in which he desired and requested him to endeavour to induce the Appellant to receive back his wife, but that he refused to comply with his request, and the Respondent, on the 3rd of July, 1843, proceeded to the house of her husband, but after a short stay there was obliged to quit it from his violent conduct and demeanour towards her, he refusing to permit her to remain in his house and forcibly expelling her from the same. Fourth, that the Respondent, during the lifetime and up to the time of the death of her father, continued to live in his house in consequence of the continued refusal of her husband to take her back and maintain her, and was maintained and supported by and at the expense of her father. Fifth, that since the death of her father, which took place on the 12th of February, 1851, the Appellant had refused to receive the Respondent, or to allow her any maintenance, and that she had been obliged to support and supply herself with the necessaries of life, by the sale from time to time of her jewels and furniture, and by the occasional assistance of her friends, and had frequently been in great distress for want of money to pay her monthly bills for rent and the other necessaries of life, and had been obliged [351] to contract debts on such account to a large amount, and was, and had been for some time past, in very needy and destitute circumstances, and without the means of providing herself with the necessaries of life. Sixth, that since the death of her father, the Appellant, though he had never been divorced from the Respondent, went through the form and ceremony of a second marriage with one Bhiceoyjee, a daughter of one Dorabjee Dadabhoj, of Bombay, Parsee inhabitant, and had for some years past been and was then living with her as man and wife and had had several children by her, and had repudiated the Respondent, his lawful wife, without

any just cause; and the libel prayed that the Respondent's husband might be ordered to take back his wife, and treat her with conjugal kindness, or, if the Appellant should not consent, to pay her Rs. 1000 per month for the period of her natural life, or a suitable maintenance for her, together with the arrears of such maintenance from the 3rd of July, 1843; then that an account might be taken, under the directions of the Court, of the Appellant's property, movable and immovable, as well as that embarked in his trade or business, together with the profits thereof, and that such suitable maintenance might be made to the Respondent thereout, as the Court should, under all the circumstances of the case, declare the Respondent, as the lawful wife of the Appellant, to be entitled to.

The Appellant filed a protest against the competency of the Court to entertain the suit, alleging that the Respondent and the Appellant were respectively born in the Island of Bombay, and were Parsees, professing the religion of Zoroaster, commonly called the Parsee religion, and were respectively descended from [352] the race of Parsees inhabiting Goozerat in India, and were not respectively descended from Parsees born or residing within any of Her Majesty's dominions other than the territories under the government of the East India Company in India, and were not respectively persons who, prior to the date of the Letters Patent establishing the Court, had been described or distinguished in the Royal Charters of Justice for Bombay by the appellation of "British subjects," and that the Court was incompetent to take cognizance of or proceed in the suit, or to administer towards and upon the Promovent or Impugnant the Ecclesiastical Law as the same, at the date of the Letters Patent establishing the Court, was used and exercised in the Diocese of London in Great Britain.

The protest was argued on the 9th of January, 1854, and on the 5th of July following, the Chief Justice, Sir William Yardley and Sir Charles Jackson, the Puisne Judge, disagreeing in opinion, delivered their judgments, *seriatim*.

The judgment of Sir William Yardley, the Chief Justice, certified and returned by him to the Privy Council, as containing the reasons for his judgment, after setting forth the pleadings, proceeded thus: "The question which is raised by this protest is, whether the Court has Ecclesiastical jurisdiction in matters relating to the marriage state over persons of the Parsee religion, who are natives and inhabitants of the town and island of Bombay. If the Court has such jurisdiction, this protest must be overruled; if not, it must be allowed.

"At the time this case came on for argument I entertained, and I confess I still entertain, great doubt whether the Impugnant ought to be allowed again to [353] raise this question by protest, inasmuch as in the year 1843, when a suit precisely similar to the present was instituted against him by the same Promovent, he then put in the same protest, which, after solemn argument, was overruled in an elaborate and careful judgment by Sir Erskine Perry, then Puisne Judge of the Court; the Chief Justice, who had been prevented by illness from hearing the argument, fully concurring in the conclusion that the Ecclesiastical jurisdiction did extend to Parsees, as appears by a full report recently published by Sir Erskine Perry in his collection of Oriental Cases, and that decision has been followed in at least one other case, which is also reported in the same volume. *Buchaboye v. Merwanjee Nasserwanjee*. (Oriental Cases, 73.) However, as this is an important question of jurisdiction, and the former decision does not seem to have been acted on by the Promovent in this case, and as my learned brother dissents from that judgment, I have thought it better not to content myself by merely referring to the former judgment, but to examine afresh the arguments which have been adduced on both sides of the question; but in so doing it is not my intention to travel over the same ground traversed by Sir Erskine Perry in his judgment, but to consider a few points in the argument which have been adverted to either not at all, or not so fully as their bearing on the question seems to demand. The Act, 4 Geo. IV., c. 71, under the immediate authority of which the Charter establishing this Court was granted, after reciting that it might be expedient for the better administration of justice in Bombay, that a Supreme Court of Judicature should be established at Bombay, in the same form and with the same powers and authorities as [354] that now subsisting, by virtue of the several Acts before mentioned, at Fort William in Bengal, enacts, by section 7, 'that it shall and may be lawful for His Majesty, his

Heirs and Successors, by Charter or Letters Patent under the Great Seal, to erect and establish a Supreme Court of Judicature at Bombay aforesaid, to consist of such and the like number of persons to be named from time to time by His Majesty, his Heirs and Successors, with full power to exercise such Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control within the said town and island of Bombay, and the limits thereof, and the territories subordinate thereto, and within the territories which now are or hereafter may be subject to or dependent upon the said Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereof; and by section 17 of the same Act, it is declared and enacted (amongst other things), 'that it shall be lawful for the said Supreme Court of Judicature at Bombay to be created by virtue of this Act, within the said town and island of Bombay and the limits thereof, and the factories subordinate thereto, and within the territories which now are or hereafter may be subject to or dependent upon the said Government of Bombay, and the said Supreme Courts are thereby required, within the same respectively, to do, execute, perform, and [355] fulfil all such acts, authorities, duties, matters and things whatsoever as the said Supreme Court of Fort William is or may be lawfully authorised, empowered, or directed to do, execute, perform, and fulfil within Fort William in Bengal aforesaid, or the places subject to or dependent upon the Government thereof.'

"I have been the more particular in setting out these two sections, because upon the language of the 7th section, as distinguished from that of the 13th Geo. III., c. 63, s. 13, under which the Supreme Court at Calcutta was erected, is founded an argument, that if the Court at Calcutta has Ecclesiastical jurisdiction over the natives of India residing within its jurisdiction, it does not thence follow that this Court has such jurisdiction, because the 7th section of the 4th Geo. IV., c. 71, only empowers the Crown to erect a Court, with the powers and authorities therein described, and that, therefore, we must look to the Charter itself to ascertain the extent of the jurisdiction conferred; whereas by the 13th Geo. III., c. 63, sec. 13, it is declared that the Court to be erected 'shall have, and the said Court is thereby declared to have, full power and authority to exercise and perform all civil, criminal, admiralty and ecclesiastical jurisdiction,' etc. Now, I feel compelled altogether to dissent from this argument, for I think it impossible that the Legislature could more clearly have expressed its intention that the Court to be erected at Bombay should be a Court with jurisdiction co-extensive with that of the Supreme Court of Calcutta than it has done in the 17th section of the Act, which I have cited, and which seems to me to give, by relation, to the Court here, any authority and power which the Court at Calcutta may have derived from the language of the [356] 13th Geo. III., c. 63, sec. 13; and if that be so, the argument which goes to show that the decision of the Supreme Court at Calcutta in the Beebee Muttra's case (Clarke's Rules, p. 119) is no authority in this case, entirely falls to the ground, and we must take it, that if by virtue of the language of the Act, 13 Geo. III., c. 63, the Supreme Court at Calcutta has the jurisdiction, this Court also, by virtue of the language of the 4th Geo. IV., c. 71, equally possesses it. But without for the present either adopting or rejecting the view of Chief Justice Russell, as to the force and power of the words cited, let us proceed to examine those clauses of our own Charter in which the jurisdiction of the Court is defined.

"The language of the clause of the Charter granting Ecclesiastical jurisdiction is as follows:— And it is our further will and pleasure, and we do hereby, for us our heirs and successors, grant, establish, and appoint that the Supreme Court at Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, and shall have full power and authority to administer and execute within and throughout the town and island of Bombay, and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing, the Ecclesiastical law,

as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said town, island, territories and people shall admit or require, and to that purpose we give and grant to the said Supreme Court at Bombay full power and authority to take [357] cognizance of and proceed in all causes, suits, and business belonging and appertaining to the Ecclesiastical Court before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well at the instance or promotion of parties as of office, mere or mixed, against any of the said subjects residing in the said town, island, territories or districts, and which by the law and custom of the said Diocese of London are of ecclesiastical cognizance, and the said causes, suits and business, with their incidents, emergents and dependents, and whatsoever is thereto annexed and therewith connected, to hear, dispatch, discuss, determine, and also to grant probates under the seal, etc., of the last wills and testaments of all or any of the said subjects of us, our heirs and successors, dying and leaving personal effects within the said town, islands, territories or districts respectively, and of all persons who shall die or have effects within the places aforesaid,' etc., etc.

"The difficulty in the construction of this clause arises mainly upon the words 'and towards and upon all persons so described by the appellation of British subjects': and it is contended for the Impugnant, that these words do not include any of the Asiatic inhabitants of the Island of Bombay, even though they and their forefathers may have been subjects of the Crown of England for many generations; and this term 'British subjects' has undoubtedly given rise to much discussion; and an opinion of Sir Charles Grey has been cited from the Fifth Appendix to the Third Report of the Select Committee of the House of Commons on the Affairs of the East India Company, 17th February to 6th October, 1831, in which, after admitting the great obscurity which the meaning of [358] the term, as used in various Acts of Parliament and Charters, is involved, he says, 'Perhaps if I were asked what I myself should say approached to a criterion of any question whether a person is within the meaning of this expression as it is used in the Statutes and the later Charters, it would be, whether he is a subject by any other title than that of birth within British India, and that if he is a subject in any other way he is a British subject according to the meaning of the Madras and Bombay Charters; but that if he has no other claim than that of birth in British India, he is not.' Sir Charles Grey then expresses himself, as it seems to me, very doubtingly upon the sufficiency of this definition or description: and certainly one does not see very clearly why the term 'British subjects' should be held to include any native, whatever his colour or race, of Jamaica, or any other dependency of Great Britain not included in the British Isles, and yet be held not to include persons born in an Island which has been a dependency of the Crown since 1661, and the natives of which have, since that time, owed no allegiance to any other power; and I cannot help thinking that all Sir Charles Grey meant to say was, that such a construction might avoid many and perhaps most of the difficulties which have arisen from the use of the term.

"It is further contended in argument, that the difference of the language of the clause of the Charter now under consideration, as to the granting of probates, indicates an intention that the power to grant probates should have a more extensive application than the general Ecclesiastical jurisdiction granted by the first part of the clause, and that such intention is manifested by the words 'and of all persons who [359] shall die or have effects within the places aforesaid,' which words are not in the Calcutta Charter, and therefore it is argued those words were clearly introduced for the purpose of including the native subjects of the Crown in this Island, which clearly shows that it was not intended that the former part of the clause should apply to them. But are the words proper for this purpose? What are 'the places aforesaid'? We must refer back to the former part of the clause, and we find that the places aforesaid are the 'town and Island of Bombay and the limits thereof, and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government,' which would now include the whole of the Bombay Presidency, and perhaps the newly-acquired Province of Scinde. How, then, can it be for a moment contended that these words were introduced merely for the purpose of giving jurisdiction to grant probates of the Wills of the native inhabitants of the Island of Bombay? Probably

the intention with which these words were introduced may have been to enable the Court to grant probate of the wills of foreigners dying and leaving *bona notabilia* in the jurisdiction, 'or' meaning 'and.' But it is not necessary at present to determine the meaning of those words. It is sufficient to show that of themselves they afford no argument that natives are not included in the jurisdiction granted by the former part of the clause. Now, if that be so, we have no more jurisdiction to grant probate of the Wills of the Asiatic native inhabitants of this Island than we have to exercise a general Ecclesiastical jurisdiction over them; that is to say, none at all, unless they are included in the term 'persons [360] distinguished by the appellation of British subjects,' or unless we can put some reasonable construction upon the Charter which would include them as well as British subjects of British descent. That is difficult, I admit, but not insuperable if we read the Charter in conjunction with the Act of Parliament under the authority of which it was granted, and which authorised the erection of a Court 'with full power to exercise such Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction, both as to natives and British subjects, etc., within the said town,' etc. Now, if we take the clause conferring the Ecclesiastical jurisdiction, and apply the words 'and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid' to the words immediately preceding, viz. 'and all the territories which now are, or hereafter may be, subject to or dependent upon the said Government,' and to those words only, we might then hold that we had an Ecclesiastical jurisdiction within and throughout the town and island of Bombay, and also over British subjects, in the narrower sense of the term, in the other territories subject to the government of Bombay; and this construction would be in strict conformity with the practice of the Court ever since it was established, and is moreover favoured by the language used, the words 'and towards,' etc., seeming to couple the words following with the sentence immediately preceding, and being unnecessary and ungrammatical if the operation of the former words was to be confined to 'persons described and distinguished by the appellation of British subjects'; and further, the words 'there residing' may, with at least equal grammatical correctness, be applied to 'the territories which now [361] are or hereafter may be subject to or dependent upon the Government of Bombay,' as to the whole of the local definition of the jurisdiction. This construction would give us a jurisdiction local and universal in the town and island of Bombay, and personal over British subjects in the territories dependent upon the Government of Bombay; and this construction alone (if the natives of Bombay may not be described as British subjects) would be in conformity with the jurisdiction heretofore exercised by the Court, and seems to satisfy and reconcile the language of the Statutes and the Charters. I have shown that the Statute gives the Court a general Ecclesiastical jurisdiction; and it is laid down by Chief Justice Russell, in Beebee Muttra's case, on the authority of Lord Kenyon, in *The King v. Miller* (6 Term Rep. 268), that the King's Charter could not essentially narrow the powers granted by Act of Parliament; nor do I think there was any intention to do so, the Charter being intended rather to particularize and specify the powers of the Court than to limit and control them.

"But another argument has been used against the exercise of an Ecclesiastical jurisdiction over any other inhabitants than those of British parentage or descent, on the ground that the Ecclesiastical Courts are essentially Courts Christian, and that their jurisdiction cannot be applicable to persons of any other religion, because formerly the sentences of those Courts were enforced by the greater or lesser excommunication, a process which, in the case of a Hindoo, or Fire worshipper, would be simply absurd. To this it may be answered, that excommunication was abolished by the 53rd Geo. III., c. 127, and consequently was not, at the date of our Charter, the practice of the Diocese of [362] London; and if the argument is good for anything it tends to show that the Supreme Courts in India cannot reasonably exercise any Ecclesiastical jurisdiction over natives who are not Christians, either for granting probates, or letters of administration, or otherwise. But the Charter seems to have been framed with a view to meet objections of this nature, for it expressly provides (sec. 29) that 'in all suits so to be determined by the laws and usages of the said natives, the said Courts shall make such rules and orders for the conduct of the same, and frame such process for the execution of their judgments, sentences, or

decrees, as shall be most consonant to the religion and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends of justice'; and the whole Charter is conceived in the same enlarged and liberal spirit, looking rather to the substantial ends of justice than to an exact conformity to the proceedings of English Courts of law.

"It has been pointed out, too, that Sir Erskine Perry's judgment proceeds on the assumption, that unless the Court exercise an Ecclesiastical jurisdiction, natives of Bombay would have no means of enforcing the rights and obligations springing from the married state, and would be altogether without remedy: and in reply to this argument, it is suggested that the wife, in a case like the present, might sue her husband, either on the equity or plea side of the Court, and that at all events persons supplying her with necessities might sue him. That is quite true, and it might constitute some argument against the existence of an Ecclesiastical jurisdiction in such cases, if the only 'conjugal rights' acquired by marriage by a [363] Parsee female were a right to be maintained at the expense of her husband; but though it is true that marriage is a contract, it is something more than a contract. It is the most important of all social institutions, and under it a female acquires a *status*, rights, and privileges which would be very inadequately vindicated by an action for necessities: and I am not aware of any authority for the position that she could enforce those rights and privileges by a suit against her husband on the equity side of the Court. I think it is much more natural to suppose that the Legislature, when it was about to erect Courts of plenary authority and jurisdiction in the presidency towns of British India on the model of the Courts of various jurisdictions in England, and expressly conferred upon the Indian Courts those different species of jurisdiction, it was intended that the procedure should be, so far as was consistent with the circumstances of the country and its inhabitants, conformable to that of the Courts in England respectively exercising the corresponding jurisdictions. And, finally, this jurisdiction has been so long exercised in the Supreme Court and the Recorder's Court that it has, to use the language of Lord Mansfield, become 'a rooted and established practice,' not to be disturbed except upon sure and sufficient grounds. A suit of this kind was entertained by Sir James Macintosh when Recorder; and we have seen that two suits of a similar kind were entertained by Sir Erskine Perry, to whose judgment in the case between these very parties I beg leave more particularly to refer,—a judgment founded upon much research and inquiry, and an extensive knowledge of the subject. Under these circumstances, even if I saw more reason than I do to [364] doubt the soundness of the views of my predecessors, I should pause before I took upon myself to reverse a current of decisions which has flowed all in one direction for half a century, or thereabouts, and I believe still longer. I think it would be incumbent on me, even if I entertained much more serious doubts than I feel on this occasion, to act upon those uniform decisions until they shall have been reversed by a superior tribunal."

The judgment of Sir Charles Jackson, the Puisne Judge, was as follows:—"Two questions appear to be raised by this protest, first, whether this Court has any and what Ecclesiastical jurisdiction over Parsees, and if it has, secondly, to what extent such jurisdiction can be properly exercised between Parsees.

"The first question, whether this Court has any and what Ecclesiastical jurisdiction over Parsees, must be decided upon the construction of the Act of Parliament authorising the establishment of this Court, and the Charter of the King passed in pursuance of that Act. The 4th Geo. IV., c. 71, sec. 7, authorised His Majesty, by Charter, to erect and establish a Supreme Court at Bombay, 'with full powers to exercise such civil, criminal, admiralty, and Ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control within the said town and island of Bombay and the limits thereof, and the territories subordinate thereto, and within the territories which now or hereafter may be subject to or dependent upon the Government of Bombay, as the said [365] Supreme Court of Judicature at Fort William in Bengal by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereof.' It is clear from this section, that the

Legislature contemplated the issuing of a Charter giving this Court an Ecclesiastical jurisdiction over natives as well as British subjects, and the same power to administer the same as the Supreme Court at Calcutta was invested with; and it appears from the 17th section that this Court, when created, is required 'to do, execute, perform, and fulfil all such acts, authorities, duties, matters, and things whatsoever as the Supreme Court at Calcutta is or may be lawfully authorised, empowered, or directed to do, execute, perform, and fulfil,' etc. Considering the terms of this enactment, and the positive language of section 13 of the 13th Geo. III., c. 63, conferring a general Ecclesiastical jurisdiction on the Supreme Court at Calcutta, and the decision of that Court in Beebee Muttra's case, I think, it is clear that this Act confers upon this Court an Ecclesiastical jurisdiction over the natives of Bombay.

"The Charter establishing this Court, dated the 8th of December, 1823, must next be considered. The 47th section of that Charter regulates our Ecclesiastical jurisdiction, and appears to be divisible into two parts. The first part of the section gives an Ecclesiastical jurisdiction in all causes and suits which are of Ecclesiastical cognizance; and the second gives power to grant Probates and Letters of Administration; and the terms employed throughout the section, describing the classes of persons subject to these different jurisdictions, are very remarkable. The first part of the section grants the Court Ecclesiastical [366] jurisdiction 'towards and upon all persons so described and distinguished by the appellation of British subjects,'—'as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said town, etc., shall admit or require,' and for that purpose authority is given to this Court to hear and determine all causes of Ecclesiastical cognizance brought 'against any of the said subjects.' The second part empowers the Court to grant Probates of the Wills 'of all or any of the said subjects,' 'dying and leaving personal effects within the said town, etc., and of all persons who shall die or have effects within the places aforesaid.' These last words, 'and of all persons,' etc., could not have been inadvertently inserted in this section, for they are not to be found in the Calcutta Charter (of which the Ecclesiastical section in this and the Madras Charters is in other respects a copy), and their insertion here raises the construction, that it was intended to let in a larger class of persons to the benefit of the jurisdiction regarding Probates than was provided for in the previous part of the section regarding Ecclesiastical suits. It is material, therefore, to ascertain what persons are meant by the description of 'persons so described and distinguished by the appellation of British subjects;' whether this description means, as is contended, on the one hand, that anomalous class of persons, so well described by Sir Charles Grey in his Minute in the Report on the Affairs of the East India Company,—a class difficult to define, but well understood in the common parlance of the Supreme Courts; or whether it means all inhabitants of this Island, excepting aliens. We find the same expression used in the 28th section of the Charter, in which the jurisdiction in Civil suits and actions is [367] confined to such 'persons as have been heretofore described and distinguished in our Charters of Justice for Bombay by the appellation of British subjects;' and this section is followed by the 29th, which gives the Supreme Court jurisdiction in all suits and actions against the inhabitants of Bombay. This last clause applies to the inhabitants generally, and does not appear to be introduced merely for the purpose of giving jurisdiction over aliens, inasmuch as it provides, in the cases of Mahomedans and Gentoos, that their peculiar laws should be preserved to them; and I, therefore, think that these two sections, taken together, show that the 28th section applied to a particular class of British subjects, and not to all the inhabitants of Bombay. We find the same expression in the 43rd section of the Charter, which empowers the sheriff to summon in criminal cases juries 'being persons so heretofore described and distinguished as British subjects'; and it is clear that under that clause of the Charter, previous to the year 1826, all the inhabitants of Bombay could not serve on juries, for in that case the Statute, 7th Geo. IV., c. 37, which was passed to render all inhabitants (not being aliens) capable of serving on juries, was wholly unnecessary. On the whole, therefore, I think that from the reference to former Charters in section 28, and from the position in which the expression is found in that section, and from the terms of the 43rd section, and Statute, 7th Geo. IV., c. 37, that the expression 'described and distinguished as British subjects' cannot

mean all the inhabitants of Bombay, and that it must be understood as meaning British subjects in a restricted sense, and excluding all those 'subjects' who have no other claim than that of birth in British India. Such was the opinion of Sir Charles Grey on [368] the meaning of that term, as expressed in the report to which I have referred; and such was the opinion of Sir Edward Ryan, arrived at in Beebee Muttra's case (Clarke's Rules, p. 142); and though the other Judges dissented from him in that decision, it would appear from the report that Chief Justice Sir William Russell did not dissent from this construction of the term 'British subjects.' (Clarke's Rules, p. 127.) Then, again, I think that the different language used in the latter part of section 47 of the Charter, in which the jurisdiction is given to grant Probates of the Wills 'of the said subjects,' 'and of all persons who shall die or have effects within the places aforesaid,' was probably introduced for the purpose of avoiding the question which arose in Beebee Muttra's case; and it certainly is improbable that they should have been so introduced for the purpose of meeting the case of aliens and sojourners only, a suggestion which seems to me answered by a comparison of sections 28 and 29 of the Charter, in which the term 'British subjects' is evidently used in contradistinction to the other native inhabitants of Bombay.

"Having thus ascertained the strict meaning of the term 'described and distinguished as British subjects,' in the first part of this section, I will proceed to examine some of the grounds on which it has been attempted to give those words a more extensive construction. First, it is said that this construction will exclude from the Ecclesiastical jurisdiction of this Court, except with respect to Probate and Administration, not only Parsees, Hindoos, Mahomedans, and Jews, but also the Portuguese and native Christian inhabitants of this Island. This is not so, for under the general Ecclesiastical jurisdiction vested in us by the 4th Geo. IV., c. 71, we might still entertain all [369] suits of an Ecclesiastical nature 'which the circumstances and occasion' of such parties might require; but whether we ought to exercise with respect to all these parties such general Ecclesiastical jurisdiction is a question of grave doubt, for such a jurisdiction seems wholly inapplicable to Asiatics, whose creed admits of polygamy and great facilities of divorce.

"Then again it is argued, that the 28th section of the Charter gives this Court jurisdiction to determine all suits and actions whatsoever, and is supposed to give us an Ecclesiastical jurisdiction over natives, if section 47 does not. The words in the 28th section are certainly large and general, and would, I think, justify us in entertaining an action by Perozeboye against her husband for his breach of contract in not maintaining her; but it is manifest, looking at the whole Charter, and particularly at sections 10, 41, 42, 43, 44, and 47, that section 28 was only intended to define the jurisdiction of this Court in plea side cases, and so it has always been understood. If section 28 had the extensive meaning now sought to be put upon it, many of the clauses in the Charter to which I have referred were wholly unnecessary.

"Assuming, then, that the Charter does not contemplate the exercise of any Ecclesiastical jurisdiction over natives, except with respect to Probates and Letters of Administration, and assuming that the Act 4th Geo. IV., c. 71, does confer a general Ecclesiastical jurisdiction over natives, and that, in accordance with Beebee Muttra's case, nothing in our Charter can limit or restrict the general jurisdiction so given, I still doubt whether we ought to entertain a suit for restitution of conjugal rights between Parsees. We find that we have a vague general Ecclesiastical jurisdiction over natives under the Act; and that the Charter, [370] in which we should expect to find that jurisdiction more clearly defined, does not contemplate the exercise of any such jurisdiction, except with respect to Probates and Letters of Administration. Surely if the Charter itself is so cautious in developing the general jurisdiction given over natives by the Act, it behoves us to erince as much caution in exercising that jurisdiction. I can conceive some subjects of Ecclesiastical cognisance,—alimony for instance,—which, upon admitted marriage, it might be proper to enforce under the general Ecclesiastical jurisdiction as between parties other than Christians; but I should not be disposed to enforce as between persons of this class personal duties which may not flow from the contract of marriage as understood by them, or laid down in their creed, and which certainly have not been

made of positive obligation by any law or Statute. It is the policy and intention of this Charter to adapt our Ecclesiastical jurisdiction to British subjects 'so far as the circumstances and occasion of the said town, island, territories and people shall admit or require;' and acting in that spirit, I think we should hesitate before we introduced among Asiatics so peculiar a form of proceeding as this. The jurisdiction to compel cohabitation seems to flow peculiarly from the Canonist's notions of indissolubility of a Christian marriage, and the obligation, under dread of spiritual censure, to perform all conjugal duties, and is, therefore, I think, inapplicable to natives, who are not bound by any law that I know of to live with their wives, and are allowed great facilities of divorce. If a suit of this nature can be entertained, we may be called on hereafter to compel a native woman to return to her husband's roof, under which he has other wives, who monopolise his attentions, or we may [371] compel a Mussulmanee to return to her husband's house, to be divorced the minute afterwards, by an imprecation. And indeed it appears from the case of *Buchaboye v. Merwanjee Nusserwanjee* (Perry's Oriental Cases, p. 73), that the Parsees also claim great facilities of divorce. These may be extreme cases, but I think they show the inapplicability of this form of suit to Asiatics. It is true that in an old case, *Andries v. Andries*, the Consistory Court in England held, that they had jurisdiction in a cause for restitution of conjugal rights, brought by a Jewess against her husband, a Jew. Sir William Wynne, in *Lindo v. Belisario*, explains this case, and does so on the ground that the marriage was admitted, and that the Ecclesiastical Court was the only one they could apply to for the purpose. (1 Hagg. Cons. Rep. Appx. 9.) The observations of Sir William Wynne on *Andries v. Andries* were quite extrajudicial; and it would seem from his observation (*ib.* p. 11), and those of Sir William Scott (1 Hagg. Cons. Rep. 216) in *Lindo v. Belisario*, that they entertained great doubt, if not on the jurisdiction, at least upon the propriety of exercising it, in a question of marriage by Jewish law, and, but for the request of the Lord Chancellor, and with the view of assisting him, would have declined to exercise it; and if they doubted their jurisdiction to determine the validity of such a marriage, they surely must have doubted it with respect to enforcing the personal duties flowing from such a marriage. The doubts of these learned Judges respecting their jurisdiction in matters relating to the validity of Jewish marriages leads me to decline jurisdiction in a much stronger case, in which I am called on to enforce personal duties arising out of a marriage between Parsees; personal duties which are unknown and undefined by [372] any law that I am aware of. No written authority has been cited showing that a Parsee husband must live with his wife, although they disagree; and I cannot see any natural law imposing such a duty, under such circumstances; for the natural law, as between natives, would rather appear to be that they should live separate when they cannot dwell together in peace.

"But it does not follow, because we decline to exercise a general Ecclesiastical jurisdiction over Parsee, Mahomedan, and Hindoo inhabitants of Bombay, and refuse to entertain suits by them for restitution of conjugal rights, that, therefore, they are without all remedy in such cases as these. By an adaptation of the law of alimony to a state of circumstances like these, we might still give the wife a remedy against her husband in the Ecclesiastical Court. Having this general Ecclesiastical jurisdiction over natives, we might perhaps exercise it so far as to make a native husband do justice, and maintain his wife; but it is quite a different thing to say that a native husband shall cohabit with his wife, whether he likes it or not; for that appears to me to be an adjudication applicable to Christians only, and somewhat anomalous when applied to Asiatics; and if any objection (which does not occur to me) should exist to that course, I cannot see why she should not have a right of action against her husband for damages, or a suit in equity for a maintenance. Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian countries a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife [373] as one person, and will not permit an action by the wife against her husband; but no such principle is known to the Mahomedan, Hindoo, or Parsee law; and the Supreme Courts at Calcutta and here have always treated native married women as *femes sole*, and indeed it is quite impossible, upon

any *a priori* or natural reasoning, to treat them as anything else. There being, then, as alleged in this case, a breach of contract, the husband having refused to receive his wife, having forcibly expelled her from his house, and having failed to maintain her, what is there to prevent this Parsee *feme sole* from bringing an action against her husband for damages, or a suit in equity for a maintenance past and future, to be secured from his estate? A great wrong has been done her, and there must be some remedy. The mere fact that such an action is novel, and unknown to the English law, would be no answer to her claim, for the reasons already stated; and she seems to have just the same right to sue in respect of this breach, as any other person has to sue for any other breach of contract; and there is certainly nothing impolitic or *contra bonos mores*, in her recovering damages for the wrong done her, or obtaining that maintenance, past and future, to which she is justly entitled; and I must say, I think that this lady would have a remedy directly against her husband. But even if this were not so, under the circumstances he alleged it is clear that the parties who supply her with necessaries will be entitled to recover against her husband, and this Court has already so decided.

The only question which remains is no doubt entitled to much consideration. It is forcibly urged, that the question has already been decided by a judgment [374] of Sir Erskine Perry between these parties, and that his judgment has since been followed in another case, and that it would be wrong now to re-open the question. This objection would have had more weight if the parties had ever acted on the previous decision in this case; but it appears that after Sir Erskine Perry's judgment, no further steps were taken, and the cause dropped, and that now an entirely new suit has been commenced, to which the present protest has been put in. I am anxious, of course, to pay every respect to the opinions of this Court; but I should not have thought that the cases referred to established such a course of decision as precluded us from inquiring further into a question of jurisdiction, more especially when we find that no such suit has ever been recognised at Calcutta, or I believe at Madras, and there is no report of any enforcement of cohabitation here. For, notwithstanding the strong opinion of the Chief Justice, I still think there is some doubt how far the language of the Charter, directing us, in 1823, to proceed in Ecclesiastical matters according to the practice of the Diocese of London, has the effect of introducing into this country the Statute, 53rd Geo. III., c. 127, by which the process of excommunication in such cases was abolished, and other process substituted. However, if I am wrong in entertaining this question, and not feeling bound by authority, I am happy to think that the expression of my opinion must, from the constitution of this Court, be peculiarly harmless."

In pursuance of the practice of the Supreme Court, an Order was made in accordance with the judgment of the Chief Justice, discharging the protest with costs.

[375] The Appellant appealed from this Order to Her Majesty in Council (*a*). The appeal was argued by

(*a*) Previous to the hearing of the appeal a search was made at the instance of the Respondent, among the records of the Supreme Court at Bombay and the late Recorder's Court, for any records of Ecclesiastical suits between natives of India or other Asiatics for any causes matrimonial, when the following authorities were reported by the acting Registrar and certified to the Judicial Committee to be the only cases on record, from the earliest date at which these records commenced, to the present time:—

1. *Anna Petruse v. Jacob Petruse*, of Bombay, Armenian. The libel was filed on the 7th day of January, 1802, for alimony. On the 3rd day of May, 1802, sentence of the Court was signed in this cause, and on the 23rd of March, 1805, the Court ordered an attachment to issue against the goods and chattels of the Impugnant, per monthly alimony due to Promovent.

2. *Dustagool Johannes v. Gregory Johannes*, of Bombay, Armenian. The libel was filed on the 10th of September, 1811, for divorce and separation from the bed and board and mutual cohabitation. On the 28th of July, 1812, the Court, by consent, dismissed the libel; and on the 20th of October, 1812, it was ordered that the original account in Armenian should be delivered to the Impugnant.

The Queen's Advocate (Sir John Harding) and Mr. Ayrton, for the Appellant, and Dr. Addams and Mr. Le Messieur, for the Respondent.

[376] The Queen's Advocate [Sir John Harding].---There are two important questions for decision in this case: first, what jurisdiction the Supreme Court [377] at Bombay possesses in circumstances such as are here presented; and secondly, whether the jurisdiction, if it exists, has been properly evoked. The case comes on upon the Appellant's protest to the jurisdiction of the Court. The parties are Parsees, and the real question is, whether the Ecclesiastical jurisdiction, "as exercised in the Diocese of London," can be applied to Parsee inhabitants of Bombay, who are governed by their own peculiar laws, and as between whom, coming under the general designation of "Gentoos," all matters of contract and dealing are to be determined by their own laws and usages. The first mention of Ecclesiastical jurisdiction conferred on the Supreme Court at Bombay, is in the Statute, 37th Geo. III., c. 142, sec. 9, which enabled His Majesty to erect Courts of Judicature in Madras and Bombay respectively, with "full power and authority to exercise and perform all Civil, Criminal, and Ecclesiastical and Admiralty jurisdiction." The Statute then defines the extent of the general jurisdiction of the Court, while section 12, which is extremely germane to the present question, "in order," as it is there expressed, "that due regard may be had to the civil and religious usages of the natives, enacts that the rights and authorities of Fathers and Masters of families, according as the

3. *Sahibnaboye v. Shaikjee Zarah*, of Bombay, Mahomedan, libel filed on the 16th of June, 1815, for decree to pronounce that the marriage which took place between the parties was void and of no effect. On the 8th of July, 1815, Court granted to Impugnant leave to defend this suit *in forma pauperis*, and no further proceedings took place.

4. *Perozeboye v. Ardaseer Cursetjee*, of Bombay, Parsee, libel filed on the 8th of July, 1843, for decree that the said Ardaseer Cursetjee do take back the said Perozeboye his lawful wife, and treat her with conjugal kindness. On the 21st of September, 1843, Court overruled the protest with costs; and on the 19th of October, 1843, leave to appeal was granted, and no further proceedings.

5. *Buchoooye v. Merwanjee Nasserwanjee*, of Bombay, Parsee, libel filed on the 2nd of February, 1844, for decree that the said Merwanjee Nasserwanjee do take home and receive the said Buchoooye his wife, and treat her with marital affection and to render her conjugal rights. On the 20th of April, 1846, sentence of Court signed, and filed the same on the 7th of May, 1846.

6. *Perozeboye v. Nanabhoj Framjee*, of Bombay, Parsee, libel filed on the 17th of February, 1844, for decree that the said Nanabhoj Framjee do take home and receive the said Perozeboye his wife, and to treat her with marital affection and to render her conjugal rights. On the 1st of January, 1846, sentence was signed in this cause, and filed the same on the 2nd of January, 1846.

7. *Buchoooye v. Merwanjee Nasserwanjee*, of Bombay, Parsee inhabitants, libel filed on the 8th of June, 1849, for divorce and separation. On the 22nd of September, 1851, cause called on for hearing and was struck out, the Impugnant being dead.

8. *Perozeboye v. Ardaseer Cursetjee*, of Bombay, Parsees, libel filed on the 7th of November, 1853, for decree that the said Ardaseer Cursetjee do take back his lawful wife the said Perozeboye, and treat her with conjugal kindness, and to provide for her alimony in the event of the said Ardaseer Cursetjee refusing to receive her back. On the 10th of August, 1854, Court granted leave to appeal, and on the 13th of November, 1854, the petition to Queen in Council was filed.

9. *Awaboye v. Nasserwanjee Merwanjee*, of Bombay, Parsees, libel filed on the 23rd of November, 1853, for decree that the said Nasserwanjee Merwanjee do take back his wife the said Awaboye, and render her conjugal rights, and alimony, *pendente lite*. On the 22nd of September, 1854, answer of the Impugnant filed, and no further proceedings.

10. *Khursedball v. Bazenjee Dossaboy Barterna*, of Bombay, Parsee, libel filed on the 18th of October, 1854, for alimony. On the 25th of June, 1855, sentence was pronounced and signed in this cause, and the same was filed on the 25th of August, 1855.

same may be exercised by the Gentoo or Mahomedan law, shall be preserved to them within their families respectively, nor shall the same be violated or interrupted by any of the proceedings of the said Courts." What could be a greater violation or interruption of a Parsee family than to introduce and enforce among them the Ecclesiastical law as exercised in the [378] Diocese of London? They are not British subjects in the sense intended by the Charter. The first Charter of Justice granted to Bombay was under this Act. Being under the authority of an Act of Parliament, it cannot exceed the exact terms of the Act, *The King v. Miller* (6 Term Reps. 268; and see *The Queen v. Eduljee Byramjee*, 3 Moore's Ind. App. Cases, 468; *The Queen v. Alloo Paroo*, *ib.* 488). There is no sufficient proof of the exercise of Ecclesiastical jurisdiction by the Mayor's Court which preceded the Supreme Court, though, in a note by Sir Erskine Perry (Perry's Oriental Cases, p. 65), it is stated that an Admiralty jurisdiction was conferred in 1683. It is true that that learned Judge held, in a case similar to this, that the Ecclesiastical laws did apply to Parsees, and in a suit for the restitution of conjugal rights awarded alimony, *pendente lite* (*Ibid.* p. 73). There was, however, no precedent for such a decision, except a case between the same parties as in this suit (*Ibid.* p. 57), decided a few years previously by the same learned Judge, which was never appealed to England. The precedents produced from the Register of the Court are neither strong in themselves, nor do they prove more than the assumption of the jurisdiction by the Supreme Court, and submission to it by the natives of India, who were wholly ignorant of the matter. The present Charter of Justice is in substitution of that under the Statute, 37 Geo. III., c. 142, but contains the same provisions regarding the jurisdiction and Ecclesiastical law.

It is scarcely necessary to argue the second question. The suit is wholly informal; it purports to be [379] for a restitution of conjugal rights, but prays not that alimony, *pendente lite*, should be decreed, but that the husband shall pay his wife a stipulated sum for separate maintenance. If the Supreme Court had all the Ecclesiastical jurisdiction possessed by the Consistory and Arches Courts in England, this Court upon appeal could not make such a decree, or anything like it, upon these pleadings. The Judges in the Court below, though they differ in opinion, are equally in error on the grounds of their decision: the Chief Justice considered himself ruled by the cases decided by his predecessor, and the analogy of the Bombay Charter to that of Fort William. No case was, however, cited before him as having been determined in that Court, and your Lordships have been informed by the learned late Chief Justice, Sir Lawrence Peel, that in a case before him, when presiding at Calcutta, between natives, it was unanimously agreed by the Judges in Court that by the true constitution of the Charter it could never be intended that Ecclesiastical law was introduced, or could be enforced against natives professing a wholly different creed from Europeans. The other learned Judge, Sir Charles Jackson, seems to found his opinion against the jurisdiction, on the supposition that marriage is a civil contract, which, *per se*, entitles the wife to an action for maintenance. We know of no such law in our Courts here, nor do I apprehend, except under the Poor Laws, that any such right exists. The wife's title to a settlement in Equity is the only thing the least resembling such a right, but that is under a totally different state of circumstances, and has nothing to do with Ecclesiastical law.

[380] Mr. Ayrton.—Though precedents have been produced from the files of the Court below, this case is, in fact, one of first impression. The decisions of Sir Erskine Perry were not upon the same state of facts as arise here, nor do the pleadings appear to have been in the same form; and an argument was there raised also before that learned Judge against the exercise of Ecclesiastical jurisdiction where the parties were Parsees, which he overruled. The assumption of such jurisdiction by the Supreme Court in such cases is of no higher value than the judgment we now appeal against. The whole question turns upon the true construction of the Bombay Charter of 1823 the words of which must govern the case, *Morgan v. Leach* (3 Moore's Ind. App. Cases, 428). The authority to apply English law in suits in equity, or common law, is general as regards English residents in Bombay (Charter, cls. 6, 10, 28, 29), but is not extended to natives; they are expressly exempted; their suits are to be determined by their own laws and usages. How,

then, can the Court administer the Ecclesiastical law of England in the case of natives, who are exempt from the Common law and principles of Equity prevailing here?

Dr. Addams.—This application of the Ecclesiastical law to Parsees is not for the first time introduced. The precedents show that suits for restitution of conjugal rights have been frequently brought, and uniformly entertained by the Supreme Court at Bombay, and that long before the decision of the two cases cited from [381] Sir Erskine Perry's "Oriental Cases." From the precedents existing in the Registry of the Court, that learned Judge could have come to no other decision. In the case between these parties, the learned Chief Justice has gone most fully into the origin and history of this jurisdiction, which it is plain has been exercised from the first introduction of English law into India. The protest is against the parties being subject to British laws at all: they say they are not British subjects, and, therefore, that the Ecclesiastical law cannot be applied to them. But they are living under the protection of the British rule, and within the territories belonging to Great Britain, and if, therefore, they are not expressly exempted by the Charter, they must be subject to the law there provided for all residents within the limits of Bombay. Are they, then, either, Mahomedans or Gentoos? for they are the only classes exempt. Parsees are not named or alluded to, either in the Charter or Act of Parliament.

With regard to the pleadings, they are sufficient for the object of the suit, which is one for restitution of conjugal rights; the prayer for maintenance is a prayer for alimony, for that is the only maintenance the Ecclesiastical Court can give, and must be, in the first instance, *pendente lite*. If the pleadings in substance are sufficient, this Court will not refuse to administer justice on account of an irregularity in form.

Mr. Le Messurier.—There is no question that the Supreme Court at Bombay possesses Ecclesiastical jurisdiction, that is given by the 47th section of the Charter. By the [382] 37th section, that Court is empowered to frame rules and process in all suits to be brought in that Court; and rules of practice and procedure have been accordingly framed, and exist. The sole question then is, whether these parties, being Parsees, are amenable to the jurisdiction established. The Supreme Court has jurisdiction over all British subjects residing within the factory, or subject to, or dependent on, the Government of Bombay; that is expressly provided by section 28. The Government permits these parties to be residents at Bombay, they are, therefore, *prima facie* liable to the jurisdiction of the Supreme Court. But it is alleged that they are Parsees, professing the religion of Zoroaster, and, as such, exempt from the Ecclesiastical jurisdiction of the Court. Now, Parsees are nowhere designated or exempted in the Charter. Mahomedans and Gentoos are the only natives designated, and they are exempted only as to "their inheritance and succession to lands, rents, goods, and all matters of contract and dealing between party and party, which shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos." Supposing, therefore, Parsees to be exempt from the jurisdiction, what law is to be applied to them? they are neither Mahomedans nor Gentoos. It is clear, therefore, if any law is applicable to them, it must be English law; that which they are entitled to claim as British subjects. It is argued, on the other side, that Parsees come under the general designation of Gentoos, which is a mere *no men collectivum*. But, if so, the Gentoos Code would have to be applied to Parsees. Why, [383] then, this objection to the introduction of Ecclesiastical law? The laws of marriage are governed in this country by Ecclesiastical law; if then a question relating to the validity of a marriage come before the Supreme Court, that Court must look to the law by which the marriage is to be regulated, and if there is no special law provided for and applicable to the parties, the law of England must be the rule for the Court's decision. That would be a case of the application, *pro tanto*, of the Ecclesiastical law, though not on the Ecclesiastical side of the Court. Matrimonial suits between Parsees have been entertained by the Mofussil Courts, *Mihirwanjee Nuoshirwanjee v. Awan Bacc* (2 Borr. Bom. Sud. Dew. Reps. 209); to these are added several cases in regard to marriage contracts, dower, etc.: they are all collected in Morley's Dig., tit. "Husband and Wife," 4,

p. 299. What is to prevent the Supreme Court exercising a similar jurisdiction when the case is properly before them when administering that law, the administration of which is expressly given to them by the terms of the Charter?

Mr. Ayrton, in reply.—Parsees are within the definition of "Gentoos," which is a generic term, being corrupted from a Portuguese word, "Gentis," meaning a gentile, or heathen, as distinguished from Mahomedans or Hindoos, the native inhabitants of India. The Ecclesiastical jurisdiction conferred by the Charter is intended for, and limited to, British subjects. Its sentence can only be enforced by Ecclesiastical process, that is, by excommunication. How can such a process be applied to Parsees?

[384] Judgment was reserved, and now delivered by

The Right Hon. Dr. Lushington (July 16, 1856).—The present question arises upon an appeal from the Ecclesiastical side of the Supreme Court of Bombay, which Court had overruled a protest against its jurisdiction; and their Lordships will have to determine whether, under all the circumstances, the judgment ought to be maintained, or the appeal allowed.

The suit in the Court below is a suit for restitution of conjugal rights; such is clearly its character, though some of the averments in the suit, and a part of the prayer made, are different from what would be made or admitted in the Ecclesiastical Courts in this country.

The parties are Parsees, natives of the Island of Bombay, and there resident. Their religion is that of Zoroaster. The wife brought the suit. The husband, in a protest, after the libel was given in, denied the jurisdiction of the Court, and contended that it was incompetent to take cognizance of such a suit. The Chief Justice was of opinion that the protest ought to be overruled, thereby, in effect, deciding that the Court might proceed to administer justice in such a suit between the parties. The Puisne Judge dissented. According to the Charter of the Supreme Court, judgment was given in accordance with the opinion of the Chief Justice.

The language of the clause of the Charter granting Ecclesiastical jurisdiction is as follows:—"And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, grant, establish, and appoint that the Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, [385] and shall have full power and authority to administer and execute within and throughout the town and island of Bombay, and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said town, island, territories, and people shall admit or require; and to that purpose We give and grant to the said Supreme Court at Bombay full power and authority to take cognizance of and proceed in all causes, suits, and business belonging and appertaining to the Ecclesiastical Court before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well as at the instance or promotion of parties as of office, mere or mixed, against any of the said subjects residing in the said town, island, territories, or districts, and which by the law and custom of the said Diocese of London are of Ecclesiastical cognizance, and the said causes, suits, and business, with their incidents, emergents, and dependents, and whatsoever is thereto annexed and therewith connected, to hear, despatch, discuss, determine, and also to grant probates under the seal, etc., of the last Wills and testaments of all or any of the said subjects of Us, Our heirs, and successors, dying and leaving personal effects within the said town, island, territories or districts respectively, and of all persons who shall die or have effects within the places aforesaid."

[386] Such being the jurisdiction conferred by the above clause upon the Supreme Court, we must next consider the objection which has been raised to the exercise of that jurisdiction in this case. The especial reason assigned against the Court taking cognizance of this case, as set forth in the protest, is, that the parties are Parsees, professing the religion of Zoroaster, born in the island of Bombay, natives of India, and are not persons who, prior to the date of the Letters Patent

establishing the Supreme Court, have been described in the Royal Charter of Justice, by the appellation of "British subjects,"—that the Court is incompetent to take cognizance, or to proceed in this suit, or administer to the parties the Ecclesiastical law as used and exercised in the Diocese of London.

It is quite true, as was argued at the Bar, that the reason assigned for the incompetency of the Court to exercise jurisdiction is, that the parties to the suit are not British subjects within the meaning of the Charter, and that the general averment of incompetency had reference to that reason, but we think that in a case of this description, where the question substantially is, whether the Court has jurisdiction to entertain the suit, or, to state the case more accurately, whether from the peculiar nature of the subject-matter this case is not excepted from the general Ecclesiastical jurisdiction conferred by the Charter, it is our duty to look at the whole record, and give judgment accordingly. If it be apparent on the face of the record that the suit is not maintainable, we think that there is enough in the protest to require us to express our opinion, though that protest may not have been intended to direct our attention to more than one particular objection.

[387] Proceeding upon this principle we will assume for the moment, that the parties to this suit are properly described and distinguished by the appellation of "British subjects," and address ourselves to the question what, with reference to the facts of the case, is the proper meaning of the words, the "Ecclesiastical law, as the same is now used and exercised in the Diocese of London, so far as the circumstances and occasion of the said town, island, territories and people, shall admit or require." The inquiry, then, is, whether the circumstances and occasion will admit or require the application of the English Ecclesiastical law in this instance?

We must remember that the English Ecclesiastical law is founded exclusively on the assumption that all the parties litigant are Christians; indeed, originally, more strictly speaking, Christians professing the doctrine of the Church, and that till of late days, the only mode of enforcing the decrees of Courts Christian was by process of excommunication, the imprisonment which followed taking place under the authority of the Civil Courts. Excommunication in ordinary cases is now superseded; instead of that proceeding, the Ecclesiastical Courts pronounce the party to be in contempt, and signify the same to the Court of Chancery, which issues the authority to imprison.

It is true, however, that a considerable part of the jurisdiction of the Ecclesiastical Court is in its nature, though not in its origin, purely civil, and has no proper connection whatever with any religious matters. We advert to the grant of probate and administration.

[388] Our proper inquiry is, whether, with reference to the limitation in the Charter, "as far as the circumstances and occasion of the said people shall admit or require," it is consistent with that limitation for the Ecclesiastical side of the Supreme Court to entertain a suit for the restitution of conjugal rights at the instance of a Parsee wife against her husband.

We must consider the nature of such a suit, the steps which must or may be taken in it, and the consequences which may arise from any decree which may be pronounced in it. In such a suit the first step may be to try the validity of a Parsee marriage, and though this might be a task of no small difficulty, yet, perhaps, it might be practicable to determine such a question by Parsee law, if it be competent to a Court Christian to take cognizance of the Parsee law for such purposes. We are aware that, under particular circumstances, the Ecclesiastical Courts in England have exercised jurisdiction with respect to Jewish marriages, ascertaining their validity by Jewish laws; but the very great difficulties attending such investigation, and the almost absurd consequences to which they lead, would not induce us to follow those precedents further than strict necessity requires.

Assuming, however, the validity of the marriage to have been tried and established, the next step in a suit for the restitution of conjugal rights in the Ecclesiastical Court, if there be no defence, is to order the husband (assuming him to be the party proceeded against) to take his wife home and treat her with conjugal affection; and if he refuse, to pronounce him in contempt, the consequences of which [389] is imprisonment. The husband may defend himself by alleging and proving his wife's infidelity or cruelty.

The Ecclesiastical Court has no power to decree alimony, except *pendente lite*, or after a decree for separation by reason of cruelty or adultery. It is wholly contrary to the first principles on which the Ecclesiastical Courts proceed, to allow alimony under any other circumstances, for the Ecclesiastical Court cannot contemplate any separation of husband and wife, except where cohabitation is prevented by adultery, or rendered impracticable by cruelty. Under all other circumstances, a separation is, by Ecclesiastical law, unlawful. It follows, therefore, if the wife succeed in a suit for the restitution of conjugal rights, the sole remedy is to compel the husband to take her home.

It appears in this case that the husband has gone through the form of marriage with another woman, with whom he is cohabiting. He, therefore, either has another wife, lawful by Parsee law, or he is living in adultery.

Is it possible that in either of these two cases the husband can, by the Ecclesiastical law as it prevails in the Diocese of London, be directed to take his wife home? In England, the wife, on account of such an intercourse, would be entitled to a separation from bed and board, and alimony; but a prayer for restitution is, under such circumstances, wholly unheard of. A Court Christian cannot enforce a renewal of cohabitation with an adulterer or adulteress: such a proceeding would be utterly repugnant to its character, its practice, and its principles. Such a decree would not be the administration of Ecclesiastical law, [390] but the violation of it. What might be the remedy by Parsee law we think it wholly unnecessary to inquire, because, from the religion the Parsees profess, it cannot be the remedy the Court Christian would afford, nor would such relief be administered by Ecclesiastical law.

There are, however, other difficulties. The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical law altogether.

For the reasons we have stated, we think that a suit for the restitution of conjugal rights, strictly an Ecclesiastical proceeding, could not, consistently with the principles and rules of Ecclesiastical law, be applied to parties who profess the Parsee religion; but we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them. We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them, but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as, from time out of mind, were [391] incident to their own caste; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies we conceive that the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. In suits commenced on the civil side, the peculiar difficulties which belong to the exercise of Ecclesiastical jurisdiction in some matrimonial cases would not arise. Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Ecclesiastical law.

We have been led to make these observations, not merely by general considerations, but more particularly by the case of *Mihirwanjee Nuoshirwanjee v. Awan Bacc* (2 Borr. Bon. Sud. Dew. Rep., 209). That case shows that the Sudder Adawlut at Bombay will take cognizance of matrimonial suits between Parsees, and will afford them such relief as a due regard to their own laws and customs will allow; it also proves, as indeed must be expected, that those laws and customs are wholly at variance with the principles which govern the matrimonial law of the Diocese of London, and incompatible with the Ecclesiastical law, as in such cases is adminis-

tered. One instance will suffice. It appears that, under many circumstances, the husband is permitted to take a second wife, the first being alive.

We have not neglected to observe that in two or three cases, the Ecclesiastical side of the Supreme Court has not refused to entertain suits of this description, but we have no reason to think that the [392] difficulties which occur to us were brought prominently before that Court, or that, after duly considering them, the Judges came to the conclusion that they were unimportant. There is no such course of decision as should make us hesitate in giving effect to our own opinion.

We think that the protest should be sustained, and the judgment reversed on the grounds we have stated, and we do not deem it necessary to enter upon a discussion which chiefly occupied the time of the Court below, whether the parties to this suit were or were not persons who, prior to the date of the Letters Patent establishing the Court, were described and distinguished in the Royal Charters of Justice by the appellation of "British subjects." Whatever may, in such respect, be their description, our opinion is that this suit cannot be entertained.

The Lords of the Committee will, therefore, humbly report to Her Majesty as their opinion, that the Order of the Supreme Court of Judicature at Bombay, of 5th July, 1854, whereby the protest of the Appellant was overruled, ought to be reversed, each party paying his and her own costs of this appeal.

[Mews' Dig. tit. HUSBAND AND WIFE; I. MARRIAGE; 1. *Validity*; b. *Solemnisation*; v. *In what place and before whom*. S.C. 10 Moo. P.C. 375. See *Hyde v. Hyde*, 1866, 1 P. and D. 137; *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, 1867, 11 Moo. Ind. App. 607. As to matrimonial jurisdiction of High Court of Bombay, see art. 35 of letters patent of 28th Dec. 1865 (Stat. R. and O. Rev. iv. 117).]

[393] HUNOOMANPERSAUD PANDAY,—*Appellant*: MUSSUMAT BABOOEE MUNRAJ KOONWEREE,—*Respondent** [July 4, 5, 7, 8, 1856].

On appeal from the Sudder Dewanny Adawlut at Agra, North Western Provinces.

Principles upon which the Native Courts in India are to proceed, in trying issues in suits depending before them.

If, by inadvertence or otherwise, the recorded issues do not enable the Court to try the whole case on the merits, the suit ought not to be disposed of, but an opportunity should be afforded by amendment, and, if need be, by adjournment, for decision upon the real points in dispute.

The power of a Manager for an infant heir to charge ancestral estate by loan or mortgage, is, by the Hindoo law, a limited and qualified power, which can only be exercised rightly by the Manager in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner would make in order to benefit the estate, a *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, or the criteria to be regarded. If that danger arises from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his favour against the heir, grounded on a necessity which his own wrong has helped to cause.

A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly,

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson. Assessor,—The Right Hon. Sir Lawrence Peel.

the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money.

The mere creation of a charge by a Manager securing a proper debt, is not to be viewed as an improvident act; and a *bona fide* creditor is not to suffer when he has acted honestly and with due caution, but is himself deceived.

No general rule can be laid down upon whom the *onus* lies to allege and prove the *bona fides* of a Manager of an estate whose title to alienate is qualified in contracting debts and resorting to loans: the presumption proper to be made varies with the circumstances, and is regulated and dependent upon them.

But if the mortgagee is enforcing his right against the heir, he must allege and prove the facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing the loan.

A mortgage Bond to secure a sum of money lent to a party deceased, in substitution of a previous deed executed by a former proprietor, by way of further security for a sum advanced by the mortgagee to the widow of the deceased, charging part of the ancestral estate; described the widow as having a beneficial proprietary right in the mortgaged estates, although, in fact, she was only the curator of her son, a minor, the deceased's heir: Held, that the description, though inaccurate, was not such an assumption of ownership as was derogative to the rights of the heir, but was to be viewed as an act done by her as curator on behalf of the heir; and as the mortgage was beneficial to the estate, it was binding upon the heir.

Mode of taking account when the mortgagee was in possession of the estates as mortgagee, and also as lessee under a lease.

This was an appeal from a decree of the Sudder Dewanny Court of Agra, which reversed the judgment of the Principal Sudder Ameen of the District of Goruckpore, pronounced in favour of the Appellant, in a suit which was brought by Lal Inderdowun [394] Singh, since deceased, and now represented by the Respondent, his son, against the Appellant, the chief Defendant, and Ranee Degumber Koonweree.

The object of the suit was, first, to recover possession of certain ancestral estates called Daree Deha, Mohundur, etc., situate in the Pergunnah Nugger Bustee, in the District of Goruckpore, with mesne profits and interest; and secondly, to set aside a mortgage Bond, dated Assar Soodee Poornumashee, Fuslee (July, 1839), and to cancel the Appellant's name as mortgagee in the Collector's records.

[395] The circumstances under which the suit arose were these:—

The Appellant, a Banker, carrying on business in the District of Goruckpore, was in the habit of making advances and loans to the neighbouring landholders. His father, Buccus Panday, before him, had been engaged in the same business, and in the course of the latter's transactions he had advanced the sum of Rs. 8002, to Raja Jobraj Singh, the paternal ancestor of Lal Seetla Buksh Bahadur Singh, of whom the Respondent was guardian. On the occasion of this advance, Raja Jobraj Singh executed several deeds, conveying certain villages, part of his estate, by way of usufruct mortgage, to the Appellant's father. In 1235, Fuslee, after the death of Raja Jobraj Singh, an adjustment of accounts took place between Appellant's father and Rajah Sheobuksh Singh, the son and heir of Raja Jobraj Singh, when a balance of Rs. 5252, as against Raja Sheobuksh Singh, was agreed on. For this sum Bonds were given and certain lands and villages were assigned to Appellant's father by Raja Sheobuksh Singh by way of usufruct mortgage. Raja Sheobuksh Singh died shortly after this transaction, leaving an only son, Lal Inderdowun Singh, an infant, whereupon his widow, Ranee Degumber Koonweree, assumed the proprietorship of the estates of her late husband, and the guardianship of his infant son. Her name was registered with that of Lal Inderdowun Singh, the infant, on the records, until he attained his majority, when a deed of gift having been executed by the Ranee in his favour, her name was removed from the Government register of landowners by a petition for mutation in the ordinary way. In 1239, Fuslee, after the death of Raja Sheobuksh Singh, [396] another adjustment of accounts took place between the Appellant (who had in the meantime succeeded to the business and property of his father, then

deceased) and Ranee Degumber Koonwerree, as the representative of her late husband, in which a balance of Rs. 3200 was agreed to be debited to the Ranee. In the same year, the family estates being in arrear of the revenue payable to Government, and in danger of sequestration by reason of such arrear, the Appellant, under authority of an order from Ranee Degumber Koonwerree, paid into the local Collectorate, to the account of such arrears, Rs. 3000, for which sum the Ranee afterwards executed three several Bonds, of Rs. 1000 each, and bearing date respectively Phagoon Soodee Poornumashee F.S. 1243, Assar Soodee Poornumashee F.S. 1243, and Katikbudee Poornumashee F.S. 1244. Previous to executing the above-mentioned Bonds, the Ranee had, in consideration of Rs. 1200, part of the balance before found to be due to the Appellant, and of a further loan of Rs. 600 from Goordial Panday (which was afterwards repaid by the Appellant), executed to the Appellant and Goordial Panday a Bond and deed of mortgage, conveying to them the Mouzas Mohunder and Dee Mar in usufruct, granting at the same time a lease of the same to him for the whole term of the mortgage. In the month Sawun, in the same year, the Ranee executed a mortgage to the Appellants, charging 200 beegahs of land lying in Bundeherree, in consideration of Rs. 1000, part of the balance of Rs. 2000, then remaining unsecured. In F.S. 1244, the Appellant, having paid off certain incumbrances to the amount of Rs. 4000, which the Ranee had previously effected on the lands of the Raj, received from her a Deed dated [397] Jeyt Soodee Poornumashee F.S. 1244, conveying to him in usufructuary mortgage the villages Dee Mar, Daree Deha, and Mohunder, also a pottah for the same, bearing the same date: the consideration for the whole being Rs. 5000, of which sum Rs. 1000 was the balance due on the original account, and Rs. 4000 the amount of incumbrance paid off by the Appellant. In F.S. 1246 a final adjustment of accounts took place between the Appellant and Ranee Degumber Koonwerree, in which the items stood as follows:— Monies paid by Appellant to Tahsildah on account of Government revenue due from the Raj, Rs. 5186; amount of monies secured by mortgage of Mohunder, Daree Deha, and lands in Dee Mar, Rs. 5000; amount secured by mortgage of Bundeherree, Rs. 1000; amount secured by three several Bonds of Ranee Degumber Koonwerree for Rs. 1000 each, Rs. 3000; amount due, being balance of Rs. 1500 secured by Bond, Rs. 814; making in the whole, Rs. 15,000. On this balance having been ascertained, the Ranee and Lal Inderdowun Singh, then a minor, by a mortgage Bond, dated Assar Soodee Poornumashee F.S. 1246, conveyed to the Appellant in usufructuary mortgage Daree Deha, Dee Mar, Bundeherree, Rajabaree, Mohunder, and Gundherea Faiz, which transaction formed the subject of the present suit. In this Bond the Ranee was described as being possessed of the mortgaged property in proprietary right.

Apart from these transactions of loan and mortgage, Raja Sheobuksh Singh granted to the Appellant in Birt some thirty beegahs of waste land lying in Bundeherree, in consequence of which grant Appellant expended much money in reclaiming the waste, erect[398]-ing buildings, and otherwise improving the land. Ranee Degumber Koonwerree afterwards, finding that Appellant possessed no evidence of his Birt title, compelled him to pay Rs. 500 for a Birt puttee, which she executed. Besides this portion of Birt lands the Appellant had purchased three and a half beegahs, lying in Dee Mar, from Gosain Musan Nath Fakir, to whom they had been granted for religious services by Raja Pirthee Pal Singh, the ancestor of the original Plaintiff.

On the 10th December, 1849, Lal Inderdowun Singh, having then attained his majority, filed a plaint in the Zillah Court of the Principal Sudder Ameen of Goruckpore against the Appellant and Ranee Degumber Koonwerree, for the possession of Zemindary right, unincumbered by Birt, of Daree Deha, Mohunder, Gundherea Faiz, and of certain lands lying in Bundeherree, Dee Mar, and Rajabaree; also to set aside the mortgage Bond before mentioned, bearing date Assar Soodee Poornumashee F.S. 1246, and to oust the Appellant. The plaint alleged that Ranee Degumber Koonwerree had acted as the guardian of the Plaintiff and managed his affairs for him during his minority; that she being a Purdah Nusheen and totally ignorant of matters of business, had been imposed on and deceived by her servants and agents, who had, without her knowledge or authority, made contracts of loan and mortgage with divers parties, and effected incumbrances on the Plaintiff's property; that the Appellant, among others, had by collusion and fraud obtained

from them, under pretence of mortgage, the possession of certain lands and villages; that the villages and lands so unlawfully possessed by the Ap-[399]-pellant were component parts of Plaintiff's ancestral Raj, and inalienable by the act of a guardian.

The answer of the Appellant set forth the circumstances above stated under which the debts were contracted and the mortgage Bonds executed, and traversed the allegations respecting the Ranee's ignorance of matters of business and the Appellant's collusion with the Ranee's agents; and alleged that the Plaintiff, in F.S. 1255, after he had attained majority, had personally acknowledged the validity of the mortgage Bond and the debt due under it; that the Appellant in expressing a desire to redeem Gundherea Faiz and Baree (which second village was not included in the suit), had proposed to execute a fresh mortgage of Mohunder, Daree Deha, and the lands in Bundeherree, Dee Mar and Rajabaree, and that the Plaintiff, since attaining majority, had borrowed money on Bond from the Appellant, and the Appellant by his answer finally insisted that the amount of mesne profits was greatly exaggerated.

The answer of the Ranee Degumber Koonweree averred ignorance of the matters in issue, asserting that the Appellant had been for some time employed by her in the capacity of Manager.

Lal Inderdowun Singh having died, Mussumat Babooee Munraj Koonweree, the Respondent, was admitted by the Court to prosecute the suit as guardian of Lal Settla Buksh Bahadur Singh, the infant son and heir of Lal Inderdowun Singh.

By a proceeding of the Principal Sudder Ameen of Goruckpore, had on the 3rd of April, 1850, the issues to be disposed of were settled. The first was upon a point of practice arising out of an alleged irregularity of the replication; the second was, whether the mortgage Bond was the act and deed of Ranee Degumber [400] Koonweree, and whether it ought to have effect against the mortgaged villages; also if the mesne profits, as stated, were correct.

Evidence was entered into on both sides, the effect of which is contained in the Sudder Ameen's judgment.

On the 23rd of December, 1850, the suit was heard by the Principal Sudder Ameen, who by his judgment and decree dismissed the suit. The material part of his judgment was as follows:—"My opinion on the second point is this—That the mortgage Bond was written, and that it exists at this time, neither of the parties in their pleadings call it into question; for the witnesses on both sides depose that it was executed on the part of Ranee Degumber Koonweree and Lal Inderdowun Singh. The only dispute is, that the Plaintiff avers it was made without the knowledge of Ranee Degumber Koonweree, the second-named Defendant; while the first-named Defendant declares that Ranee Degumber Koonweree was cognizant of its execution. My opinion is, that the Plaintiff's plea of the Bond having been made without the knowledge of Ranee Degumber Koonweree, the second-named Defendant, is opposed to facts, and on several grounds inadmissible. First; several witnesses, among whom are some who attested the Bond, others who were percipient witnesses of the transaction, have deposed on both sides, especially some who are the servants, dependants, and Malgoozars of the Raja, have deposed to the fact. It is, therefore, impossible that so many persons should be aware of the transaction, and yet the Ranee and Raja remain in ignorance, as stated by the Plaintiff's witnesses. Secondly; had this Bond, by which certain property was mortgaged, been made without the Ranee's knowledge, seeing that she was the Manager of the Raj, [401] the Defendant would not have been able to get possession of the property mortgaged by the Bond: for when the Defendant attempted to take possession he would have been opposed by the Ranee. Thirdly; that at the settlement the Defendant's name would not have been recorded as mortgagee. Fourthly; assuming the Plaintiff's statement to the effect that the Karindas colluded with the Defendant, and executed the Bond as he dictated, and that they moreover filed a petition admitting the mortgage in the settlement, it is obvious that there was nothing to prevent the Defendant, in collusion with the Karindas, from fabricating a deed of sale conveying the disputed property to him: he would not, seeing that he had such great influence, have been content with the mortgage Bond. Hence it is clear to me that Ranee Degumber Koonweree, being in wait, and also wishing to satisfy former debts in order to preserve the estates in her hands, mortgaged the estates in order to pay the debts and put the Defendant

in possession; otherwise it is not possible to credit, that in the face of such dishonesty on the part of the Karindas, she should refrain from complaining in the Courts, and preventing Defendant from entering upon the estates: for her experience and sagacity are demonstrated by the fact that she has saved the estates of the Raj, and has continued to manage them herself to the present time. Fifthly; were the plea of the Plaintiff to the effect that the Karindas were ungrateful and dishonest, they would not have given their evidence in favour of the Ranee as supporting her statement: they would unequivocally have declared that the Bond was made with the knowledge and sanction of the Ranee. These witnesses, after the lapse of so long a period, not having [402] the fear of eternity before their eyes, depose that they acted under the tutorage of Defendant, and did not acquaint the Plaintiff with the transaction. Then what more is required to prove their attachment and subservience to the Ranee? Indeed, from the fact that the Defendant has been in that possession, the settlement was concluded with him, that Ranee Degumber Koonweree and Lal Inderdowun Singh, deceased, remained silent for so long a period, it is clearly inferred that the statement of the Defendant and his witnesses is true. On these grounds my opinion is, that there can be no doubt that the Bond was made with the knowledge of Ranee Degumber Koonweree, the Manager of the Raj, and that the statement of Plaintiff and of her witnesses is made with dishonest intentions. Several witnesses have been adduced on the part of the Plaintiff, who state that Ranee Degumber Koonweree and her predecessors had no occasion to borrow money. This assertion is sufficiently rebutted by the exhibits filed on the part of the first-named Defendant. It is opposed to common sense to suppose that although the Raj was to be maintained and that the expenses of the Rajas were great, and moreover that a woman was the manager, that there should have been no occasion to borrow money. Indeed, copies of papers obtained from the office of Register of Deeds, and more especially the decree of the Moonsiff of Captain Gunj, dated 21st of September, 1847, is conclusive evidence to prove the Plaintiff's statement to be false. The second point remains to be considered, namely, whether the mortgage pleaded by Defendant is valid and of effect touching the villages in dispute. The record shows that Ranee Degumber Koonweree was the manager of the Raj [403] during the infancy of Lal Inderdowun Singh, and that all her acts and deeds are recognised in the Revenue Department and in the Special Commission. During her management, with the object of saving the estates, of paying the debts of her predecessors, and of satisfying the claims of Mahajuns, the mortgage Bond was executed. Seeing, moreover, that the settlement was also made with the Defendant by the Settlement Officer, that a Bond of this nature does not extinguish the title of the infant, it follows then, as a matter of justice and equity, that the Bond is valid and of effect. For if it be held to be invalid, two difficulties will arise—First, that when the Raj is under the management and guardianship of a person, should necessity arise to take money on loan in order to pay the Government Malgoozaree and to pay other necessary expenses of the Raj, no person will be willing to lend the money, and the loss of the estates will be the consequence. Secondly, should any person, on the faith of the Raj, and satisfied that there are assets sufficient to liquidate his loan, advance money to the manager of the Raj, and save the Raj from being lost, and subsequently, should this fact be proved, and on the suit of the proprietor, on his attaining his majority, he should be able to repudiate the loan, it would be gross injustice. There next remains to consider the fact that the name of Lal Inderdowun Singh is associated with that of Ranee Degumber Koonweree in the mortgage Bond. I remark that this is not a suit brought by the Defendant, consequently this point need not be tried and disposed of, since in my opinion the claim must be dismissed: and precedents adduced by the Plaintiff do not apply to this case: on the contrary, it is a legitimate inference that these precedents support my [404] view of the case. Finally, since the Plaintiff's claim is dismissed by me, there remains no necessity for an inquiry into the matter of mesne profits. On the ground above stated, it is ordered, that the Plaintiff's claim be dismissed, with costs."

From this judgment the Respondent appealed to the Sudder Dewanny Adawlut at Agra. The principal grounds of appeal were, that Lal Inderdowun Singh, at the time the Bond was made, was a mere child, that the Ranee was not designated as guardian in the Bond, but as proprietor, and that the Bond, therefore, was totally

invalid, since, under the Regulations, or the Hindoo law, a deed made by an infant could have no effect or force; that even admitting the Bond to be genuine, Ranee Degumber Koonweree was not competent by the Hindoo law to make such a Bond; that under the law of the Shastras, the son of the deceased living, the Ranee Degumber Koonweree could have no personal title to the property, but as the son was an infant she was competent to act as guardian; but as such she was not competent to make such a transfer of the property as had been made; and, lastly, that the Ranee was not cognizant of the Bond being executed or of the transaction.

The appeal, which was referred to the full Court, came on for hearing on the 22nd of January, 1852, when the Messrs. Begbie, Deane, and Brown, the Judges of the Sudder Dewanny Court, by their judgment, held, that the question which the Court had to deal with, related to the right of the Ranee to execute the deed before them. They remarked that the deed itself assigned to the Ranee a proprietary character, and that it was not among the Defendant's pleas that the Ranee acted as her son's guardian, but [405] that he claimed for her the proprietary character both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. That the Plaintiff, on the other hand, had, throughout, argued for the avoidance of the Bond by denying the Ranee's proprietary right in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the Plaintiff, to the exclusion of the Ranee on the death of the Plaintiff's father, Raja Sheobuksh Singh, had no hesitation in declaring that even on the assumption that the Ranee voluntarily executed the Bond and received full consideration for it, the Bond was not binding on the Plaintiff, and that neither he nor his ancestral property could be made liable in satisfaction of it. That it was needless for the Court, their inquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the Ranee and Hunoomanpersaud Panday; but that a final judgment could not then be pronounced, the amount of the waisilat (mesne profits) being disputed, and no investigation on that point having been made by the Court below. The Court, therefore, decreed to the Plaintiff, in alteration of the Principal Sudder Ameen's judgment, so much of his claim as related to the avoidance of the Bond, and remitted the suit, with directions, to the principal Sudder Ameen, that he determined what amount of mesne profits from the date from which they were claimed the Plaintiff was entitled to recover. It was ordered, therefore, "that the judgment of the Principal Sudder Ameen of Goruckpore, dated 23rd of December, 1850, be amended; that the Bond set up by the Defendant be set aside; and that a decree do pass in favour of Plaintiff, and [406] that the costs be awarded in the decree to the extent of the jumma of the property claimed."

Against this decree the present appeal was brought.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Wigram, Q.C., Mr. Bagshaw, Q.C., and Mr. W. Field, for the Respondent.

The Principal points submitted to the Court in the argument, were:—

First. As to the validity of the mortgage Bond, whether it was executed by the Ranee at all, and further, as the Bond purported to be executed by her in a beneficial character, if it constituted a valid incumbrance on the Raj.

Second. Whether the incumbrance created by Raja Sheobuksh Singh entitled the Appellant to retain possession of the villages and lands in the mortgage Bond executed by him until such incumbrance was paid off, or whether it was a personal charge only on the heir; and the Appellant had not a right to stand in the place of the Ranee in respect of the monies he had advanced.

Third. Whether it was competent by the Hindoo law to the Ranee, as the registered proprietor of the family estate and curator of the infant's property, to charge ancestral estates by way of mortgage, in consideration of the advances made for the benefit of the minor's estate, to prevent a sequestration and probable confiscation.

Fourth. Whether after the *factum* of the mortgage [407] bond was established, and proof of the advances made, the presumption of law was not in favour of the charge, and the *onus probandi* was not upon the heir to disprove the necessity of the advances.

Upon these points the following authorities were cited:—

As to the power by the Hindoo law, of a manager or guardian, in possession, to mortgage ancestral estates, to charge by way of mortgage for payment of debts or Government revenue to save the estate from sequestration, or in any way to alienate ancestral estate by deed or Will, 2 Coleb. Dig., pp. 265, 270, 284, 294, 319; The *Mitacschara*, ch. i. sec. i. pars. 28, 29, 30, where reference is made to Inst. of Menu, ch. xi.; 1 Strange's "Hindu Law," p. 18 (2nd Edit.); *Rajah Sahibdeen Khan v. Brig Raj Sing* (6 Sud. Dew. Adaw. Rep. 47); *Gopce Churun Burrat v. Mussumant Lukhee Ishwuree Dibia* (3 Sud. Dew. Adaw. Rep. 93); *Anohutao Day v. Mahes chunder Dutt* (Fulton's Rep. 380); *Shrogoridpershad Singh v. Ramchurum Doobi* (9 Sud. Dew. N.W.P. 133); *Nagalutchmee Ummal v. Gopoo Nadaraja Chetty* (6 Moore's Ind. App. Cases, 309); *Rungama v. Atchama* (4 Moore's Ind. App. Cases, 1); *Mulraz Lachmia v. Chalekany Vencata Rama Jagganadha Row* (2 Moore's Ind. App. Cases, 54). By the English law, *Archer v. Hudson* (7 Beav. 551).

That the debts of ancestors were charges upon the estate, 1 Strange's "Hindu Law," p. 166, *Oomed Rai v. Heera Lal* (6 Sud. Dew. N.W.P. 218).

Upon whom the *onus probandi* lies, *Rajah Sahibdeen Khan v. Brig Raj Sing* (6 Sud. Dew. Adaw. Rep. 47).

As to the manner of taking mortgage accounts, Ben. Reg. XV. of 1792.

[408] And, upon the practice of framing the issues of the points in dispute, Ben. Reg. XXVI., sec. 10, cls. 2 and 3, of 1814; Macpherson "On civil procedure," 207.

Judgment was delivered by

The Right Hon. the Lord Justice Knight Bruce (July 26, 1856).—The complainant in the original suit, was Lal Inderdowun Singh, described in the plaint as proprietor of the Raj of Pergunnah Munsoor Nuggur Bustee. The suit was against the present Appellant, the chief Defendant, and Ranees Degumber Koonweree, the second Defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immovable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage Bond bearing date Assar Soodee Poorunmashee, 1246 Fuslee, set up by the Appellant; to oust the Appellant, to cancel the name of the Appellant as mortgagee in the Collector's records, and to recover mesne profits.

To this suit the Defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the Defendant alleged his title as mortgagee (except as to some Birt lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the Defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the plead-[409]-ings or proceedings in the suit. It is sufficient to state, that in the result the Sudder Ameen decided in favour of the security, and dismissed the claim generally, but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned.

The reasons for the decision of the appellate Court are contained in their judgment. The Court says, "The question with which the Court have first to deal, respects the right of the Ranees to execute the instrument before them." They then remark, "that the Bond itself assigns to the Ranees a proprietary character, and that it was not amongst the Defendant's pleas that the Ranees acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The Plaintiff, on the other hand, has throughout argued for the avoidance of the Bond, by denying the Ranees's proprietary title in any way; and such being the issue joined between the parties, the Court, looking to the fact that the estates in dispute unquestionably devolved on the Plaintiff, to the exclusion of the Ranees, on the death of the Plaintiff's father, Raja Sheobuksh Singh, have no hesitation in declaring that, even on the assumption that the Ranees voluntarily executed the Bond, and received full consideration for it, the Bond is not binding on the Plaintiff, and that neither he nor his ancestral property can be made liable

in satisfaction of it. It is needless for the Court, their inquiries being thus stopped *in limine*, to enter on the real [410] merits of the transaction as between the Ranee and Hunoomanpersaud Pandey."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship, to the further consideration whether the Appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in whole or in part, as a charge effected by a *de facto* Manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view :

First. Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly. Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? And

Thirdly. Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted?

On the first point their Lordships think it right to observe, that it is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according [411] to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.

But their Lordships think that if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal Sudder Ameen states the issue on this point are: "whether it (the mortgage Bond) ought to have effect against the mortgaged villages." It was not an issue limited to the particular description or character in which this act was done, and a misdescription or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the Sudder Dewanny Adawlut, upon the first point, that the real question in dispute between these parties, namely, whether the charge bound the lands in the hands of the heir, was not substantially included in the issues, which were evidently intended to raise it. Neither can their Lordships adopt the reasoning or the conclusion of the Sudder Dewanny Adawlut, upon the second point, as to the relation in which the Ranee meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the [412] transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the Ranee, which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, *pro tanto*, a claim adverse to her son; and it is conceded by the Respondent's counsel that she did not claim adversely to her son. The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as a Manager, inaccurately and erroneously described

as "proprietor," or "heir"; and it is to be observed, that the Collector takes this view, for, whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as "Surberakar." If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient, in their Lordships' judgment, to show the real character of her proprietorship.

Upon the third point, it is to be observed that under the Hindoo law, the right of a *bona fide* incumbrancer who has taken from a *de facto* Manager a charge on [413] lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title. Therefore, had the Ranee intruded into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector, exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Ranee's assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently, even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further inquiry would not have been well-founded. It would not have been accordant with the principles of the Hindoo law, as declared in Coleb. Dig., vol. i., p. 302, and in the case of *Gopee Churun Burrall v. Mussumant Isharree Lukhee Dibia* (3 Sud. Dew. Adaw. Rep. 93), and as illustrated by the case cited for the Appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say that they see any ground of probability for the assertion, that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its au-[414]-thority, by any consciously false description of herself. The title to this Raj cannot readily be supposed to have been unknown in the Collector's office, nor is it probable that the Ranee could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence discloses, as it is contended for the Respondent that it does disclose, no *prima facie* case of charge at all on this ancestral estate, then, as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief, is made out; but if, on the other hand, the evidence discloses even a *prima facie* case of charge, some inquiry at least ought, as it seems to their Lordships, to have been directed.

[415] The question then next to be considered is, whether a *prima facie* case of a subsisting charge is made out by the Appellant. This question involves the consideration of two points: first, the actual *factum* of the deed; and, next, the consideration for it.

First, as to the *factum*. The execution of the Bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on behalf of the Respondent, that the Court ought not to act on their evidence. Some discrepancies, —such, however, as are not unfrequently found in honest cases in native testimony.

were dwelt upon. The Sudder Ameen, who decided this case originally, has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the Bond is the deed of the Ranees. The decision by a native Judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this Bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was, therefore, put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further, that this receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto*, the annual income of the estate, which would come to be administered by the Ranees, and that this state of things continued for [416] several years after the execution of the Bond. The Ranees' ignorance, then, of such title, possession, receipt, and diminution, is, as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the Ranees was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case: she herself denied it on a subsequent contest as to the managership; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect and mismanagement, which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranees' allegations of her own competency; that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the Sudder [417] Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranees' execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the Respondent give as to the *factum* of the instrument. The story told by the witnesses, Heera Lal and Gyapershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the Respondent, this Bond was fraudulently executed in the name of the Ranees, without her sanction or knowledge, in order to fix a false charge of Rs. 15,000, in the Defendant's favour, on the property of the infant Raja. The Defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses, who give nearly *verbatim* the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet such is at once the impatience and the folly of these conspiring parties, that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy; and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the con-[418]-cealment are both without motive according to the account which is given us. And the story of this utterly needless communication of his crime, is told of a man used to business, intelligent, and

described by the Respondents as the habitual accomplice of crafty and designing men, the Karindas, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the Sudder Ameen as to it.

Next, as to the construction for the Bond. The argument for the Appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewanny Adawlut at Agra, in the case of *Oomed Rai v. Heera Lal* (6 Sud. Dew. N.W.P. 218), was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected [419] with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate: whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the Manager accompanying the loan as part of the *resgestae*, and as the contemporaneous declarations of an [420] agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *prima facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's "Digest," seems the foundation of this practice. (See also the case of *Brown v. Ram Kunnee Dutt*, 11 Sud. Dew. Adaw. Rep. 791.)

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the Appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances: it is a consolidating security; and as to part, at least—namely, the ancestral debt—there is, in the opinion of their Lordships, ground to raise a *prima facie* presumption in the Appellant's favour of a consideration that

binds the estate. It is unnecessary to the decision to pursue the inquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *prima facie* proved as against the estate. And, as to the whole [421] charge, there is also at least *prima facie* evidence in the admissions of the Plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not, according to the law current in the North-Western Provinces, be charged, in the hands of the heir, for an ancestor's debt. But it is to be observed as to the change of security, that there was a reduction of interest; it is, therefore, a transaction, *prima facie*, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the Decisions of the Sudder Dewanny Adawlut, North-Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *prima facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether, in taking the account between these parties, the Defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with [422] the rent fixed by the pottah. It is said for the Appellant, that the Sudder Dewanny Adawlut did not set aside the pottah. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage Bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation such as this pottah evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage security, and forfeiting the claim of the mortgagee to his principal and interest: but Mr. Palmer contends that where there is no such evasion, and a *bona fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but, notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and is in accordance with the true nature of the security and the spirit of the Regulations.

[423] In the case of *Roy Juswunt Lall v. Sreekishen Lall*, reported in the decisions of the Sud. Dew. Adaw. in 1852, vol. 14, p. 577, the Court seems to have thought that where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but it appears from that case, that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage debt, and must be restored when the debt, interests, and costs are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the case must be sent

back for further inquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has [424] arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms:—

“ Their Lordships are of opinion that the Ranee [425] ought to be deemed to have executed the mortgage Bond, dated Assar Soodee Poornumashee, in the pleadings mentioned, as and in the character of guardian of the infant Lal Inderdowun Singh.

“ And their Lordships are of opinion that the validity, force, and effect of the Bond, as to all and each of the sums, of which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the Appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

“ And their Lordships are also of opinion that, assuming the Bond to be invalid and ineffectual, the Appellant would, nevertheless, be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the Bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

“ And their Lordships, therefore, are of opinion that the decrees of the Zillah and Sudder Courts respectively ought to be reversed, and the cause remitted to the Sudder Court, with directions that inquiry be made into the several matters aforesaid, and that all such accounts be taken and such other inquiries made as, having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the Sudder Court do proceed therein as may be just, both with respect to the said mortgage Bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the Sudder Court.”

[See *Chetty Colum Comara Ventacachella Reddyar v. Rajah Rungaswamy Stree-munth Jyengar Bahadoor*, 1861, 8 Moo. Ind. App. 326; *Collector of*

Masulipatam v. Cavalry Vencata Narrainapah, 1861, 8 Moo. Ind. App. 540; *Lalla Bunscedhur v. Koonwur Bindeseree Dutt Singh*, 1866, 10 Moo. Ind. App. 454; *Gordharee Lall v. Kantoo Lall*, 1874, L.R. 1 Ind. App. 331; *Prosunno Kumari Debya v. Golab Chard Baboo*, 1875, L.R. 2 Ind. App. 152; *Koonwur Doorganath Roy v. Ram Chunder Sen*, 1876, L.R. 4 Ind. App. 63; *Baboo Kameswar Pershad v. Ran Bahadoor Singh*, 1880, L.R. 8 Ind. App. 8; *Lala Amarnath Sah v. Rani Achan Kuar*, 1892, L.R. 19 Ind. App. 202; *Maheshar Baksh Singh v. Ratan Singh*, 1896, L.R. 23 Ind. App. 57.]

[426] BODHRAO HUNMONT,—Appellant; NURSING RAO and Others,—Respondents * [July 11, 1856].

On appeal from the Governor in Council of Bombay.

Heard *ex-parte*.

Enam villages, granted by Government to the grantee and his male heirs, for services rendered to the State, are not, by the Hindu law in force in the Southern Mahratta country, distinguishable from other ancestral real estate; and are divisible among the heirs of the grantee.

The question in this appeal was the right of the Appellant to a partition of certain Enam villages in the Southern Mahratta Country, which had been granted by the Government of Bombay by a sunud, dated the 9th of April, 1823, to Hunmont Rao, the ancestor of the Appellant and Respondents, to hold to him and his posterity in the male line from generation to generation.

The circumstances which gave rise to this question were these:—

The Appellant and Respondents were Hindoo Enam Jageedars, and inhabitants of Hooilgole in the Talook Dunnul, of the Dharwar Zillah, in the Presidency of Bombay. The Respondent, Nursing Rao, being a Sirdar of the second class, was exempt from the Jurisdiction of the ordinary Zillah Courts, but by Reg. [427] VII. of 1830, of the Bombay Code, subject to that of the Political Agent of the Southern Mahratta Country.

On the 10th of January, 1851, the Appellant instituted a suit against the Respondents in the Court of the Political Agent in that District, and, by his plaint, stated, that Krishna Rao, deceased, the father of the Respondent, Nursing Rao; Narragen Rao, deceased, the father of the Respondent, Keshow Rao; and the other Respondents, Shreenewao Rao, Ragvendir Rao, Venkut Rao, were, with the Appellant, the six brothers and legitimate sons of the late Hunmont Rao, to whom Mr. Chaplin, formerly Commissioner at Poonah, gave, in consideration of his having served Government, by order of the then Governor in Council, three villages named Hooilgole, Nagavee, and Kulsupoor, in Surva Enam, yielding a total revenue of Rs. 4094 3a. 6p.; that the sunud granted at the same time to Hunmont Rao, declared that the Enam villages were conferred upon Hunmont Rao and his posterity in the male line hereditary; that in pursuance of the Sunud, Hunmont Rao was put in possession, and that the Appellant and Respondents lived together and managed the villages under their father's directions; that after his death, the Appellant and Krishna Rao, the father of the Respondent, Nursing Rao, jointly managed the villages for some time until disagreements arose between the Appellant and Respondents, which led to a division of their ancestral moveable property; and the Appellant further alleged, that in such division the father of the Respondent, Nursing Rao, and the rest of the Respondents combined against him, and by fraud subjected him to heavy losses; that the management of the three villages had been since in [428] the hands of the Respondents, who had collected the whole income without

* Present: Members of the Judicial Committee,—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule. Assessor,—The Right Hon. Sir Lawrence Peel.

giving him his share, or showing him the accounts of the same, and he prayed to be put in possession of a sixth share of the three Enam villages held by his father.

The Respondents, Ragvendir Rao, and Venkut Rao, transmitted their answer by letter to the Political Agent, stating the circumstances under which the joint possession of the estate had continued since the decease of their father, and expressing their willingness to a partition, and charging the Respondent, Nursing Rao, with being the sole cause of the non-partition.

The Respondent, Nursing Rao, by his answer insisted that the Enam villages could not be partitioned, as it was understood when Hummont Rao obtained the grant from Government that it was to be continued to his family in perpetuity, that a decision had been made by the Collector of Dharwar, giving him, as the eldest son of the deceased grantee, the management of the villages and the division of the income among his brothers; that the effect of the villages being parcelled among them would be that disputes would arise between the sharers and the Ryots; and he concluded by praying that a decision should be passed confirming the practice of sharing the nett income of the Jaghire, and to determine against a partition.

The Appellant replied, insisting, that neither the Hindoo law, Regulations, or usage, entitled a person empowered by a sunud to conduct the management of a Jaghire to withhold from his brothers their shares in it. In the rejoinder, Nursing Rao reiterated the statements contained in his answer, objecting, that the Appellant claimed a share of the landed property, [429] although he had agreed to receive cash as his division of the Jaghire, and further objecting that the suit should have been instituted for partition of the personalty and of the landed property of the family, and not of the landed property alone.

None of the other Respondents appeared or took any part in the proceedings.

The suit was heard before the Political Agent, when the Appellant put in evidence the *sunud* granted by the Bombay Government to Hummont Rao, dated the 9th of April, 1823, of the villages in dispute, which provided that he and his sons, and sons' sons, should enjoy the same in male line all succeeding generations in Enam. Also a letter from Krishna Rao to the Respondent, Venkut Rao, in which he expressed his desire for a partition, that each might manage his share. And to show that the usage of the Southern Mahratta country was in conformity with the Hindoo law, he examined witnesses, to prove that ancestral property and Jaghire lands, inherited by several brothers, had been partitioned amongst them. The evidence produced by the Respondent, Nursing Rao, went to the denial of the letter of Krishna Rao above stated, with other evidence which in no way affected the Appellant's claim to a partition.

Mr. Inverarity, the Political Agent, recorded his opinion, that the matter in dispute should be decided by considering whether the Appellant could by the Hindoo law claim a partition of his ancestral landed property, after a division of the ancestral personal property had been made, and he, therefore, directed that question to be laid before the Shastree of the Court of Dharwar, who returned an answer, [430] that if the property was capable of division, and the division did not injure or destroy the property, it might be partitioned; whereupon the Political Agent by his decree, dated the 6th of October, 1852, decided that the partition prayed for by the Appellant should be allowed, and that he should be put in possession of one-sixth share of the Enam villages in question.

The Respondent, Nursing Rao, appealed from this decision to the Governor in Council, at Bombay, urging that as the villages contained both superior and inferior lands, such a partition would be attended with considerable inconvenience, and further stating that the revenue had hitherto been paid to each sharer, and that the Respondent would continue to pay the same in future, and submitting that such a division was not contemplated by the Hindoo law.

The Governor in Council thought that the case involved an important question of law, and referred the case for the opinion of the Shastree of the Sudder Court. That officer reported that on referring to several books on Hindoo law it was laid down that, the sons had a right to divide the moveable and immoveable property of their deceased father, and that, therefore, the land was divisible; and that there did not appear any difficulty in dividing the villages.

On the 17th of July, 1853, the Governor in Council recorded a minute on the

appeal, in which he stated that the opinion of the law-officer was not definite enough to dispose of the appeal, and referred the case back for evidence upon one point, namely, whether the division of the villages would be at-[431]-tended with loss: as he thought the merits of the decision rested upon that ground.

The Political Agent in accordance with this direction issued a commission, under sec. I. cl. 31, of Reg. IV. of 1827, to the Mahalkurree of Roan, for him to repair to the villages, and report whether there existed any obstacle to the division of the lands. The Commissioner reported the mode in which the villages might be conveniently divided into six shares. The Governor on receipt of this report referred the case to the Secretary to Government in the Revenue Department for his opinion, whether he concurred in the statement that a division could be made without injury to the property, or proprietors, upon which the Revenue Secretary stated, that he was of opinion, that there were many objections to allowing the revenue management of a village to rest with more than one party, which he pointed out, and expressed an opinion that the management should continue in the hands of one party, the accounts being open to all.

The Governor in Council thereupon, on the 17th of February, 1854, made his decree, the material part of which was in these terms: "The Court having maturely considered the facts adduced in the Mahalkurree's report, together with the proceedings and judgment of the lower Court in the original suit and petition of appeal, and having considered also that Enamdars of villages have no more title to the occupied lands in their villages than Government have to Khalsa lands held by Ryots in Khalsat villages, but only to the revenues of such lands, and that many objections exist to the revenue management of a village resting with more than one party, judges that the division of the [432] lands described in this appeal cannot be claimed, and ought not to be admitted without injury to the property." The decree of the Political Agent was accordingly reversed, and the Court directed that the management should continue in the hands of one party, the accounts being open to all.

From this decree the present appeal was brought, and, as the Respondents did not appear, was heard *ex-parte*.

Mr. Rolt, Q.C., and Mr. Ayrton, in support of the appeal, contended, that by the usage of the Southern Mahratta Country, and in conformity with the Hindoo law, the villages, though granted in Enam, were, in common with the other moveable and immoveable property of the deceased, Hummont Rao, divisible among his heirs, and that the Appellant was entitled to one-sixth share upon a partition, and they submitted that the decision of the Governor in Council was influenced by a consideration relating to the Revenue, which was quite irrelevant to the question between the parties.

The Right Hon. T. Pemberton Leigh.—There appears no reason why the Enam villages in question should not be governed by the general principles of the Hindoo law respecting partition of the father's estate among his heirs. The terms of the *sunud* are absolute. There is nothing peculiar in the case; it is an ordinary partition suit, which is an every day's occurrence in India, and the division must be according to the Hindoo law. The mode of collecting [433] the revenue has nothing to do with the question. We, therefore, must reverse the decree of the Governor in Council of Bombay, and consequently, affirm the decree of the Political Agent of the Southern Mahratta Country, of the 6th of October, 1852, with costs, as well here as of the appeal to the Governor in Council of Bombay.

HURRYDOSS DUTT,—*Appellant*: SREEMUTTY UPPOORNAH DOSSEE and
Another,—*Respondents** [July 14 and 15, 1856].

On appeal from the Supreme Court at Calcutta.

Bill, *quia timet*, by reversioner, against the daughter of an intestate Hindoo in possession of personalty, dismissed.

A Court of Equity will not interfere, unless it is shown that there is danger from the mode in which the tenant for life in possession is dealing with the property.

The mere fact of the tenant for life keeping in hand for about three months part of the corpus for the alleged purpose of an eligible investment does not amount to waste, nor is in derogation of the rights of those entitled in reversion.

The title of a Hindoo widow to her husband's property, though a restrictive one, is not in the nature of a trust.

Whether by the Hindoo law current in Bengal the interest of a daughter in the estate of her deceased father, is of the same nature as that of a widow. *Quære.*

This appeal was brought from a decree on the Equity side of the Supreme Court at Calcutta, in a suit instituted by the Appellant against the Respondents, dismissing the Bill with costs.

[434] The facts out of which the appeal arose were as follow:—

Heeraloll Mullick, a Hindoo merchant and Banker, died in the year 1819, seised and possessed of considerable real and personal estate in the Presidency of Bengal, leaving a widow, his heiress and legal personal representative, and four daughters, his only children, him surviving. The widow entered into possession of his real and personal estate, and died on the 30th of April, 1850. At the time of her death, three only of the daughters survived her, one having died in her lifetime without issue. Of the three daughters who survived, one, Rungunmoney Dossee, was a childless widow. Another, Joymoney Dossee, was the mother of the Appellant, and the infant Respondent, Singheechurn Dutt; and the third the Respondent, Sreemutty Upoornah Dossee, the wife of Lall Mohun Roy, by whom she had had two female children, deceased, one of whom, however, Fuloomary Dossee, left a son her surviving. Soon after the death of the widow of Heeraloll Mullick, some litigation ensued between her three surviving daughters with respect to the right of succession to the property of Heeraloll Mullick, which resulted, by compromise and arrangement (subject to a small money payment to Rungunmoney Dossee) in the equal division of the property between Joymoney Dossee and the Respondent, as the only daughters of Heeraloll Mullick having issue or capable of having issue at the death of his widow. The share of the property to which the Respondent succeeded consisted, *inter alia*, of a sum of Rs. 55,466 10a. and 8p., at that time invested in the promissory notes of 1825 and 1826, called Com-[435]-pany's paper, bearing interest at £5 per cent. On the 23rd of April, 1853, the Government of the East India Company issued a notification of their intention to pay off the whole of their promissory notes of 1825 and 1826, on the 25th of July then next, giving parties who were holders of those promissory notes the option of taking either the *par* value of such promissory notes to be paid in liquidation, or the nominal equivalent at *par* in a loan opened in 1842 and 1843, bearing interest at the rate of £4 per cent. only. The Respondent did not at the time approve of the transfer of the £5 per cent. promissory notes of 1825 and 1826 into the £4 per cent. notes of 1842 and 1843; and, on the 25th of July, 1853, she received in cash from the Government of the East India Company, in discharge of the share of the property of Heeraloll Mullick so invested in the promissory notes of the year 1825 and 1826, the sum of Rs. 55,466 10a. and 8p., of which sum, however, she shortly afterwards invested the

* Present: Members of the Judicial Committee,—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William Maule.

sum of Rs. 39,340 in the purchase in her own name of Company's paper in the loan of 1842 and 1843, bearing interest at the rate of £4 per cent.; and, at the date of the filing of the Bill, the residue of the sum of Rs. 55,466 10a. and 8p., remained in the hands of the Respondent uninvested, ready for an investment when an advantageous opportunity should in her judgment offer.

The Bill was filed by the Appellant on the 15th of August, 1853, against the Respondent, Sreemutty Upoornah Dossee, and Singheechurn Dutt, an infant, the other Respondent, as Defendants, in the Supreme Court at Calcutta, stating at great length the facts above set forth, and alleging his presumptive [436] title, as grandson of Heeraloll Mullick to the share of the Respondent in the whole of the sum of Rs. 55,466 10a. and 8p., and charging that the Respondent intended to misappropriate the greater portion of the estate of Heeraloll Mullick to which she had so succeeded, and that it was in danger of being entirely lost; and the Bill further charged that by the Hindoo law and usage a daughter succeeding to the estate of her father, had no greater interest in the same than a Hindoo widow, and that she was only entitled to the usufruct and could not alter or vary the securities in the Company's paper, and praying a declaration by the Court that the Respondent, by the acceptance of cash from the Government of the East India Company, in discharge of the promissory notes of 1825 and 1826, instead of having invested the same in the new £4 per cent. loan of the Government in the purchase of Company's paper, had committed waste, and for a decree that all sums received by the Respondent in respect of her share of the estate of Heeraloll Mullick might be paid into Court, and invested in the promissory notes of the Government of the East India Company. The Bill also prayed for an injunction restraining the Respondent from in any way converting into money any of the Company's paper in her possession, power, or control, belonging to the estate of Heeraloll Mullick.

The Respondent by her answer, stated that she had already invested the sum of Rs. 39,340, part of the sum of Rs. 55,466 10a. and 8p., in the promissory notes of 1842 and 1843 of the Government of the East India Company, which she purchased at a discount of 3 to 5 annas per cent., and she denied that she had misappropriated, or that she intended to mis-[437]-appropriate, any portion of the cash so received by her from the Government of the East India Company, and that the residue remained in her hands ready for investment whenever an advantageous opportunity occurred, either in mortgage security, Government paper, or purchase of real estate, and that she had been looking for such investment, and submitted as a matter of law, to the judgment of the Court, the nature or extent of the right of herself, and Joy-money Dossee, as such daughters of Heeraloll Mullick in his estate, whether the same was by the Hindoo law an estate for life only, or a lesser or greater estate, or any portion of the estate of Heeraloll Mullick, and she insisted that there was nothing whatever to show that the money remaining in her hands, or any portion of the estate of Heeraloll Mullick, to which she had succeeded, was in any danger of being lost.

The cause was heard on Bill and answer on the 25th of February, 1854, before the Supreme Court, on which day, judgment was delivered by Sir Lawrence Peel, Chief Justice, as follows:—"The question which has been argued before us is an important one, but, as we think, not difficult of solution. It is, in fact, in a great degree settled by authority, to which all Courts in this country must submit, namely, that of the decision of the ultimate Court of appeal, the Privy Council. The right of the Hindoo widow, as heiress to her deceased husband under the law prevalent in Bengal, to the free and unrestrained possession of the property which she takes by succession, is declared by the judgment of Lord Gifford in the case (*Cossinauth Bysack v. Hurrosoondery Dossee*: Clark's Rules and Ord. Add. Ca. p. 91) quoted in the argument. [438] This, of course, has no application where she is subject to the tutelary care of the Court of Wards. It is only where she is about to deal with the property in a mode contrary to the Hindoo law in extension of her powers over it, and in derogation of the rights of those who may succeed to it, that the Court would be justified in restraining her in the use, custody, and disposition of it. Now this case shows nothing of the kind. The case comes before us on Bill and answer, and all that the answer admits is, that the Government proposed to pay her off as a holder of certain Government paper in the five per cent. loan, giving her the option

of taking an equivalent in a four cent. new paper. This she says she declined, not thinking it an equivalent, or advantageous as an investment. She says also that she has received the money, Rs. 50,000, and has since purchased other Company's paper to the amount of upwards of Rs. 30,000, and that the remainder she intends to invest either in Company's paper, or on mortgage on real security, or in the purchase of land when an eligible opportunity offers. There is nothing whatever admitted to show that the money is in any danger. The mode of custody is not shown. It was stated in argument that she has it in her private dwelling, but that even is not admitted. Now, this is nothing like waste, or like that sort of dealing with the property which would justify a Court of Equity in interfering. We are asked to declare, for such is the prayer of the Bill, that she, having received what her debtors paid her on their notice to pay her off, committed waste in not re-investing it in Government paper. Such a prayer could only be asked on the assumption that the heiress is a trustee, and must [439] invest as that trustee must invest who is directed to invest in Government securities only, and has no option to exercise his discretion as to the investment. But such is not the condition of the heiress. Hers, as is stated in the judgment of this Court in *Hurrydoss v. Ranguinnoy Dossee*, is a restricted, not a trust estate. Here she does not even change the security. It does not proceed from her act, but she is paid off. If she were about to invest in an unsafe security, that might justify the interference of the Court. It is not even shown that there is imprudence in keeping the money; but if there were, imprudence merely is not waste or misdealing. It is not uncommon for natives, or even for others than natives, to have in plate, jewels, cash, etc., property to a larger amount than this in a private dwelling. There is as much danger from encouraging litigation by lending an ear too readily to complaints from reversionary heirs, in families where no union is, as in declining to listen to complaints of those who show no grave foundations for the alarm which they assert that they feel; but a short time has elapsed since she received the money, and there is nothing to show that she does not really mean to do that which she asserts she intends to do. It was argued that the Legislature has disabled Hindoo and Mahomedan representatives from making transfer of Government paper and Bank shares unless under probate, letters of administration, or certificate; but that notion proceeds in a mistaken reading of the Act; it is mainly for the protection of debtors who may, if they really doubt as to title, or are distracted by rival claims, or by disunion amongst claimants under the same title, refuse to pay debts to representatives unless to persons claiming under Pro-[440]bate, Letters of administration, or certificate. But if the heir merely ask for his own security, the Act does not apply. Where a transfer is sought to be made, not by a representative title simply, but under the title that a certificate confers, then it is true the certificate will not avail, unless that power is conferred by the certificate. In other words, the representative title to make a transfer will not be displaced by a certificate not expressing that that power is given by it; but even if this were otherwise, the objection has no application here, where the debtor in fact takes the initiative, gives notice to pay, and the creditor merely receives the money. The Act is not for the protection of debtors, and the debtor may waive a security intended for his protection."

From the decree founded upon this judgment the present appeal was brought, the Appellant submitting that the same was erroneous, for the following reasons:—

First. Because with reference to the nature of the interest of the Respondent, according to the Hindoo law, in the Company's paper, and the proceeds thereof, the Court below would have been justified in interfering in order to protect the same for those entitled in remainder.

Secondly. Because the facts stated in the Bill, and admitted by the answer, afforded sufficient grounds for the interference of the Court, and that, therefore, the Bill ought not to have been dismissed.

On the other hand the Respondent, Sreemutty Uppoornah Dossee, who alone appeared, contended that the decree was correct, for the following reasons:—

[441] First. Because, according to the Hindoo law prevalent in Bengal, upon the death of the widow of Heeraloll Mullick, the Respondent being and still continuing a married woman, and capable of having male issue, was absolutely entitled, as a daughter of Meeraloll Mullick, to one equal moiety of his wealth.

Second. Because the Respondent had at least a right to the free possession and enjoyment of the share of the property to which she by succession became entitled, without any restraint other than such as might be imposed by her duties as the wife of a Hindoo, and because those who might be entitled to succeed to her property at her death could only be entitled to so much thereof as should remain after the lawful enjoyment thereof by her during her life.

Third. Because, by the Hindoo law, the Respondent, if not entitled to the property to which she succeeded, either absolutely, or in manner mentioned in the second reason, was, at any rate, warranted in devoting a portion of the property to which she succeeded to pious uses, and might, in case of necessity, dispose of a portion of the corpus thereof in support of herself and her family.

Fourth. Because the discretion as to the time and mode of investment or re-investment of the share of the property to which the Respondent by succession became entitled, as well as the management thereof, rested in any event wholly with her.

Fifth. Because there could be no just analogy between the case of a tenancy for life created by a Will or settlement of a Testator or settlor, and the limitations or restrictions upon enjoyment, imposed by the Hindoo law of inheritance and succession.

[442] Sixth. Because, even assuming that the Respondent had not the right to the free and unrestrained possession and management of the property to which she succeeded, yet inasmuch as the discharge by the Government of the East India Company, of the promissory notes of 1825 and 1826, was an act over which the Respondent had no control, her acceptance of such discharge could not be construed as an act of waste.

Seventh. Because the Respondent was not, under any circumstances, bound to invest the share of the property to which she had succeeded in the Company's paper.

Eighth. Because the only possible ground on which the Court could have been justified in restraining the Respondent from having the use, custody, and disposition of the property to which she has succeeded, would have been either on proof by the Appellant, or on the admission of the Respondent, that she had dealt or intended to deal with the property, the subject of the suit, in a mode contrary to the Hindoo law, whereas there was not only no such proof by the Appellant, but there was a positive denial of any such act or intention by the Respondent in her answer, by which answer, having regard to the nature of the pleadings and the course of proceeding adopted by the Appellant, he must be concluded.

Ninth. Because, even on the Appellant's own showing, he had only a bare presumptive title, and the possibility of his succeeding to the property in question was too remote, and could only be realised in the several events of this Respondent dying without male issue, and of the Appellant surviving both his own mother and the Respondent.

[443] Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—This is an ordinary *quia timet* suit, and we submit the facts of the case justified resort to the Court. The Bill was filed by the Appellant, one of the next heirs in expectancy, to prevent the probable loss of part of the corpus of that portion of Heeraloll Mullick's estate to which the Appellant might become entitled, and which, in the circumstances of danger in which it was placed by the Respondent, reasonably led the Appellant to apprehend and anticipate its possible loss, *Flight v. Cook* (2 Ves. Sen. 619). The Respondent is a married woman, and although she has invested part of the Rs. 55,466, amounting to Rs. 39,340, yet there is an undisposed residue of Rs. 16,126, odd, which by her answer she admits she has retained in her hands. The judgment of the Court below proceeds upon an erroneous presumption of Hindoo law as applicable to this case: the Court puts the Respondent, a daughter, upon the same footing as a Hindoo widow, and justifies such a conclusion upon the judgment of this Court in the case of *Cossinauth Bysack v. Hurrosoondery Dossee* (Clark's Rules and Ord. Add. Cases, p. 91; S.C. Morton's Rep. 85). That case is distinguishable from the present. A material distinction exists in the Hindoo law between the interest a daughter has in her father's estate, and that which a widow possesses in her husband's estate. *Cossinauth Bysack v. Hurrosoondery Dossee* was a case of a widow;

here a daughter is in possession. By the Hindoo law, the widow, in the absence of male issue, succeeds to her husband's estate as half of his body, and she alone [444] is capable of performing certain funeral oblations; and although she is only tenant for life, yet she possesses for some purposes a power of alienation of the estate. *Daya-Bhaga*, ch. xi. sec. i. pars. 2, 7, 26, 43, 56, 57, 60 l. F. Macnaghten's "Con. on Hindoo Law," pp. 19, 20-23. According to the cases of *Bungsa Dhar Hagra v. Thakoor Pyrag Sing* (7 Sud. Dew. Adaw. Rep. 114), and *Radha Benode Mist v. Sheikh Musherutoollah* (7 Sud. Dew. Adaw. Rep. 350), she is only a holder in trust for certain purposes, and an action for waste would lie against her. Now, the title of a daughter to a father's estate is widely different, she has no such privilege as the widow, of discretionary alienation, she only enjoys for life the estate which devolves upon her by the failing of nearer heirs, F. Macnaghten's "Con. on Hindoo Law," pp. 6, 7. Her very title depends upon her continuing the line, *Daya Bhaga*, ch. xi. sec. ii. par. 8; *Gunga Mya v. Kishen Kishore Chaudhry* (3 Sud. Dew. Adaw. Rep. 130), and she cannot give away or sell any portion, 2 W. Macnaghten's "Prin. of Hindu Law," p. 224; 1 Coleb., Dig., p. 496. She cannot defeat the right of her son's or reversioners' succession at her death, *Dor drun, Colley Dass Bose v. Debnarain Koberanj* (Fulton's Rep. 329); *Karuna Mai v. Jai Chander Ghose* (5 Sud. Dew. Adaw. Rep. 46). It is apparent, then, that the law, as laid down by Lord Gifford in *Cossinuth Bysack v. Hurrosoondery Dossee*, was wrongly applied by the Court below in this case, as the analogy between the widow and daughter's estate cannot be carried out. That case is treated by F. Macnaghten, "Con. on Hindoo Law," p. 16, as applying to widows only. The fact of the Re-[445]-spondent keeping the residue of the Rs. 36,000, in her house, was a devastavit, which authorises a Court of Equity to interfere. No case can be found in which a person, who, like the Respondent, is entitled to the mere income without any discretion of alienation, has been allowed possession and custody of property which she has neglected to invest in proper securities.

Mr. Rolt, Q.C., and Mr. Macnaghten, for the Respondents, were not called upon to address their Lordships.

The Right Hon. T. Pemberton Leigh.—Their Lordships do not think it necessary to trouble the Counsel for the Respondent. This Bill is filed by a party entitled to property secured during the life of the tenant for life; and the Bill proceeds on the ground that the property is endangered from the manner in which the tenant for life is dealing with it. The tenant for life is the daughter of the intestate, Heeraloll Mullick. It has been decided by this Court in the case of *Cossinuth Bysack v. Hurrosoondery Dossee*, after most full and deliberate argument and consideration, that the principles which are applied in Courts of Equity in England, for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the case of property in India, where such property is in possession of a Hindoo widow.

Now, the Bill alleges, that, in this respect, the widow and the daughter stand in the same situation. Whether they stand in the same situation or not, with respect to the right of disposition of the property, [446] they at all events stand in the same situation as to the right of administration, and right of enjoyment for their lives; and the principle laid down in the case which has been referred to in this Court was this, that it is not sufficient to say that there is one person entitled in possession, and another entitled in remainder, in order to induce the Court to interfere to take the property out of the hands of the individual who is in possession of it; but it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere.

The law, therefore, being perfectly settled by that decision, and that decision having been followed during the time Sir Edward Ryan presided over the Supreme Court, and also of his successor, Sir Lawrence Peel, it must be considered as the settled law of the Courts in Bengal.

The question here is, has anything been shown in this case to justify interference, or has the case alleged in the Bill been established by evidence?—the only evidence which exists being the answer of the Defendant. It appears to their Lordships,

it has not been made out at all. It is perfectly true that the property at the husband's death was in Company's paper; and as long as it could remain in that security, the Respondent permitted it so to remain; but in the month of July, 1853, the Company paid off the loan in which it was invested. The property, therefore, could no longer continue on the security in which it was invested. The Respondent received the amount of the money, which was about Rs. 50,000, and before the Bill in this case was filed, (on the 15th [447] of August, 1853,) she had invested Rs. 39,000, of the money so received in other Company's paper; and she says, at the time when she puts in her answer, in the month of October, 1853, that is three months after the date when she received the money, that the remainder of the money was still in her hands uninvested, waiting for an eligible investment. Then can it be said, that the Respondent, who, according to the ordinary Hindoo custom, keeps in her house a certain portion of the money, having, in the course of three months, invested Rs. 39,000, three-fourths, or at least two-thirds, of the money in other securities, was guilty of a devastavit, or showed the slightest intention of committing a devastavit in this respect? Their Lordships are of opinion that no such case is made out; and, as the ground upon which the Bill was filed, therefore, entirely fails, the appeal must be dismissed with costs.

We must observe, that if there were any foundation for the law which has been now contended for at the Bar, the cases in which such applications would be made must have been, we should suppose, extremely frequent; yet no such instance has been produced, either from the Native or the Supreme Courts in which any order has been made for such interference, except in a case in which manifest danger, or risk of danger, has been proved to the satisfaction of the Court.

Their Lordships will advise Her Majesty to affirm this decree with costs.

[448] MODEE KAIKHOOSCROW HORMUSJEE,—*Appellant*; COOVERBHAE, and Others,—*Respondents* * [Nov. 26, 27, 1856].

On appeal from the Sudder Dewanny Adawlut at Bombay.

Will by a Parsee established.

Semble. There is no restraint upon the testamentary power of disposition by a Parsee.

An appeal lies to the Queen in Council from the decision of a single Judge of the Sudder Court, upon the admissibility of a special appeal. The Bombay Act, No. III. of 1843, enacts that such refusal is final, yet not having received the sanction of the Crown: Held, that its finality was confined to the Sudder Court, and did not affect the prerogative of the Crown, or deprive the subject of his right of appeal to the Queen in Council.

Bom. Reg. IV. of 1827, sec. 27, cl. 2, imposes no obligation on the Court, in the absence of any allegation in the pleadings of family usage or custom, to call for evidence of such fact.

The facts of this appeal are fully set forth in the judgment.

The case was argued by Mr. Le Messurier, and Mr. Leith, for the Appellant; and Mr. Rolt, Q.C., and Mr. Ayrton, for the Respondents.

The authorities referred to were:

Upon the alleged refusal of the Court to examine witnesses upon the custom of the Parsees to make, first, a testamentary disposition at all; and second, whether any restraint was imposed upon the Testator disposing of his property, *Bom. Reg. IV. of 1827, [449] sec. 27, cl. 2, Jeswunt Sing-jee v. Jet Sing-jee* (2 Moore's Ind. App. Cases, 424), Macpherson "On civil procedure," p. 220.

* Present: Members of the Judicial Committee.—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

Assessor,—The Right Hon. Sir Lawrence Peel.

As to the power of a Parsee Testator, by the custom of the Parsees, to make a Will, without any restriction imposed upon him for disposing of his property, *Sauvee Buhoo v. Peshtunjee Loola Bhare* (1 Borr. Bom. Rep. 1), *Mehranjee Ruttunjee v. Poonjeea Bhare* (1 Borr. Bom. Rep. 141), *Khoorshed-jee Manick-jee v. Mehranjee Khoorshed-jee* (1 Moore's Ind. App. Cases, 431).

Judgment was pronounced by

The Right Hon. the Lord Justice Turner (Dec. 1, 1856).—This appeal arises out of a suit instituted by the Appellant in the Court of Surat, against the Respondents, the widow and daughters, and also a grand-daughter of the Appellant's late brother, Modee Rustomjee Hormusjee, for the purpose of recovering his late brother's estate.

By the plaint in this suit, the Appellant alleged that his father, Modee Hormusjee Bhimjee, died in the year Sumvit, 1877; that he had three sons, the eldest of whom was Modee Muncherjee, the second, Modee Rustomjee, and the third, the present Appellant; that neither of the other two brothers, but only himself, the Plaintiff, had sons, and that according to the custom of the family, and the rules of their Parsee Punchayet of Surat, the brothers of deceased persons, and not their wife and daughters, are entitled to their inheritance; that his elder brother, Modee Muncherjee, died six years past, leaving his wife; and the certificate of heirship to him had been obtained from the Court by the Appel-[450]-lant and his brother, Rustomjee, and the two brothers had received his property. That Appellant's brother, Rustomjee, died on the 16th of August, 1849, and he having no son, the Appellant was the owner and heir to all the property of his deceased brother, Rustomjee, and all the property that had been taken possession of by his widow, Cooverbhaee, his daughters, Dimbaee and Mottebaee, and grand-daughter, Khursetbaee, which they did not make over to him, the Appellant; but alleging their false claim thereto, by the instigation of some people they intended ruining the property, with the object of injuring the Appellant's just claim. He preferred his plaint, therefore, for Rs. 6,18,699, and to obtain possession, according to the following particulars, of the property, ready money, jewels, etc., deed and other documents, and Duffurs, and he requested that Cooverbhaee, widow of Modee Rustomjee, Dimbaee and Mottebaee, daughters of Rustomjee, and Khursetbaee Buchoobaee, grand-daughter of Rustomjee, might be summoned to appear, and after instituting an investigation by means of witnesses and pleadings, the property, ready money, deeds and other documents, and Duffurs, might be made over to him, out of their possession; and he further stated by his plaint, that his brother had lent money to some people, the documents for which he had caused to be written in the names of his widow and daughters, but that the amount belonged to his brother, who was the owner thereof, and the persons therein named had no claim thereto, but that he, the Appellant, had. Then followed the particulars of demand, which were estimated at Rs. 6,18,699.

The Respondents, by their answer, stated that the Plaintiff had unjustly laid a false claim against them, [451] who were females, and the rightful heiresses, seeking to intimidate them. That the Plaintiff and his brother, the deceased, Modee Muncherjee, and the deceased, Modee Rustomjee, all three brothers, in the year Sumvit, 1880 (A.D. 1823), divided the little property of their father between them, and having executed releases to each other respectively, they separated, and they took their meals separate, and traded separately. Therefore, according to the custom of the world, and the rules of their caste, they, the wife and daughters of the deceased, Modee Rustomjee, were his heiresses; and, in like manner, amongst them, the wives and daughters of deceased persons who had separated from their brothers had inherited their property. The Respondents further alleged that the deceased, Modee Rustomjee, made his Will in Sumvit, 1902 (1845 A.D.), appointing them his heiresses and administratrix, by which also, according to the regulations of their religion and usage, the suit laid by the Plaintiff was clearly false. Besides which, the Modeejee of their community, the Plaintiff, and others, gave a written answer, dated the 5th of November, 1842, to a question put by the Judge respecting Parsees, wherein it was distinctly written, that if the deceased had not left a Will and there existed any paternal property, his brother was entitled to inherit the same; that by the admission of the Plaintiff it was publicly known amongst them, that a person might by Will bequeath his paternal property to whomsoever he pleased; and in this case the deceased, Modee Rustomjee, after the division of his paternal property, acquired

property by his own labour, and also made a Will in favour of the Defendants, his wife and daughters; therefore, according to the contents of the answer given by the Plain-[452]-tiff, and the other members of their community, with their signatures thereto, his claim was clearly false. That many suits had been heard in the Adawluts relative to Parsees, wherein, although a brother and nephews were living, the Court had decided that the persons in whose names the Wills of the deceased were made were his heirs; and those heirs of the deceased by Will have received the inheritance; and the objections and claim made by the brothers and nephews of the deceased have been rejected. That although this was known, the Plaintiff had unjustly laid this false claim, in order to injure them, and cause them improper loss. That the Plaintiff in his petition stated that his brother, the deceased, Modee Muncharjee, died, and he had become his heir. In answer to which they, the Defendants, begged to state that Modee Muncharjee, had no issue, and his wife was insane; therefore, that she was the same as if she did not exist in the world; and also the deceased, Modee Muncharjee, made no Will, consequently that statement had no connection with their case. That after the release was passed, as above stated, and after the deceased, Modee Rustomjee, made his will, the Plaintiff executed another written release to the deceased, Modee Rustomjee, in the year Sumvit, 1903, (1846, A.D.), wherein it was distinctly written by the Plaintiff as follows: "I have no claim on account of any inheritance, or in any other manner, against you, your heirs, administrators, etc.; and should either of us prefer any claim whatever against each other, or against our heirs, administrators, etc., the same shall be null and void." That by this release also the Plaintiff had no right to lay any claim in any way against them, who were the deceased's legal heiresses and [453] administratrix. That the list of outstanding debts and property, etc., set forth by the Plaintiff in his petition, was mostly false, and in his claim to the inheritance of the deceased, Modee Rustomjee, he had also unjustly included what was due personally to the Defendant, Cooverbhaxe.

The cause was first heard before the Sudder Ameen of Surat, who, after having examined the case, evidently with great care and attention, dismissed the plaint with costs. From this decision the Appellant appealed to the Zillah Court of Surat, by which Court the decision of the Sudder Ameen was affirmed. The Appellant then presented a petition to the Sudder Dewanny Adawlut of Bombay, praying for the admission under Act, No. III., of 1843, of the Bombay Presidency, of a special appeal from the decisions of the Sudder Ameen, and of the Zillah Court, which petition having been heard before a single Judge of the Sudder Court, according to the provisions of that Act, was rejected by him. The decision of the single Judge was afterwards brought under the consideration of the other Judges of the Sudder Court by a petition of review presented by the Appellant, and which was also dismissed.

The appeal before us complains of these four several decisions. In disposing of this appeal, it may be convenient, first, to consider whether the order of a single Judge, dismissing the petition for the special appeal, has been properly made the subject of appeal. The Act, No. III., of 1843, which has been referred to, and which has been followed by an Act, No. XVI., of 1853, to which reference was also made, contains the following enactments:—

"I. It is hereby enacted, that from and after the [454] 1st day of May next, a special appeal shall lie to the Courts of Sudder Dewanny Adawlut at Calcutta and Allahabad respectively, to the Court of Sudder Adawlut of Madras, and to the Court of Sudder Dewanny Adawlut at Bombay, from all decisions passed on regular appeals in the Civil Courts subordinate to them respectively, which shall appear to be inconsistent with some law, or usage having the force of law, or some practice of the Courts, or shall involve some question of law, usage, or practice upon which there may be reasonable doubts.

"IV. And it is hereby enacted, that every application for a special appeal, duly presented to the proper Court as aforesaid, shall be heard by a single Judge of the Court, in the presence of the special Appellant, or his Vakeel, or Agent; and it shall be competent to the Judge, at his discretion, to call for and peruse any document forming a part of the record of the cause, and to summon the opposite party to answer the application.

"V. And it is hereby enacted, that if it shall appear to the Judge that a special appeal is admissible under this Act, he shall pass an order accordingly, and shall at the same time reduce the points to be determined to writing, in English, in the form

of a certificate, which shall be translated into the vernacular language in use in the Court, and the special appeal shall then be brought on the file of the Court, to be heard and determined in due course. Provided, that it shall not be necessary to call for or refer to any part of the proceedings, the reading of which is not required for deciding the point or points of law stated in the certificate.

"VI. And it is hereby enacted, that if it shall [455] appear to the Judge that a special appeal is not admissible under this Act, he shall reject the petition, and his order, so rejecting a petition for a special appeal, shall be final.

"VII. And it is hereby enacted, that in every case of special appeal admitted as aforesaid, the Court of Sudder Dewanny Adawlut shall determine the point or points certified as above enacted, and no other point or part of the case whatever."

By this Act, therefore, the decision of a single Judge as to the admissibility of a special appeal was made final, and, no doubt, the Act has rendered it final, so far as the Sudder Court is concerned; but it is a wholly different question whether the Act could extend to take away the right of appeal to Her Majesty in Council. It is the prerogative of the Crown to do justice between all its subjects, and the Indian Legislature could have no power to limit or affect that prerogative without the sanction of the Crown, which does not appear to have been given. The finality created by the Act must, as it seems to their Lordships, be limited by the jurisdiction of the Legislative power which created it, and their Lordships are, therefore, of opinion, that the order of the single Judge rejecting the special appeal has been properly made the subject of appeal.

That order, however, forms only one of the subjects of this appeal. The appeal goes far beyond it; it extends to the decisions of the Zillah Court and of the Sudder Ameen, and it is plain that this case admits of different considerations, if it be looked at with reference only to the decision of the single Judge, from those which present themselves, if it be looked at with reference also to the previous decisions. In the one case, the question to be considered would be whether a sound discretion was exercised by the single Judge, and by the other Judges of the Sudder Court, assuming them to have been competent to entertain the subject, in rejecting the special appeal. In the other case, the question would be whether the successive decisions sought to be upheld upon the whole merits of the case. It would be difficult, if not impossible, to deal with the question whether a sound discretion was exercised by the single Judge in rejecting the special appeal without entering at large into the merits of the previous decisions. It would also be an unsatisfactory mode of disposing of this case to deal with it simply with reference to this question of discretion, as the result of so dealing with it might be to remit the parties to fresh litigation.

Moreover, the most favourable view of this case for the Appellant must be, that the question should not be regarded as one depending merely upon the exercise of discretion, and their Lordships, therefore, have determined to decide this appeal with reference not merely to the decisions of the single Judge and of the other Judges of the Sudder Court, but with reference to all the decisions which have been pronounced in the cause.

The nature of the case sufficiently appears from the pleadings which have been already stated. It is hardly necessary to add, that if the Will set up by the answer be a valid and effectual Will, the Appellant's case must be wholly at an end. He claims as heir, and as heir only, and his title as heir would be displaced by the Will. It is to the Will, therefore, our attention must be directed. Now, the [457] *factum* of the Will is not disputed. It is, indeed, proved beyond dispute; but the Appellant's case is this: that the Testator was a Parsee; that among Parsees, there is a rule, or usage, that no disposition can be made by Will to the total disinheritance of the heir, or, at all events, that there was such a rule or usage in the Testator's family; that, under the provisions of Bom. Reg. IV., of 1827, ch. vi. sec. 27, cl. 1, it was the duty of the Court to have ascertained this rule or usage, by examining persons versed in the laws by which Parsees are governed; but that evidence on the part of the Appellant, which would have established this rule or usage, was rejected by the Court. Three points are involved in this argument on the part of the Appellant. First, that there is such a rule or usage, as the Appellant alleges. Second, that under the Regulation referred to, it was the duty of the Court to ascertain it. And third, that evidence on the part of the Appellant, tending to prove it, was rejected.

As to the first of these points, no such rule or usage as is now insisted on upon the part of the Appellant is in any manner set up by the pleadings in the suit; there is no replication to the answer denying the validity of the Will upon any such ground. The existence of any such rule or usage is first adverted to in the supplemental petition of appeal from the decree of the Sudder Ameen; and, indeed, what is alleged in that petition, as well as in the petition to the Sudder Court for the special appeal, is not that the testamentary power of Parsees is limited in the manner now insisted on, but that they have no power whatever to dispose by Will to the prejudice of the heir, which in effect amounts to their having no [458] testamentary power at all, although the existence and constant exercise of the power is notorious and recognised, and well established by authority, and was indeed admitted at the Bar. It is in the petition for the special appeal, too, that we first find the suggestion of the alleged family rule or usage, which it is scarcely necessary to mention, as it rests on no other ground than that some members of the family had died intestate. It was argued for the Appellant that it rested upon the Respondents to prove the power of the Testator to make the Will in question, in order to establish their title under that Will; but it being admitted that the testamentary power existed generally, it was clearly upon the Appellant to show that it did not extend to this particular case, and to allege and prove the limits of the power. He has made no such allegation and adduced no such proof. The Appellant, therefore, cannot maintain this appeal upon the ground of the existence of the alleged rule or usage.

As to the second point, there does not appear to their Lordships to be any foundation for the argument on the part of the Appellant. Whatever may be the duty of the Judge under the Regulation in question, where any particular rule or usage is alleged as to which any reasonable doubt may exist, and the parties have not waived resort to the course prescribed by that Regulation, (and their Lordships are far from considering that in such cases the Judges in India may not well be advised of their own accord to act upon the Regulation,) we certainly would not be disposed to discourage such a practice. But their Lordships, at the same time, have no hesitation in stating their opinion to be, that this Regulation imposes no such obligation [459] upon the Judges, where there is no allegation of any rule or usage as to which any reasonable doubt can be entertained, which is the case in this instance as to the power of disposing by Will, or where the parties have waived resort to the course pointed out by the Regulation, as they have done in this case. The appeal, therefore, cannot be maintained on this ground.

There remains, then, only the third question, that of the rejection of evidence; and most certainly if the Appellant had succeeded in satisfying their Lordships that any evidence bearing, however slightly, upon the question as to the alleged limit of the testamentary power, had been rejected by the Courts in India, this case must have been sent back for the reception of that evidence.

Justice requires that all the evidence which is material to the issue, and which the parties may desire to adduce, should be received before the rights of the parties are disposed of, and their Lordships fully adhere in that respect to the principle on which the case of *Jeswant Sing-jee v. Jet Sing-jee* (2 Moore's Ind. App. Cases, 424), cited in the argument, proceeded. But the Appellant in this case has wholly failed to satisfy their Lordships that any evidence bearing upon the question of limited testamentary power, which is the only material question in the case, was rejected by the Courts, or was tendered on his part.

It seems to their Lordships to be clear from the language of the Durkhasts, that the witnesses originally proposed to be examined on the part of the Appellant, were proposed to be so examined as to the heirship only. Looking to that language, and to the [460] issues in the cause, and to what is stated in the petition for the special appeal, they cannot adopt the suggestion of the Appellant's Counsel that these witnesses were intended to be examined, not only as to the heirship, but as to the title of the Respondents, as heirs under the Will.

If the Appellant had had any witnesses to examine as to the alleged limit of the testamentary power, it cannot be doubted that he would have claimed the right to examine them when the witnesses to the Will had been examined, and the question of reference to the Moddee Punchayet, which under the minute of the 20th June, 1850,

to which all parties must be taken to have agreed, was to be preliminary to the examination of the witnesses, came before the Sudder Ameen; but so far from proposing to examine any witnesses, the Appellant then waived the reference to the Modée Punchayet. The Judge, indeed, in the judgment appealed from, refers to the rejection of some evidence by the Zillah Judge. He says: "The second question is, whether the Judge was justified in refusing to take the further evidence tendered in appeal by the Appellant on the question of custom as to inheritance and the validity of the Will. I think he was, for the reasons assigned by him, namely, that the record contained sufficient evidence of the customs of Parsees in the exposition taken from former cases filed in the Lower Courts, and that those expositions were better evidence, because less unbiassed, than there was any hope of obtaining by the examination of witnesses called by the parties. There was a mass of documentary evidence before the Court, showing the right in Parsees to devise, and the practice obtaining amongst them of devising their property. [461] Indeed the fact is so notorious, that it is difficult to be understood how such a plea as that there is no testamentary right in Parsees could have been set up. It has not been alleged that they are prohibited from doing so by any restrictive law. On the whole, I think the Judge exercised a very sound discretion in refusing to take further evidence, the only result of which would have been to prolong the litigation."

The Judge of the Sudder Adawlut here meant to refer to what was alleged in the petition of the Appellant before him, in which the Appellant sums up his objections as to the rejection of evidence in these terms:—"That, in our caste, the brothers of a deceased dying without male issue are entitled to his inheritance, although the widow, daughters, and grand-daughters may be living; in order to prove which I presented Durkhasts (Exhibits. Nos. 7, 8, 9, and 10) in the original suit, for the evidence of respectable persons of our caste to be taken, such as Ardaseer Dhanjee-shaw, Khan Bahadoor, Jamasjee Bomanjee Bhownguree, Nusserwanjee Pestonjee, Vakeel, and others, upon solemn affirmation, which persons were summoned by the Principal Sudder Ameen; but, nevertheless, their evidence was not taken, and my suit, of the value of lacs of rupees, was at once decided, within five months, upon an insufficient investigation. Cherisher of the Poor, if the evidence had been taken of the witnesses in my favour in the Lower Court by the Principal Sudder Ameen, and the question in the case been referred to the Modéejee and other members of the Parsee community, and their answer received, the custom of our caste would have been quite apparent, that the brothers of a deceased person dying without male issue are entitled to the [462] inheritance, although the deceased's widow and daughter are living. But, unfortunately, my suit of lacs of rupees was dismissed without taking the evidence of my witnesses, and the answer of the Modéejee of the community; consequently, I was helpless. But through the justice of your Honourable Court, I entertain the hope that, should the evidence of the witnesses on my behalf be caused to be taken, and the questions below mentioned be referred to the Modéejee, and other members of the Parsee community at Surat, and their answers thereto taken, I shall obtain my just rights."

What was complained of was, therefore, the rejection by the Zillah Judge of the proposal for referring the question to the Modée Punchayet, which, of course, it would not have been proper to do, as the Appellant had, in terms, waived the reference when the case was before the Sudder Ameen. The Appellant's case, therefore, fails upon this third point as completely as it fails upon the other points; and upon the whole case, their Lordships are of opinion that this appeal must be dismissed.

It has not escaped their Lordships' attention, that if they had decided this appeal upon the simple question whether the decision of the single Judge rejecting the special appeal was right or not, and had differed from the single Judge upon that point, the Appellant might have been entitled to a further hearing before the Sudder Court; but their Lordships are satisfied that the Appellant could not have succeeded in that Court upon the case as it stands, and that it would not, under the circumstances of this case, have been right, for that Court to have admitted further evidence; they do not think it necessary, therefore, to give any [463] final opinion as to the decision of the single Judge, although, as at present advised, they see no reason to dissent from it.

Their Lordships also desire it to be understood, that in what has been said as to the testamentary power of Parsees, they are far from having intended to intimate any doubt as to the extent of that testamentary power, or to give any encouragement to the notion that any such limit as the Appellant has contended for in facts exists. They do not mean in any manner to disturb what has been decided in India upon that subject, and they abstain from giving any opinion upon it only because it does not properly arise, and has not been fully argued in this case.

Their Lordships, therefore, will humbly recommend Her Majesty to affirm this judgment, and to dismiss the appeal with costs.

[464] NANA NARAIN RAO,—*Appellant*: HURREE PUNT BHAO and SHREE NEWAS RAO,—*Respondents* * [Nov. 29, 1856].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces.

Cross appeal allowed from part of a decree of the Sudder Court appealed from to England; although the Respondents had not applied in India for leave to appeal within the proper time; the Respondents being mistaken in the practice of the Judicial Committee upon a cross appeal.

Such cross appeal directed to be prosecuted and heard upon one printed case, if the principal appeal was proceeded with; but in the event of the principal appeal being dismissed for want of prosecution, liberty was reserved to the Respondents to prosecute the cross appeal as a separate appeal.

This was an application by the Respondents for special leave to enter a cross appeal against portions of a decree of the Sudder Court, appealed from to England, so far as it affected their interests in that decree.

The petition stated, that by a decree of the Sudder Dewanny Court of the North-Western Provinces, dated the 2nd of April, 1855, made on an appeal from a decree of the Zillah Court of Cawnpore, in a suit in which the Petitioners (the Respondents) were the Plaintiffs, and the Appellant, Nana Narain Rao, was the Defendant, that Court decided in favour of the [465] Petitioners for two-thirds of the two ana eight pice share in Mouza Bheekur; also for two-thirds of a two ana share of Mouza Brishur; also for two-thirds of each of the two dwelling-houses and gardens specified in the Appellant's schedule; and also for Rs. 3,10,226. 10. 2., being two-thirds of the value of the property, with interest and mesne profits from the date of the institution of suit to that of obtaining possession, with costs in both Courts; and the Court dismissed the rest of the Petitioner's claim which related to Lallpore and Bulwapore, which the Court found that the Appellant was the sole proprietor of by purchase, and the excess in their valuation of the personal property. That the Appellant appealed from this decree, and that the transcript had arrived in England, but that no steps had yet been taken by the Appellant, who had not put in an appearance. That the Petitioners had applied to the Sudder Court for a review of judgment with regard to the two last portions of the decree regarding the Mouzas Lallpore and Bulwapore, and the finding of the Court as to the whole of the personal or movable estate, which the Sudder Court had rejected. That the Petitioners had instructed agents in England to obtain, at the hearing of the appeal, a reversal of the two portions of the decree affecting them, believing that they would be entitled to state their objections at the hearing, to such two portions of the decree, and to obtain a reversal of the decree, so far as had relation to those portions, without any formal and separate appeal being instituted by them, such being the practice of the Sudder Courts in India, when an appeal was brought by one party from the decree of the Zillah Judge to the Sudder Dewanny Adawlut, and that rely-[466]-ing on that practice they had not applied to the Sudder Dewanny Adawlut for leave to appeal against

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

the decree within six months, the time prescribed for presenting a petition of appeal. That they had been advised that they had acted in error, and that it was necessary for them to institute a separate or cross appeal against so much of the decree as related to the two portions aforesaid; and the Petitioners prayed that leave might be granted to them to appeal against such two portions of the decree of the Sudder Court.

Mr. Leith in support of the petition.

Their Lordships granted the application upon the terms contained in the following Order in Council:—

“That leave be granted to Huree Punt Blao and Shree Newas Rao, to enter and prosecute their cross appeal from so much of the decree of the Sudder Dewanny Adawlut of the 2nd of April, 1855, as regards the Mouzas Lallpore and Bulwapore, and also from the finding and decree of that Court, as to the amount and value of the personal and movable estate and property of Soobadar Runchunder Punt, upon lodging in the Council Office the certificate of a recognizance to be entered into by some proper person (to be approved by the Registrar of the Privy Council), before one of the Barons of Her Majesty's Court of Exchequer, in the penalty of £300 sterling, conditioned to pay such costs as might be awarded by their Lordships in case the appeal be dismissed, and the cross appeal to be prosecuted and come on for hearing on one printed case, and on the same printed transcript record as the principal appeal in this suit, provided the same be duly proceeded with by the Appellant [467] herein, but if such principal appeal be dismissed for non-prosecution, then the Petitioners were to be at liberty to prosecute their cross appeal as a separate cause.”

[S.C. 11 Moo. P.C. 36. See now Code of Civil Procedure (Art. XIV. of 1882) ss. 540 *et seq.* As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125. See also *Myna Boyer v. Ootaram*, 1861, 8 Moo. Ind. App. 413; *Omanath Chowdry v. Sheikh Nujeh Chowdry*, 1861, 8 Moo. Ind. App. 498; for subsequent proceedings see 9 Moo. Ind. App. 96.]

STAFFORD BETTESWORTH HAINES. *Appellant*: The EAST INDIA COMPANY,—*Respondents* * [Dec. 2, 1856].

On appeal from the Supreme Court at Bombay.

A., in the custody of the Sheriff, and confined in the gaol at Bombay, under a writ of execution issued against him upon a judgment of the Supreme Court at Bombay, was permitted by the Sheriff, with the sanction and authority of the judgment creditors by reason of illness, to go out of prison, and temporarily reside outside the precincts of the gaol, upon the condition that he should continue under the surveillance of the Sheriff's officers, and to which condition A. agreed and continued for a time to reside out of gaol at a private house, where he was constantly under such surveillance. Upon A.'s becoming convalescent, the Sheriff, at the instance of the judgment creditors, took him back to gaol. Upon an application by A., to the Supreme Court at Bombay, to discharge him out of custody, on the ground that the writ of execution was satisfied, that Court held, that A., having agreed to the condition imposed on him by the judgment creditors, of continuing in the custody of the Sheriff's officers while out of gaol, was estopped from saying that he was out of the Sheriff's custody when he was permitted to leave the gaol, and that a change of the place of imprisonment in such

* Present: Members of the Judicial Committee—The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir John Patteson.

Assessor—The Right Hon. Sir Lawrence Peel.

circumstances did not amount to a discharge out of custody. Such judgment affirmed, upon appeal, by the Judicial Committee.

Where an execution creditor is willing to allow a debtor to go out of prison for a temporary purpose, the custody continuing, the Sheriff may refuse, unless ordered by a rule of Court; but if, without any rule of Court, all parties agree to the debtor leaving the prison, and from a laxity of surveillance of the Sheriff's officers the debtor escapes, it is a question of fact for the jury, if the judgment creditor brings an action against the Sheriff, whether the judgment creditor did not himself contribute to the escape.

If the Sheriff alone, on the ground of a debtor's ill-health, makes any relaxation of the imprisonment, by letting the debtor reside out of prison, it would be an escape.

The appeal in these cases was brought from a judgment of the Supreme Court at Bombay, which refused an application to discharge the Appellant out of the custody of the Sheriff of Bombay, and to have satisfaction entered of a judgment obtained by the Respondents against him.

The facts of the case were these:—

On the 25th August, 1854, an action on promises was brought in the Supreme Court of Bombay by the Respondents, against the Appellant. On the 26th of the same month the Appellant was arrested by the Sheriff of Bombay on mesne process issued out of that Court in the action, and imprisoned in the gaol of Bombay. On the 4th January, 1855, a verdict in the action passed against the Appellant, and, on the 22nd of the same month, judgment was signed for the Respondents, for Rs. 2,79,917, for damages and costs, and a writ of *Ca. Sa.* issued against the Appellant, under which writ he was detained by the Sheriff in gaol. During his imprisonment in the gaol, the Appellant in a bad state of health, which being reported by the medical officer of the gaol to the Government of Bombay, that officer was desired by the Government to state "whether he considered it absolutely requisite for his (the Appellant's) recovery, that he should temporarily released from his present confinement." The medical officer reported, that a "temporary [469] release from his present confinement was essentially necessary for the re-establishment of his (Appellant's) health." Upon which, the Secretary of the Bombay Government wrote to the Sheriff and the Superintendent of Police of Bombay the following letters:—"Sir,—Assistant-Surgeon R. Haines, in medical charge of the Bombay gaol, having reported that the temporary release of Mr. S. B. Haines, from his present confinement is essentially necessary for the re-establishment of his health, I am directed by the Right Honourable the Governor in Council, to inform you that, under the Report, Government is pleased to permit him temporarily to reside outside the gaol, under such surveillance as may prove as little irksome as possible to the prisoner, while consistent with its perfect efficiency. The Superintendent of Police has been instructed to render you all the assistance of which you may stand in need, for keeping Mr. S. B. Haines under efficient surveillance while without the walls of the gaol. A copy of my letter of this date to Major Baynes, is inclosed for your information." The communication referred to by the Secretary of the Bombay Government was as follows:—"Sir, I am directed by the Right Honourable the Governor in Council to inform you that Assistant-Surgeon R. Haines, in medical charge of the Bombay gaol, having reported to Government that the temporary release of Mr. S. B. Haines from his present confinement is essentially necessary for the re-establishment of his health, Government is pleased to permit him temporarily to reside outside the gaol under surveillance; and I am to request that efficient measures may be adopted by you, in communication with the Sheriff of Bombay, to prevent his quitting the Island. It is the [470] wish of Government, that while the surveillance over Mr. Haines should be completely efficient, it may be rendered as little irksome to his feelings as may be practicable."

These letters were communicated to the Appellant in the gaol at Bombay, by the Deputy-Sheriff, when the Deputy-Sheriff explained to the Appellant, that if he availed himself of the permission of Government to reside temporarily outside the gaol, Sheriff's peons, or officers, would be stationed in and about the house in which he might take up his residence, and that two of the Sheriff's peons would always

remain in the house, and asked him if he was willing to avail himself of such permission, on such terms. The Appellant expressed to the Deputy-Sheriff his willingness to avail himself of the permission, both verbally and by the following letter:—"Sir,—I shall be grateful for any change, and the consideration of my health is indeed most welcome." In consequence of what had thus passed, on the day following the Deputy-Sheriff went to the gaol, and accompanied the Appellant thence to a small Bungalow situated at Omercarry, near the gaol, and, on that occasion, the Deputy-Sheriff pointed out to the Appellant one of the Sheriff's peons, who had accompanied them from the gaol, as one of the Sheriff's officers who would always be in the house. On the 22nd of July, the Appellant, accompanied by the Sheriff's peons, removed to a more convenient Bungalow, at Mazagon. During the whole of the period that the Appellant was residing at Omercarry and at Mazagon, he was in the custody and charge of the Sheriff's officers, and was within the barwick and jurisdiction of the Sheriff of Bombay.

[471] On the 3rd August, in consequence of a communication from the Appellant's wife to the Bombay Government, stating that the Appellant's health was so seriously affected by his recent incarceration that his life might possibly be endangered if he should be again confined in the Bombay gaol, the Government appointed a Medical Committee to examine the Appellant, and report whether the Appellant's life would be endangered by a re-incarceration in Bombay gaol. On the 20th of the same month, the Medical Committee reported to the Government as their opinion that Mr. Haines' impaired health did not arise from any cause connected with the climate of the gaol, but was attributable to mental causes; and that his life would not be endangered by re-incarceration in the Bombay gaol, so far as its climate was concerned, mental suffering often leading to mental and bodily disease, and even to death, in all places and in all climates; but in Mr. Haines' present state of health, bodily and mental, so far as was discoverable by them, they were of opinion that a fatal result would not be more likely to occur in the Bombay gaol than in any other place. In consequence of this report, the Government of Bombay, on the 22nd August, 1855, directed the Sheriff of Bombay to take immediate measures to remove the Appellant "from the place of his (the Sheriff's) custody of him to the gaol," and on the same day the Deputy-Sheriff went to the Bungalow where the Appellant was residing, for the purpose of removing the Appellant to the gaol. On that occasion, Mrs. Haines, the wife of the Appellant, opposed the Deputy-Sheriff seeing him, on the ground that he was so dangerously ill that the presence of the Deputy-Sheriff might violently excite him, and possibly [472] cause his death; and she informed the Deputy-Sheriff that she expected Dr. Haines, the Surgeon of the gaol, every moment, and the Deputy-Sheriff thereupon agreed to wait until Dr. Haines should arrive; and shortly afterwards a note arrived from Dr. Haines, which the Appellant's wife read to the Deputy-Sheriff, and which induced the Deputy-Sheriff to think the Appellant was in such a critical state of health that he ought not to press for an interview with him without further communication from Government, and he accordingly left the house with the note, which the Appellant's wife gave up to him, and which he afterwards forwarded to Government. On the occasion of the above interview, the Appellant's wife told the Deputy-Sheriff that she had been advised he had no right to enter the house, as the Appellant had acquired his liberty by being removed from the gaol; and the Deputy-Sheriff, in answer, explained to her that he considered the Appellant as still his prisoner, as the Appellant had always been in the custody of the Sheriff's officers. It was shown that the Appellant knew that the Sheriff's peons were always in and about the house.

On the 3rd of December, 1855, the Medical Committee having, in pursuance of instructions from the Government of Bombay, examined the Appellant, and reported that his removal to gaol would not endanger his life, the Sheriff of Bombay was instructed by the Government to take immediate measures for his re-incarceration in the gaol; and the Appellant was accordingly removed by the Sheriff from the Bungalow at Mazagon to the gaol at Bombay, where he remained a prisoner in the custody of the Sheriff. Previous to the Appellant's removal from the gaol [473] he received subsistence-money, and, after his removal, the Under-Sheriff regularly received subsistence-money for the Appellant from the Government of Bombay, which, however, the Appellant declined to avail himself of.

On the 21st of December, the Appellant moved the Supreme Court of Bombay to be discharged from the custody of the Sheriff, and that satisfaction might be entered on the judgment-roll. The motion was grounded upon affidavits setting forth the facts to the purport above stated. The Respondents opposed the motion on the ground that upon these facts, as well as those properly to be inferred from the statements in the affidavits, the Appellant never was discharged from custody, and was properly retaken to gaol. The motion was heard on the 21st of December, 1855, when the Court took time to consider its judgment, and, on the 3rd of January, 1856, Sir William Yardley, Chief Justice, delivered judgment. After stating the above facts he proceeded as follows:— "The case was very fully and ably argued on both sides, and a great array of authorities, more or less bearing upon the question, were cited. Most of those authorities related to the question whether or not the facts of this case would render the Sheriff liable to an action of debt for the escape, under the Statute of Westminster the 2nd, if the relaxation of the duress of imprisonment had not been made by the licence of the Plaintiffs; and I may at once say that it is perfectly clear that these facts would render the Sheriff liable to such an action. Any relaxation whatever of the rigour of imprisonment by the Sheriff, of his own authority, would entitle the Plaintiffs to maintain an action against him for the whole amount of the [474] debt and costs. That has been settled by a continued series of authorities, extending over several centuries down to the present time; and, moreover, it is equally clear that, if a Defendant be discharged out of execution by the Plaintiff himself, he can never be taken in execution again upon the same judgment, even though it be agreed at the time of his discharge that if he should fail to satisfy the debt he should again be charged in execution. There are several cases to that effect, which were cited at the Bar, such as *Vigers v. Aldrich* (4 Burr. 2482); *Jaques v. Withy* (1 Term Rep. 557); *Clarke v. Clement* (6 Term Rep. 525); *Tanner v. Hague* (7 Term Rep. 420); and *Blackburn v. Stupart* (2 East, 243); which last is an exceedingly strong case, for there it had been expressly agreed that the Plaintiff should be at liberty again to take the Defendant in execution if he failed to perform the conditions on which he was discharged; but, in all the cases cited, there is this marked distinction between them and the present case, that there was an actual discharge of the Defendant out of custody, not merely a relaxation of the rigour of imprisonment; and, secondly, that the Plaintiff relied for the recovery of his debt upon some substitute, actual or intended, for the judgment. It is, however, argued by the Counsel for the Defendant that in every case in which there has been such a relaxation of duress as would, if permitted without the licence of the Plaintiff, render the Sheriff liable to an action for an escape, the Defendant, if the relaxation had been permitted by the Plaintiff himself, would be absolutely discharged from the execution, and would not be again liable to be taken in execution upon the same judgment, unless, indeed, he returned volun-[475]-tarily into custody. Let us illustrate this argument by some of the decided cases. It is laid down by Buller, J., in *Benton v. Sutton* (1 Bos. and Pull. 24), that if the Sheriff's officer take the prisoner out of the direct road, it is an escape. So if the Sheriff on a writ of *habeas corpus* carry the prisoner (in execution) round about a great way, for his accommodation, it is an escape, though he be in actual custody all the time. *Mosedell's Case* (1 Mode. 116). Now, could it have been contended in these cases, that if the deviations had been by the licence of the Plaintiff, the prisoner would have been thereby discharged out of execution? There is no decision to that effect to be found in the books; but in all the cases in which it was held that the prisoner was entitled to be released, there had been an actual discharge of him out of all custody. If he be allowed to go at perfect liberty for ever so short a time, by the leave and licence of the detaining creditor, he cannot again be taken in execution upon the same judgment. But a change of the place of imprisonment by the licence of the Plaintiff, and with the consent of the Defendant, is not a discharge out of custody. It manifests no intention on the part of the Plaintiff, no longer to rely upon the judgment and the process of law for the recovery of his debt. I have not, however, been able to find any case in which it has been actually decided that the Plaintiff may relax the rigour of imprisonment without thereby entitling the Defendant to his discharge. In the absence of authority, therefore, we must be guided by the general principles of the law; and the principle upon which the Sheriff has been made liable to an action for an escape, in every

case in which he has allowed an [476] indulgence to the prisoner inconsistent with strict duress, is, that the object of the imprisonment is to compel the Defendant to pay the debt for which he is taken in execution, and the Plaintiff is entitled to the benefit resulting from the full pressure of such duress; and, therefore, if the Sheriff takes upon himself to remove any portion of that pressure, and thereby diminishes the probability of the Plaintiff's recovering the amount of his debt, the Statute of Westminster the 2nd, c. 11, made the Sheriff himself liable to an action of debt, for the full amount—a severe and strict law, which has been mitigated in England by a recent Statute, enacting that the Sheriff shall be liable only on an action upon the case for the damages sustained by the person or persons at whose suit such debtor was taken or imprisoned. But is the principle upon which the Sheriff was held liable for an escape applicable to the cases in which the relaxation of the duress is the act of the Plaintiff himself? Is there any sound reason why the Plaintiff might not allow his debtor an indulgence without sacrificing the whole of his demand? If the argument of the learned Counsel be correct, a detaining creditor could not allow his debtor to be taken temporarily out of the gaol where he was detained, upon the utmost emergency—to visit the death bed of a wife or child, for example,—without the risk of thereby sacrificing the whole of his debt; for, according to the argument, if the prisoner did not choose voluntarily to return to the gaol, he could not be compelled to do so; because, according to the decided cases, such an indulgence, if permitted by the Sheriff of his own authority, would doubtless be an escape, and, therefore, it is argued, if permitted by the Plain-[477]-tiff, would operate as a discharge out of execution. But I think I have shown that the principle upon which it would be such an escape as to render the Sheriff liable does not apply to make it a discharge by the Plaintiff; and, I confess, it appears to me that it would be repugnant alike to reason and to humanity to hold that a detaining creditor might not partially forego the advantages, such as they are, resulting from the pressure of the duress of imprisonment, and might not mitigate the rigour of such imprisonment, except at the sacrifice of the whole debt and costs. It appears to me to be manifest that there was no intention upon the part of the Plaintiffs, in the present case, to set the Defendant at liberty for one moment, nor to rely upon any other security for the payment of the balance of the debt than the judgment and process of the Court; and that the Defendant, although humanely permitted to reside out of the gaol for several months for the benefit of his health, was, during the whole of that time, in the custody of the Sheriff, and that he cannot, therefore, be held to have been discharged out of execution by the Plaintiffs. It is scarcely necessary to add, that the fact of the Plaintiffs being represented by the Government of this Presidency makes not the least difference in the case. The learned Advocate-General did not for a moment contend that the Government had, or pretended to have, any more right to send the Defendant back to gaol than any private individual would have had under similar circumstances. It was, in short, a licence from the detaining creditor to the Sheriff to change for a time the place of confinement, for the benefit and with the consent of the Defendant, upon a representation that such a change was neces-[478]-sary to his health; which licence was withdrawn when, in the opinion of a medical Committee, the necessity for it ceased to exist, and thereupon the Sheriff reconveyed the Defendant to the usual place of confinement." The Court accordingly refused the application.

The appeal was preferred from this judgment.

Sir Fitz-Roy Kelly, Q.C., and Mr. J. J. Powell, for the Appellant.—The Sheriff of Bombay, with the consent of the Respondents, having suffered the Appellant to escape from gaol, the judgment entered against the Appellant at the Respondents' suit was satisfied, and the Sheriff had no legal authority to detain the Appellant in custody. It may be urged that the conduct of the Appellant in availing himself of the legal consequences of his having obtained permission to leave the gaol, is an ungrateful return for the indulgence afforded him by the Respondents; but that cannot affect his right in law to be discharged out of custody. The argument, in this case, is confined to one of a debtor in custody under a writ of execution completely executed, and has nothing to do with mesne process. If a writ of *capias ad satisfaciendum* be once executed, and the Defendant in custody of the Sheriff and in prison, it is the duty of the Sheriff to keep him in *arcta et salva custodia*. Comyn's

Dig., tit. "Imprisonment" (I.) If the Sheriff permits a prisoner to quit the gaol for a single moment, even with a keeper, *Benton v. Sutton* (1 Boss. and Pull. 24), he is "at large," to use the language of the old authorities; the writ is then satisfied, and the custody at an end. In *Jones v. Pope* (1 Wms. Saunder's, 36), all the authorities upon this [479] point are collected. Viner's Abr., tit. "Escape," (A. 5) and (N 11), Bacon's Abr., tit. "Escape in civil cases (B), *Burton v. Home* (1 Shower, 174), *Atkinson v. Jameson* (5 Term Rep. 25), *Clarke v. Clement* (6 Term. Rep. 525), *Blackburn v. Stupart* (2 East. 243), Dyer's Reports (296 (b)).—[Sir John Patteson: In *Blackburn v. Stupart*, there was an agreement between the Plaintiff and Defendant that the Defendant was to be perfectly at large, and if he did not pay the judgment debts and costs within a certain time there was to be another execution: that is an important distinction.]—During the plague in London, in the reign of Charles the First, the prisoners in custody in the King's Bench petitioned that they might be allowed to go at large, upon giving security to return; but by a resolution of the Judges (Croke Car. 466), it was determined that if such permission was granted, except by rule of Court, it would be an escape. By the Common Law and Statutes, 1 Rich. II., ch. 12 (3 Clitty's Collec. of Statutes, p. 1066), and 8th and 9th Will. III., ch. 27, a prisoner must be kept in gaol till the debt is satisfied, or by rule of Court he is permitted to leave the gaol. So long as the Appellant was in gaol he was in lawful custody, but as soon as he was let out of gaol, it amounted to an escape. In law there is no distinction between being at large by consent of the Sheriff, or by consent of the Plaintiff. No contract or Bond can confer any power upon a Plaintiff who has allowed his debtor to go at large, to retake him. The writ of execution is satisfied, and he cannot issue a second writ of execution for the same cause, the first having been satisfied by the custody of the [480] body of the Defendant. Neither will the law allow any agreement between the Plaintiff and Defendant as to what shall be custody or liberty. No consent of parties can make a gaol where there is no gaol. The law has defined what shall be lawful custody.—[Sir John Patteson: The real question here is, whether the Appellant was ever at large. He accepts the terms to be let out of the gaol, but to remain in the custody of the Sheriff. How then can he say he was not in custody?—The Appellant was let out of gaol.—[Sir John Patteson: Yes, but in custody, and continued so.]—You cannot by agreement alter the character of lawful custody. An escape occurs when a Defendant is allowed to be treated otherwise than the writ commands. The prisoner's assent can make no difference, it merely bars an action of trespass at his instance. Neither is it of importance that the Sheriff's officers were in attendance upon the Appellant; it was no less an escape, as he was let out of gaol. At most it was a license revocable at pleasure; and even if the Court should think that up to the 22nd of August, when the Sheriff, went to retake the Appellant, there was such a consent by him to remain in custody of the Sheriff, still when the Appellant's wife refused to let the Sheriff enter the house, the license was determined, and from that day, and up to the 3rd of December, when he was retaken to gaol, he was at large. What authority had the Sheriff to retake him after an escape? An action would lie against the Sheriff for retaking him after the writ of execution was satisfied. *Atkinson v. Jameson* (5 Term. Rep. 25), *Burton v. Home* (1 Shower, 174). The judgment of the Court below is unsupported by authority.

[481] Mr. Wigram, Q.C., Mr. Forsyth, and Mr. W. H. Melvill, appeared for the East India Company; but their Lordships, without calling upon them, delivered judgment, by

The Right Hon. Sir John Patteson.—This case comes before their Lordships under peculiar circumstances, as, indeed, it came before the Court at Bombay. It should always be remembered that in all cases we must look at the circumstances of the case before us, in order to see whether or not the principles of law are to be strictly applied to the case, or whether there can be any relaxation of what are supposed to be the strict principles of law.

A question was argued before the Court of Bombay, and has been urged here, as to what will be the consequence to the Sheriff upon the question of escape; but really that is not the question in the case. There cannot be the slightest doubt that if these circumstances had taken place by the authority of the Sheriff alone; if he, upon the representation that the Defendant was suffering very severely in health,

had taken upon himself to make this relaxation of the imprisonment, and had permitted the Defendant, accompanied by ever so many of his own officers, to go and reside in a house of his own, it would have been an escape. There can be no question at all about it; and why? Because the Sheriff having taken a party in execution under a *capias ad satisfaciendum*, is bound to keep him in his own gaol, he cannot of his own authority allow the prisoner to make a gaol for himself; he is bound to keep him *in arcta et salua custodia*, in order to enforce payment of the debt, and if he relax [482] that *arctam custodiam* at all, so far the pressure to compel the payment of the debt is relaxed also, which the Sheriff has no right to do. Upon that principle it is, that where the Sheriff had suffered a man to go out of gaol, even in the custody of one of his officers, or, as in the case of *Benson v. Sutton* (1 Bos. and Pull. 24), he had suffered him, before he was taken to gaol, to go away from the lock-up-house in the custody of one of his officers, it was held to be an escape. Whether it was going at large again, or not, may be quite another question, with respect to the mere words "going at large;" but it constituted an escape so far as the Sheriff was concerned, and entitled the Plaintiff, if he thought fit, to bring an action against the Sheriff for that escape. Formerly he would have recovered the whole amount; latterly the law has been altered, and he would recover damages only; but that is immaterial.

There is no doubt, therefore, that the Sheriff, of his own authority, could not have done this act. But then look to the peculiar circumstances of the case. The Plaintiff in any case, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the Defendant out of custody. If he does discharge him out of custody, I agree that if it be only for a week, he cannot, by any agreement which he may have made with the Defendant, afterwards retake him, although the Defendant may possibly have agreed that, if he does not pay the money within a week, he shall be retaken. That is decided law.

But the question in this case really is, whether or not the Plaintiffs ever did consent to discharge, and ever did discharge, the Defendant out of custody. [483] Now, supposing that the Defendant was in a bad state of health, as it is said he was, and supposing that it had arisen from his confinement in the prison, and that he had applied to the Supreme Court at Bombay, from which this execution issued, for a rule of Court, to be allowed to be taken from the prison and put into some other place, and there kept by a Sheriff's officer, and that for the sake of saving his life, or for the benefit of his health, the Court had thought fit to grant that indulgence even against the will of the Plaintiffs, and there had been a rule of Court to that effect, and he had been removed out of gaol under that rule of Court, and had been kept in the charge of a Sheriff's officer in a private house, can there be the slightest doubt that he would then still have been in the custody of the Sheriff? I cannot conceive that there would have been any question upon it. Now, here they did not apply for a rule of Court, but they did it at once. It is said that the Defendant did not solicit it. It is true he did not solicit it, but it was done. We have an account of the Plaintiffs, upon the representation of the medical officer, inquiring into the state of the Defendant's health. What then did they do? they wrote a letter to the Sheriff, and they say that in consequence of the state of the Defendant's health, a temporary release from confinement in the gaol itself is essentially necessary, and that "Government is pleased to permit him temporarily to reside outside the gaol, under such surveillance as may prove as little irksome as possible to the prisoner, while consistent with its perfect efficiency." What does that mean? The perfect efficiency of keeping him in custody; it cannot mean anything else by possibility. Then what is the letter to the Superintendent of the [484] Police? Why, it recites that same thing; that the Defendant has been allowed to be so under surveillance, and directs him also to take care that he does not go out of the Island. This is communicated to the Defendant, who verbally agrees to it, and expresses his willingness to avail himself of that permission. But not only that, he actually writes a letter to the Sheriff, in these words:—"Sir, I shall be grateful for any change, and the consideration for my health is indeed most welcome." Then he goes out of the gaol with a Sheriff's officer. Now, really, can there be a doubt but that the object of the Plaintiffs was, in consequence of the state of his health, a kindness towards the Defendant? Their object was to keep the judgment

and the writ of *capias ad satisfaciendum* still on foot, and to keep the Defendant in the actual custody of the Sheriff. A place where his health might be re-established, was constituted a special prison for that purpose, by consent as it were. The Defendant agrees to that, and is thankful for it. Then, surely, he must be estopped (it is a sort of estoppel), from saying that the custody in which he then was, was not the custody of the Sheriff, when both parties intended it to be so, and that in point of law such custody should be treated as the custody of the Sheriff.

There have been some cases lately, in which a question has been raised whether the party has been estopped from taking advantage of any irregularity, even the non-compliance with an Act of Parliament. There was one case before the Court of Queen's Bench very lately, in which the doctrine was carried to a very considerable extent, and yet I think not further than it may be carried in the [485] present instance. I allude to *Tyerman v. Smith* (25 Law Journ. Q.B. 359), in which the case had been referred under the compulsory powers of the Statute, 17th and 18th Vict., c. 125, sec. 15. The award was not made within three months, and the time was not enlarged by the Court, or a Judge, as it ought to have been, or by the written consent of the parties; but both parties having gone before the arbitrator after the time had elapsed, it was held that the party against whom judgment had been signed upon the award was estopped from taking advantage of the non-compliance with the Statute. In another case, *Andrews v. Elliott* (25 Law Journ. Q.B. 1). There, under the Common Law Procedure Act, the parties chose to refer it to a Judge and not to a jury, but that, according to the Act of Parliament, ought to have been done by a written consent. It was not done by written consent, but the Court said, that having chosen to act upon the oral consent, the party was precluded from taking advantage of the want of a written consent. So here this Defendant must be precluded from saying that he was not in the custody of the Sheriff, where he intended to be, and where the Respondents intended him to be all along, unless there be any strict rule of law which prevents his being so considered.

Now, with regard to the observations respecting what took place on the 22nd of August. On that day, it seems that there was an order on the part of the Government that the Defendant should be taken back to prison, and the Sheriff's officer goes to the house where he is, for the purpose of taking him back to prison; because the contention is, that he was always in the custody of the Sheriff. In [486] the case on the part of the Appellant, it is stated that his wife resisted it, and told the Deputy-Sheriff that her husband was not legally in custody. The Respondents in their case state that his wife alleged her husband to be in a very bad state of health indeed, and that it would be very dangerous to remove him; and that she did not allege that he did not consider himself to be in the custody of the Sheriff at all. The Deputy-Sheriff, on account of what he considered to be the state of the Defendant's health, did not act upon the order, and remained quiet. The Sheriff's officers, however, still continued about the premises just the same as before; they never had notice to retire, or were warned off, or told to go about their business by the Defendant, but he continued in this house with these officers until the 3rd of December, and then he was taken back to the gaol. Then it is said, that it may be considered that on the 22nd of August the Appellant revoked his consent, and that from that time he had a right to say that he was at large. But it is to be observed, that the custody, such as it was, remained just the same after the 22nd of August, until the 3rd of December, when he was taken back to gaol, and that there was no voluntary escape permitted by the Sheriff. It was not the intention of the Sheriff to let him go, or that he was to be in any different kind of situation from what he was before, nor was it the intention of the Respondents, nor, as far as I know, the intention of the Appellant; therefore, he was so detained from the first to the last under this agreement.

It is said that if parties can make such an arrangement as this, to substitute one place of imprisonment for another, the Sheriff will be placed in a very unfor-[487]-tunate situation, and may be liable for an escape in a very different manner, and under very different circumstances from what he would be if the prisoner continued in the gaol itself; and that is very true. If the Sheriff had it communicated to him by the Plaintiffs that they were inclined to grant this indulgence to the prisoner, and that he might go to another house in the custody of the Sheriff's officers, I am not

prepared to state that the Sheriff might not say, "I will not do any such thing: I have him here under a *capias ad satisfaciendum*, and unless you have a rule of Court for that purpose, I shall not consent to any such thing, because I cannot have the same strict custody over the party, and the means of keeping him in custody in another house (at this substituted prison as it were) that I have when he is gaol, and, therefore, I will not consent to anything of the sort: if you mean to take him, discharge him; you have authority to do it yourself, and take him yourself: make your agreement as you please with him; I will have nothing to do with it." Still the Sheriff may consent to do it; and here the Sheriff did consent to do it; and all parties consented to it. I apprehend that the Sheriff, when the Defendant was in this private house with his officers about him, might be liable to an action for escape, if it appeared that he had not used proper care, if he had removed his *prisoners*, or had employed persons who had not taken sufficient care to prevent the prisoner from escaping. Still it would be, under all circumstances, for a jury to consider whether, being in some measure instrumental in it, a Plaintiff ought to recover against the Sheriff at all; it would be a question of fact to be decided under all the circumstances of the case.

[488] Now, really, under all these circumstances, the authorities which have been cited do not appear to bear distinctly (I do not mean to say that they do not bear indirectly) upon the case in question, and I feel that the Chief Justice at Bombay was perfectly right in saying that he had not been able to find any authority for saying distinctly, whether there could be such an arrangement as this or not. In his judgment he says:—"I have not, however, been able to find any case in which it has been actually decided that the Plaintiff may relax the rigour of imprisonment, without thereby entitling the Defendant to his discharge. In the absence of authority, therefore, we must be guided by the general principles of the law (*ante* [6 Moo. Ind. App.], p. 475)." It is perfectly true that there is no case, as far as I know, which goes to this particular point; but there is nothing to show that it is contrary to any principles of law that the creditor and the debtor may agree. The creditor may, under certain circumstances, or if he feels it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place.

I should observe, that this opinion must not be taken to go the length of supposing that it would be possible, for instance, for a Plaintiff to say to a Defendant, "Oh, you may go about just where you please, but it shall be considered that you are in custody"; because that would be a fallacy and an absurdity: but here was an actual removal from the gaol to a private house, and an actual custody of some sort [489] continuing, which was intended to continue as a *bona fide* custody, as far as we can judge from all the circumstances of the case.

Under these circumstances, we think that the judgment of the Court below is correct; that there is a distinction between the duty of the Sheriff to keep a man *in arcta et salva custodia*, and the question, whether or not any acts of the Plaintiffs have been such as to discharge the Defendant. They are totally different questions, and here there is clearly no intention to discharge the Defendant; there is no act done by the Plaintiffs which, in point of law, necessarily operates to that effect. It was not the intention of either party that he should be discharged; it was a matter of indulgence and kindness to him, and certainly he does not appear to have made a very grateful return for it. However, if in point of strict law he is entitled to be discharged, the law must take its course, whether he is grateful or not grateful, or whether it is a gracious proceeding on his part or not. There is, however, nothing in law to prevent this from being clearly a continuing custody of the Sheriff by the arrangement of the parties, and, therefore, we think that this appeal must be dismissed, and of course dismissed with costs.

The Lords of the Committee, will, therefore, humbly recommend as their opinion to Her Majesty, that the judgment of the Supreme Court of Judicature at Bombay, of the 3rd of January, 1856, ought to be affirmed, and this appeal dismissed with costs.

SHERIFF, H. ARREST BY SHERIFF, 13. *Action for escape*. S.C. 5 W.R. 159, 11 Moo. P.C. 39. As to liability of Sheriff for escape, see Act VIII. of 1852, s. 8, and Sheriffs' Act of 1887 (50 and 51 Vict. c. 55) s. 16.]

[490] PETER CLARKSON REED,—*Appellant*; SREEMUTTY GOURMONEY DABEE,—*Respondent* * [May 9, 1857].

On appeal from the Supreme Court at Calcutta.

Recognizance entered into to abide the determination of an appeal vacated upon petition of the Appellant upon the abandonment of the appeal.

In this case leave to appeal had been granted by the Judicial Committee upon terms of lodging in the Council Office a certificate of recognizance, under a penalty of £500, before one of the Barons of the Exchequer conditioned upon the determination of the appeal. These terms were complied with; but the parties having compromised, the appeal was not further prosecuted. The Appellant now presented a petition, praying that the Order granting leave to appeal be dismissed, and the recognizance vacated.

Mr. Elderton, in support of the petition.

Their Lordships rescinded the Order granting leave to appeal, and discharged the recognizance entered into on behalf of the Appellant. The Appellant to apply upon a certificate from the Council office to the Court of Exchequer to vacate the recognizance.

[S.C. 11 Moo. P.C. 151.]

[491] RANEE HURROSOONDREE DEBIAH,—*Appellant*; RAJAH PRAN KISHEN SING,—*Respondent* * [May 9, 1857].

On appeal from the Sudder Dewanny Adawlut, Bengal.

In circumstances showing conflicting and opposite decisions by the Sudder Court upon the same question at issue, between the same parties, an appeal treated under the Statute, 8th and 9th Vict., c. 30, sec. 2, as abandoned for non-prosecution, was restored upon terms of paying costs and undertaking to lodge cases forthwith, and to lodge security or a Bond in England to the amount of £500.

Where an appeal has been treated as abandoned by Statute, 8th and 9th Vict., c. 30, sec. 2, their Lordships have no power to grant leave to institute a new appeal: only a discretion to allow the original appeal to be restored.

This was a petition to restore, or, in the alternative, to admit a fresh appeal, which had been treated as abandoned, under Statute, 8th and 9th Vict., c. 30, sec. 2, for non-prosecution within two years. The petition stated that leave to appeal to England had been granted by the Sudder Court on the 18th of January, 1848, and that the transcript of the proceedings arrived and was registered at the Council Office on the 7th of November, 1850. That an agent had been appointed in England

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in the month of May, 1852, and that the agent attended at the Council Office on the 24th of that month, with a view of proceeding with the appeal, and was informed that the Respondent had appointed agents in this country on his behalf, and that he immediately put himself in communication with them to join with him in paying half the expense of printing, when the Respondent's agents informed him that they had no remittances [492] from India to enable them to do so, but promised to join when they received sufficient remittances. That the Appellant's agent in consequence delayed taking a copy of the transcript proceedings till the 3rd of February, 1853. That the Sudder Dewanny Adawlut of Bengal, on the 12th of May, 1856, in another suit in which the same question was raised between the same parties, had held, regarding the family usage as to the division of the Raj in dispute, directly in opposition to their decree made in the suit now appealed. That on learning the result of this decision, the Appellant's agent prepared the transcript for printing in the month of January, 1857, when he became aware for the first time, that on the 24th of December previously, the appeal had been treated as abandoned within the provisions of the Statute, 8th and 9th Vict., c. 30, sec. 2. That the Appellant was desirous of prosecuting the appeal and bringing the same to a hearing, and that the delay was caused by no wilful intention, and the Petitioner prayed that the appeal might be restored or that special leave to appeal against the judgment of the Sudder Dewanny Adawlut might be allowed to the Appellant.

Mr. Wigram, Q.C., in support of the petition, asked for an order for special leave to appeal.—[The Right Hon. Dr. Lushington: I very much doubt if the appeal is not lost, under the Statute, 8th and 9th Vict., c. 30, sec. 2, or that it can have been intended that their Lordships should have power to grant leave to institute a new appeal. It is a question of great difficulty. The real question is one of restoration, not of granting leave to appeal.] The object of that Statute was to remedy the mischief which existed [493] of allowing appeals to stand over for an indefinite time. It is an inherent right in the Crown to permit appeals at any time.—[The Right Hon. Lord Wensleydale: The Statute meant that the appeal should be finally put an end to, not that there should be a fresh power to appeal.]

Mr. Leith opposed, submitting that conditions ought to be imposed, if the application was granted, for the due prosecution of the appeal.

The Right Hon. Dr. Lushington.—Their Lordships, under the very peculiar circumstances of this case, are inclined to allow leave to be given for the purpose of prosecuting this appeal. But their Lordships wish it to be distinctly understood, that it is the very peculiar facts attending this case which induce their Lordships to come to this conclusion. It appears upon the petition of the Appellant that there have been two opposite decisions in India, upon what it seems must be considered substantially the same question; and it might be productive of very great inconvenience, and would certainly not be very creditable to the law as administered in India, if such two conflicting decisions were allowed to stand. Their Lordships greatly lament the delay which has taken place upon the present occasion, and certainly, in many respects, it appears to be utterly unjustifiable; but, for the reasons I have stated, their Lordships are inclined to adopt the course of allowing the appeal to be restored. It must, however, be understood that the costs of this application must be paid by the Appellant, and security given here [494] to the amount of £500, or a Bond in such terms as their Lordships shall think fit to prescribe, and the Appellant must also print and lodge his case without delay.

Mr. Wigram.—Will the Court allow a re-deposit in India, or, if it should be found that the deposit remains in Court in India, will fresh security be required here?

Dr. Lushington.—Security must be entered into here for £500, or a Bond to secure that amount.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL: 6. *Practice*; d. *Restoring*. S.C. 11 Moo. P.C. 152. See now O. in C. of 26th June, 1873 (Stat. R. and O. Rev. iv. 318). As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermüller*, 1837, 2 Moo. P.C. 125; for subsequent proceedings see 7 Moo. Ind. App. 16.]

JOHN COCKRANE.—*Appellant*; HURROSOONDURRY DEBIA and Others,—*Respondents* * [Feb. 2, 3, 7, 1857].

On appeal from the Sudder Dewanny Adawlut, Bengal.

C., a Hindoo, by his Will appointed G. and others executors, and thereby gave and devised the residue of his estate to his daughter, H., the wife of G. All the executors proved, but G. alone acted in the trusts of the Will. G., being largely indebted to C.'s estate, by deed in 1831, conveyed to H. part of C.'s real estate as security for his debt. In 1833, G. was declared insolvent under the Statute, 9th Geo. IV., c. 73. H. entered into possession of the property so conveyed to her, and continued to hold the same uninterruptedly till the institution of a suit by the Official Assignee of the Insolvent Court, a period of twenty-two years. Held, in the absence of any proof of fraud in the transaction of 1831, or unfairness against H. in obtaining possession, so as to bring the case within the exception in cl. 1, sec. 3, of Ben. Reg. II. of 1805, that the possession by H. for more than twelve years was, by Ben. Reg. III. of 1793, sec. 14, a bar to the suit.

The question in this case was, whether the principal Respondent having been in uninterrupted possession [495] of a Talook, named Durgapoor, the property in dispute, under a conveyance, for more than twelve years before the institution of the suit, the claim of the Appellant was not barred by Ben. Reg. III., of 1793, sec. 14; or whether she had obtained fraudulent possession under a collusive conveyance, so as to bring the case within the exception to that bar provided for by Ben. Reg. II., of 1805, sec. 3, cl. 1.

The facts of the case were as follow:—

On the 1st December, 1824, Goureechurn Bandopadhyā, the husband of the Respondent, Hurrosoondurri Debia, borrowed of Doorgachurn Chuckerbutty, her father, the sum of Rs. 18,500, and gave his Bond to secure the repayment thereof, together with interest thereon at six per cent per annum. On the 3rd July, 1825, Chuckerbutty died, possessed of real and personal estate and property to a large amount, having first made a Will, whereof he appointed Goureechurn, and Bissonauth Mutty Loll, and Obhoychurn Bandopadhyā, executors. By his Will he appointed the Respondent his residuary devisee and legatee. Goureechurn and Bissonauth proved the Will, and obtained probate from the Supreme Court at Calcutta, and thereupon took upon themselves the burden of the execution of the trusts thereof; but Goureechurn alone acted in the management as executor.

[496] On the 7th November, 1826, Goureechurn and Bissonauth, as such executors, filed in the Supreme Court at Calcutta an inventory of the goods, etc., which came to their hands as executors, and in that inventory the Bond of Goureechurn was entered as belonging to the estate of the Testator. On the 1st November, 1829, an account was made up by the executors, of the sum due on this Bond for principal and interest, which amounted to the sum of Rs. 18,500; whereupon Goureechurn executed another Bond in substitution of the first, for that sum.

In the beginning of January, 1831, on an account being taken of what was then due from Goureechurn, as debtor and acting executor to the estate of Chuckerbutty, it was found that Rs. 47,000 was the aggregate amount due, when it was arranged that Goureechurn should mortgage a portion of the real estate to secure the due payment of such sum of Rs. 47,000. Thereupon indentures of lease and release in fee in the English form and language, dated the 13th and 14th January, 1831, were drawn and prepared by Bird, then an attorney of the Supreme Court at Calcutta (since deceased), which deeds were executed and delivered to the principal Respondent by Goureechurn. By the release, in consideration of the sum of Rs.

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Assessor,—The Right Hon. Sir Lawrence Peel.

47,000, mentioned therein, the Talooks of Doorlae and Doorgapore (the subject of the suit), and other property attached thereto, were conveyed, released and assigned to the Respondent and her heirs. The Respondent contemporaneously, to render the same a conditional and not an absolute conveyance, executed to Goureechurn certain articles of agreement bearing even date with indenture of release, whereby it was provided that the Respondent should not, within the space of [497] five years from the date thereof, convey or part with the possession of the Talooks and premises, or encumber the same, or any part thereof, but hold and possess the same merely as by way of a collateral security for the sum of Rs. 47,000, and interest.

In the month of April, in the same year, Goureechurn, on the request of the Respondent, determined to raise the sum of Rs. 20,000, in order to pay off a portion of the sum of Rs. 47,000, still due to her. This sum was obtained as a loan from one Radakissen Bysack, and a mortgage of part of the estate of Chuckerbutty made to him; and in order to effect this the Respondent, on the 29th April, 1831, executed a reconveyance to Goureechurn of the whole of the estate previously conveyed to her, on the understanding that Goureechurn would immediately execute to the Respondent another deed of mortgage for the sum of Rs. 27,000, the balance which would remain due on the debt of Rs. 47,000, after paying to her the sum of Rs. 20,000; and on the 29th of the same month, Goureechurn executed indentures of lease and release by way of mortgage, whereby he conveyed to the Respondent the Talooks of Doorlae and Doorgapore, subject to a proviso for redemption on payment by Goureechurn or his heirs, executors, or administrators, of the sum of Rs. 27,000, with interest. And for the further security, Goureechurn contemporaneously executed a Bond, with a warrant of attorney to confess judgment thereon, in the penal sum of Rs. 54,000, conditioned for the payment of such sum of Rs. 27,000.

Default was made by Goureechurn in the payment of the last-mentioned sum and interest, on the 30th [498] of April, 1832, whereupon the Respondent took possession of the Talook of Doorgapore alone, which had become forfeited under the terms of the indenture of release and mortgage, Goureechurn having surreptitiously sold the other Talook, Doorlae; and, being unable to redeem the Talook of Doorgapore, conveyed the equity of redemption in respect to that Talook, to the Respondent, in Benamee (or trust), in the name of one Nilmoney Mutty Loll, for the sum of Rs. 8000, as the estimated value of such interest, and it was then agreed that such sum should be credited to Goureechurn by the Respondent in account. The Respondent, after obtaining possession, paid the Government revenue.

On the 21st of December, 1833, Goureechurn was declared insolvent, under the Statute, 9th Geo. IV., c. 73. In the schedule the sum of Rs. 20,000 was stated as the balance of principal due on the Bond of the 30th of April, 1831, and the balance was entered as a debt due from Goureechurn to the estate of Chuckerbutty.

Goureechurn died in the year 1834, leaving the other Respondents his heirs. Amongst other children, he left a son called Obhoychurn, who was indebted to Messrs. Mackillop, Stewart and Co., of Calcutta, in a large sum of money; who obtained a judgment against him, under which a writ of sequestration issued against the Talook in question, then in the possession of the first Respondent, which was, on the 7th of January, 1846, seized by Messrs. Mackillop and Co., who insisted that the conveyance to Nilmoney was "Benamee" for Obhoychurn, their debtor, or that, at all events, he had some bene-[499]ficial interest in it. Upon this the Respondent, Hurrosoondurri Debia, claimed the property under the purchase; and as there were other properties similarly situated, Messrs. Mackillop and Co. filed a Bill in the Supreme Court at Calcutta, against Hurrosoondurri Debia for the purpose of setting aside her claim to and possession of this and the other properties, and of enforcing their own claim, as being the property of Obhoychurn. In this suit the Respondent, Hurrosoondurri Debia claimed the property in question under the bill of sale to Nilmoney Mutty Loll, alleging that she was the real purchaser on that occasion, and that the conveyance was made to him "Benamee" for her. In support of this case she produced, and put in evidence, and relied upon the absolute conveyance, by her husband, to her of the 13th and 14th January, 1831, which included the Talook Doorbae, as well as other property, and another conveyance to her, dated the 29th and 30th April following, by way of mortgage for securing Rs. 27,000, and the Bond of even date by way of collateral security. The release of the 14th January,

1831, purported to be in consideration of a sum of Rs. 47,000, due from the Insolvent to the estate of Chuckerbutty, the father of the Respondent, Hurrosoondurri Debia, and of whom she was the heiress and residuary legatee; but, although she was only tenant for life of the residuary estate bequeathed by the Will, the conveyance to her was in fee. To account for the second conveyance and the omission in it for the other Talook, a reconveyance to Goureechurn of the whole property was recited, alleged to bear date the 28th and 29th April, 1831, and to have [500] been in consideration of the payment to Hurrosoondurri Debia of the sum of Rs. 20,000, which it was alleged was borrowed by Goureechurn of Radakissen Bysack, for that purpose; but this reconveyance was not produced, nor was there any evidence which it was alleged could be relied upon, to show that any such transaction took place. Messrs. Mackillop, Stewart and Co. contested the Respondent's title to the estate, and thereupon the Supreme Court directed an issue in effect to try the validity of it. Upon the trial of the issue, evidence was gone into on both sides. The Supreme Court, upon the hearing of the issues, found that the deeds upon which the Respondent relied were collusive, and not intended to be acted upon, and that the conveyance to Nilmony was intended to screen the property from the Insolvent's creditors; and, in the absence of his assignee, who was no party to the suit, the insolvency not appearing upon the proceedings, they found that the bar interposed in Hurrosoondurri Debia's favour, being removed, the Talook was to be treated as the estate of the Insolvent, descendible to his sons; and in accordance with this finding (Goureechurn's insolvency having in the meantime been brought before the Court), judgment was afterwards given in favor of the Plaintiffs, and, as the Court assumed that there was a case of fraud made out against the Respondent, she was condemned in costs. A sale took place under a writ of sequestration, and Mackenzie, as one of the firm of Messrs. Mackillop, Stewart and Co., bought the Talook of the Appellant the official assignee, for Rs. 400, on account of his firm; but being unsuccessful in a suit to obtain [501] possession as purchaser under that title, the Appellant, at the instance of Messrs. Mackillop and Co., on the 29th August, 1853, instituted a suit for possession, in the nature of an action of ejectment, in the Zillah Court of the Twenty-four Pergunnahs, claiming the Talook in question as a concealed possession of the Insolvent, and making the widow the chief Respondent, and the sons of Goureechurn, except Obhoychurn, Defendants. The Appellant in his plaint alleged in substance the facts above stated, and relied upon the judgment of the Supreme Court. He charged that the possession of the Respondent had been acquired and held by fraud, and that he was entitled to maintain the suit within twelve years from the date of the judgment of the Supreme Court when the fraud was discovered; and, at all events, he was so entitled under sec. 3, Ben. Reg. II. of 1805, by which the ordinary limitation of twelve years is declared not to be applicable to claims where possession had been acquired by violence, fraud, or any other unjust and dishonest means.

The Respondents, in their answers, took various objections to the right of the Plaintiff to sue as assignee; but the substantial defences were:—First, that the suit was barred by the lapse of twelve years from the accrual of the cause of action, under sec. 14, Ben. Reg. III. of 1793, and was not within sec. 3, of Ben. Reg. II. of 1805; and, second, the Respondent Hurrosoondurri Debia's title and possessions as purchaser, under the circumstances above detailed; and the Respondents alleged that the judgment of the Supreme Court was not binding upon them, upon the ground that the Zillah Court had an original [502] jurisdiction of its own; and insisted that Hurrosoondurri Debia received possession from Goureechurn at the time of the transaction in question, and had retained such possession ever since.

Amongst other evidence given by the Plaintiff, he put in authenticated copies of the judgments and orders of the Supreme Court in the former suit; and he also put in the Bengal Hurkaru, of 22nd May, and 18th of July, 1848, and 10th of January, 1849, containing reports of the judgments of the Court, the correctness of which he proved by the certificate of Sir Lawrence Peel, the Chief Justice, and also by the evidence of Mr. Clarke. These printed reports were rejected as evidence by the Zillah Judge, and by the majority of the Judges in the Sudder Court, but were allowed to be referred to as evidence, saving all just exceptions.

On the 13th of April, 1854, the Zillah Judge gave judgment in the Respondent's favour, holding that no fraud was proved against the Respondents, and that the

case did not come within the Reg. II. of 1805, sec. 3, and he dismissed the suit with costs.

Against this decision the Appellant appealed to the Sudder Dewanny Adawlat, on the grounds of the rejection of evidence, and also that the decision was opposed to the facts and merits of the case; on the 16th of April, 1855, the appeal came on to be heard before the Sudder Court, consisting of Mr. A. Dick, Sir Robert Barlow, and Mr. J. B. Colvin. Upon the merits, Mr. Dick held that no sufficient case of fraud had been shown. Sir Robert Barlow and Mr. Colvin were of the contrary opinion upon this point; but the latter held that Tarneychurn and [503] the other heirs of Goureechurn had been in possession for twelve years without fraud; therefore, on this point, although there had been fraud (by which he held them not bound) on the part of their ancestor Goureechurn, Mr. Colvin, differing with Mr. Dick in his reasonings, concurred with him in the result, which was, that the appeal should be dismissed with costs, and which was accordingly done. Sir Robert Barlow dissented from this judgment, and gave his opinion in favour of the Appellant. The majority of the Judges being in favour of the affirmance of the Zillah Court's decree, a decree was accordingly passed affirming that decree. The present appeal was brought from that decree.

Mr. R. Palmer, Q.C., and Mr. W. Field, for the Appellant, insisted that there was sufficient evidence of fraud to take the case out of the operation of Ben. Reg. III. of 1793, sec. 14.

Mr. Wigram, Q.C., and Mr. Leith, for the principal Respondent, Hurrosoondurri Debia, submitted that the *onus* of proof lay upon the Appellant to show that it was a collusive transaction for the purpose of defeating Goureechurn's creditors, which he had failed to do, and that, therefore, he had not brought the case within the provisions of Ben. Reg. II. of 1805, sec. 3, cl. i.; and that as the Respondent had held quiet and unmolested possession for more than twelve years before any claim thereto was preferred in a competent Court, under a title she believed just and valid, the suit was barred by Ben. Reg. III. of 1793, sec. 14.

[504] The cases cited were—

Upon the question of limitation, *Sheikh Imdad Ali v. Mussumat Koorhy Begum* (3 Moore's Ind. App. Cases, 1), *Rajah Dandial Sing v. Rajah Anund Kishnur Sing* (2 Moore's Ind. App. Cases, 482) *Ruthur Munnee Dassie v. Shunkurree Dassie* (6 Sud. Dew. Adaw. Rep. 136).

Whether it was a Benamee transaction, *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53).

Upon the effect of the transaction between the Appellant and Mackenzie, whether it amounted to champerty and maintenance, *Ram Gholam Sing v. Keerut Sing* (1 Sud. Dew. Adaw. Rep. 12), *Harrington v. Long* (2 Myl. and Keen, 590).

That the consideration for the deed of 1831, being to secure a debt, was good, *Cadogan v. Kennett* (2 Cowper, 432), *Twyne's Case* (3 Co. Rep. 8).

Upon the admissibility of the printed newspaper report of the Supreme Court's judgment in evidence, *Maha Raja Dheeraj Rajah Mahatab Chund Bahadoor v. The Government of Bengal* (4 Moore's Ind. App. Cases, 509); and whether that judgment operated as an estoppel, *Jones v. Bow* (Holt's Rep. 285), Starkie "On Evidence," p. 323 (4th Edit.), and 1 Phillips and Arnold "On Evidence," p. 7.

At the conclusion of the arguments, judgment was pronounced by

The Right Hon. Lord Justice Knight Bruce,—After stating the pleadings and proceedings in the suit, The Lord Chief Justice proceeded: In this case the possession of the first Respondent being, in form [505] as well as effect, admitted, the first question for decision is, as to the manner in which such possession originated, and the character of that possession. The account she gives of the matter is this: She was the daughter of a Banian named Chuckerbutty, who appears to have died possessed of considerable wealth. He made a Will, by which, after giving certain legacies, he gave a life interest in the residue of his property to her. Unfortunately, he appointed her husband, Goureechurn, one of his executors, and, therefore, substantially her trustee, and he seems to have been the sole acting executor. Goureechurn appears to have possessed himself of considerable assets of the Testator, independently of his own Bond for Rs. 18,500, upon which it is clearly in evidence he was indebted to the Testator. The exact amount of his debt to the Testator's

estate may be matter of fair contention, but it was considerable: and that it must in any event have exceeded the amount of Rs. 20,000 is a matter upon which no reasonable man, upon the materials before their Lordships, can possibly doubt. In these state of things a security, not one of great formality, was prepared in the English form. In one sense it may be said to have been in the shape of an absolute conveyance: but taking the whole transaction together, their Lordships see upon the face of it, that it was intended only as a security. By it, several portions of the landed estate of Goureechurn, including the Talook in question, were, in consideration of a debt of Rs. 47,000, stated to be the amount which he owed to the estate, conveyed, not to any person in trust for the benefit of any parties who might be entitled to the estate, but, singularly enough, to the wife herself, who was the tenant for life of the residue. It seems remarkable that the [506] instrument should have been prepared in such a shape by Messrs. Collier and Bird, who are described, and no doubt accurately, as highly respectable solicitors at Calcutta.

Shortly afterwards, it seems to have suited some arrangement of the husband that a change should be made: and in circumstances which, perhaps, do not clearly appear, a part of the property was withdrawn from the security: the wife was treated as having received Rs. 20,000, or 27,000 of the Rs. 47,000, which it is probable enough she never did receive, and a second mortgage deed was, in April, 1831, taken in her name for the reduced amount. This deed, in all substantial respects, was similar to the former deed.

Now, if the matter had rested here, and the instrument of 1832, upon which so much stress has been laid throughout the argument here and below, were out of the question, it appears to their Lordships, upon the evidence, that the validity and good faith of these transactions could not have been successfully impeached or affected. As I have said, there is every reason to believe, indeed, to be satisfied, that the amount of debt due from Goureechurn to the estate of Chuckerbutty was considerable: it could not have been less than Rs. 20,000, and it may by possibility have amounted to Rs. 47,000. There may not, or may, have been an intention upon the part of Goureechurn to prefer the wife to his other creditors: but if that was his intention, it does not necessarily invalidate the instrument. It is not proved that there was any contemplation of insolvency: the transaction of April, 1831, was more than two years before the insolvency, which did not take place until the month of December, 1833.

The suit was not to redeem her as a mortgagee: it [507] was to impeach her title upon the ground of fraud: nor as a suit for redemption has it been treated by the Appellant, because it has been stated in effect on his part at the Bar, that if the transactions of 1831 are considered as forming a good mortgage, it would not be worth the while or money of the Appellant to redeem: a statement which is not surprising when it is seen that the valuation of the Talook in the plaint is placed at Rs. 12,000: and even considering that as under the true value, we cannot possibly place the value of the Talook higher than the amount of the security upon it. It has been said that all this was a mere fraud for the purpose of cheating the creditors of Goureechurn. Their Lordships are of opinion, that the evidence affords no ground to support such an allegation. Independently of the side on which the burthen lies of supporting such an allegation (even if the burthen had been upon the widow to support the fairness of these transactions), their Lordships are of opinion that the transactions would have been supported, especially considering the great length of time that has elapsed since the year 1831: without laying any stress upon the decease of persons who could give evidence, and who have died in the interval.

This case, indeed, would have been clear of all difficulty, but for two circumstances: one, the transaction of June, 1832: the other, the judgment of the Supreme Court, which has been so often mentioned during the argument.

Now, over the transaction of June, 1832, there seems to hang some mystery. Their Lordships are not perfectly satisfied with any account which has been given of it: but the question is, whether it affords evidence of fraud sufficient to impeach the [508] prior transactions of 1831: and their Lordships think it does not. Whatever may have been the reason which induced those who were parties to that transaction to treat the Talook in question as valued at Rs. 8000, to make a sale of it at that value to the person for whom Nilmoney Mutty Loll took Benanee: whatever may

have been the motive for that transaction—whether it was foolish or wise, whether fairly or unfairly intended—their Lordships think that the evidence wholly fails to connect the widow with it as a fraudulent transaction, or as one in any sense unfair. Whatever character, therefore, is given to the instrument of 1852, whatever is believed upon the subject, their Lordships are of opinion that, in the case of the widow, it is wholly immaterial; her title under the instruments of 1851 is in either case not affected by it, and, as far as she is concerned, she cannot be prejudiced by treating the cause as if that instrument has never existed. With regard to the judgment of the Supreme Court, it is plain, that considering the parties to the suit in which that judgment was given, it is not evidence in the present case, but it was treated in the Courts in India, as their Lordships would be disposed to treat it here, with the greatest deference and respect as a decision proceeding from such a tribunal. We must recollect, however, not only that that suit had a different object from the present, independently of the difference of parties, but that the evidence here is beyond, and is different from, that which was before the Supreme Court upon the occasion of delivering that judgment.

Their Lordships have the high authority of Sir Lawrence Peel for saying, that, upon the present materials applied to the present issue, he entirely agrees [509] with the conclusion that the title of the principal Respondent is not impeachable for fraud. He entirely concurs with the opinion of their Lordships in this case, and in the conclusion to which they have arrived, namely, that this has been an unsuccessful attempt, and I fear it may, without impropriety, be called a litigious attempt, after a long lapse of years, to impeach the fair title of a person who, if there has been fraud, has, upon the evidence, as it strikes their Lordships, been a sufferer from that fraud, and in no sense a participator in it.

Their Lordships are of opinion that the case entirely fails upon the merits, and this relieves them from the necessity of deciding some other points on which they might have made some observations. As it is, they cannot part with the case without expressing some regret at the inference they are obliged to draw from the materials before them, with respect to the character of this litigation. It is impossible for them to believe, upon the present materials, that the true state of the case, as between Cockrane and Mackenzie, was brought under the notice of the Insolvent Court. Their Lordships are of opinion, that before obtaining leave from the Insolvent Court to prosecute this suit, the true nature of the case should have been explained, and the Insolvent Court should have had an opportunity of exercising its controlling judgment upon the propriety of the Official Assignee lending his name for such a purpose, and allowing a gentleman, who was desirous of spending a sum of Rs. 100, or Rs. 500, for the purpose of buying a right of this description, to use the name of a public Officer in the way in which the Appellant's name has been allowed to be used; for this, to every substantial pur-[510]-pose, is the suit of Mackenzie, from the beginning to the end, and of him alone. Their Lordships, however, do not decide the case upon that point, whether viewed as the suit of the Appellant or of Mackenzie; it is a case in which their Lordships consider, without the slightest doubt or hesitation, that the appeal ought to be dismissed with costs.

BEBEE TOKAI SHEROB.—*Appellant*; DAVID MULICK FUREEDOON BEGLAR and GABRIEL AVIETIE TER STEPHANOOS.—*Respondents* * [July 15 and 16, 1856].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A., by four deeds, conveyed certain real estates near Dacca in Benamee, for S., his mistress, by virtue of which she took possession. By a Will made subsequent to the date of the conveyances, A. appointed G., his illegitimate son, executor, and after satisfying certain charges thereby created, which would exhaust his whole estate, gave G. a life estate in the residue. A. was involved and in pecuniary difficulties, and an action was brought against him in the Supreme Court at Calcutta by some of his creditors, which action was pending at the time of his death, and was revived against G. as A.'s heir, and judgment obtained against G. without reference to his character as executor of A. Under an execution sale in satisfaction of this judgment, the Sheriff sold "the right, title, and interest" of G. to V. (whose interest afterwards became vested in B.) for a nominal sum. Ejectment by B. founded on the title under the Sheriff's Bill of sale, against S. and G. to recover possession of the real estate in S.'s possession, impeaching the conveyances made to her by A. as void as against A.'s creditors. The Court in India decreed possession to B. on the ground of the conveyances being fraudulent. Decree of the Sudder Court reversed by the Judicial Committee by reason,—

First, that the title of S. to the lands under the conveyances was established.

Second, that in the circumstances of G. having only an uncertain right in unascertained property, it was not such an interest as could be seized by the Sheriff under a writ of execution, and that the Bill of sale was void.

This suit (see case reported, *nom.* "*Bibi Takoi Sheraab v. Mukeethur Vardoon*," 7 Sud. Dew. Adaw. Rep. 547) was instituted by the Respondent, Beglar, for possession of four distinct estates consist-[511]-ing of lands and houses in the District of Dacca, with mesne profits, in the possession of the Appellant, claiming as purchaser under four deeds of conveyance from one Avietie Ter Stephanoos, an Armenian merchant of Dacca, and also as mortgagee under a foreclosure. The principal question was, whether these conveyances were *bona fide*, and for valuable consideration, or collusive and fraudulent as against Avietie's creditors. The Respondent Beglar's title was a purchaser under a Sheriff's Bill of sale in execution of a judgment of the Supreme Court at Calcutta.

The facts of the case are fully stated in the judgment.

Mr. Wigram, Q.C., and Mr. Leith, for the Appellant, contended that the title of the Appellant as a *bona fide* purchaser for a good consideration to the four parcels of land, was fully established; and that, so far as related to the particular parcel included in the foreclosure, the decree of the Zillah Court, of the 7th of April, 1843, was a bar to this suit. That this being, in effect, an action of ejectment, the *onus* of proof lay upon the Plaintiff to prove that a legal title ever became vested in Gabriel Avietie Ter Stephanoos, to these[512]four parcels; so as to have been capable of being seized by the Sheriff; but that the Plaintiff had entirely failed to prove that the Respondent, Gabriel Avietie Ter Stephanoos, had any "right, title, and interest" in these parcels; or that any right, title, or interest passed to him under the Sheriff's Bills of sale, which would entitle the Plaintiff to possession. That the Will of Avietie had not been proved; but even if it had, it could not affect the real estate of Avietie. Neither was it shown that any interest of Avietie became vested in Gabriel Avietie Ter Stephanoos under such Will, other than as executor: the estates were not mentioned, and would not, therefore, pass. That the estates were, in fact, vested in the Appellant under the conveyances. The charges created by Avietie would exhaust

* Present: Members of the Judicial Committee.—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson. Assessor,—The Right Hon. Sir Lawrence Peel.

his estate, even if the four estates were included, so that there would be no residue, and, therefore, Gabriel's interest was incapable of being seized under a writ of execution. They further insisted that the proceedings in the Supreme Court were altogether irregular; that Court treating Gabriel as heir instead of executor, and that the judgment creditors could only attach, in satisfaction of their debts, such assets of Avietie as came to his hands; and if they were insufficient, then Beglar's remedy was to proceed against the real estate by impeaching the *bona fides* of the conveyances to the Appellant, and recover the balance due.

Mr. R. Palmer, Q.C., and Mr. Maude, for the Respondents, insisted that the estates in question really belonged to Avietie. That the pretended conveyances by him to the Appellant were without consideration, and, [513] therefore, not being *bona fide*, were void, *Groves v. Groves* (3 You. and Jer. 163), and liable to be seized by the Sheriff, the transactions being collusive to defeat his creditors. Archbold's "Practice," p. 431 (Edit. 1840). That at Avietie's death the estate passed to Gabriel under his Will. *Gabriel Avietie Ter Stephanoos v. Gaspar Malcum Gaspar* (7 Sud. Dew. Adaw. Rep. 58). That whatever interest Gabriel took under the Will, whether equitable or legal, the title to recover the estates had become vested in the Respondent, Beglar, under the Sheriff's Bills of sale, in satisfaction of the judgment against Gabriel, who was liable to the debts of his father. *Shunkerdiel Patu v. Hurnam Singh* (6 Sud. Dew. Rep. N.W.P. 6); Macpherson, "On civil procedure," pp. 46, 67, 358, 364-5; Marshman's "Guide to the Civil Law," p. 734.

The Right Hon. T. Pemberton Leigh (July 17, 1856).—In this appeal, it is very possible, from the course which the parties have thought fit to pursue, that it may not be in the power of their Lordships to arrive at the substantial justice of the case, whether they affirm or reverse the judgment. But we can deal with the case only in the shape in which it comes before us.

The facts appear to be these:—The Appellant lived with an Armenian merchant, of the name of Avietie Ter Stephanoos, as his mistress. At what time this connection began, does not distinctly appear, but it began before the year 1827. During the continuance of this connection several transactions took place between Avietie and the Appellant, which ap-[514]-pear to have been in the nature of purchases and sales.

Four different conveyances of property were executed by Avietie to the Appellant, all purporting to be conveyances made for a valuable consideration *bona fide* paid. The first of these transactions took place in the year 1827; the second and third took place in the year 1832. One of the transactions in the year 1832, was a conditional sale in the nature of a mortgage, which was made absolute in the year 1840. The fourth was a transaction which took place in the year 1833, and was of this description. Avietie appears to have fallen into difficulties, and judgments, by a number of his creditors, having been obtained against him, a portion of his property was put up for sale in the year 1833, and purchased by an individual named Hurchundur, who is represented to have been an agent of the family of Avietie, and the conveyance and purchase under that execution was represented by Hurchundur to have been made on behalf of the Appellant, and, in 1837, the property was conveyed to her by him.

Now, before the death of Avietie, several other suits had been instituted against him, one by a person of the name of Petrose, and two by another creditor of the name of Beglar.

On the 17th of April, 1835, Beglar instituted these two suits, one claiming a balance of account, and the other claiming a sum of money for rent alleged to be due. It appears that Avietie lived but a few months, or, perhaps, a few weeks only, after the institution of these suits, and he died in the year 1835, before he had put in any defence to these suits. Upon his death a summons was taken out, calling on his heir, [515] or representative, to appear and defend, and after some delay, Gabriel Avietie Ter Stephanoos, his son (though as it appears an illegitimate one only), appeared and took up the defence to these suits. He appeared as the son and heir of his father, Avietie. The suits seem to have been revived against him, without any very particular inquiry as to the nature of the interest he had, but he was treated as the representative of his father. Decrees were obtained in these suits, by Beglar

against Gabriel, and the suits being suits originally instituted against the father for debts due from the father, of course the decrees ought to have been against the son in his representative character; decrees in short against the estates of the father. Probably that may have been the intention of the decrees, but the language of them, according to our notion, is a little unsound.

The first decree was made on the 31st of August, 1836, and the other in December of the same year. The terms of that, and the decree in the second suit (which appears to be much the same as the other), are as follow:—"The sum which the Plaintiff is entitled, therefore, to recover from the Defendant (who is the heir), is Rs. 381. 8a. 1c., for interest; and principal, Rs. 2591, making a total of principal and interest of Rs. 2972. 8a. 13g. 1c., because, after the death of Avietie Ter Stephanoos, that Kalwaja Gabriel Avietie Ter Stephanoos, Defendant, is his son and heir, is evident from the answer, and the proceeding upon the record. Payment must, therefore, be made by the Defendant."

This is the form in which the decree was pronounced in both suits. It certainly is one which seems in its terms to imply a personal liability on the part of the [516] son, but, at all events, it is a decree against the son in his representative character; and had the proceeding been taken by Beglar as against what is called, in India, the decree-holder, no doubt the estates of the father might have been made responsible for that debt. Having obtained this decree, Beglar proceeded to attach the property which was in the hands of the Appellant as being the property of the deceased, his debtor, and liable, therefore, to the payment of his demand. But in the meantime various proceedings had taken place, partly in suits instituted by other of the creditors and partly in suits in which Beglar himself was a party, in which the Court had so dealt with this property that they had held that, *prima facie*, at all events, the whole of it was the property of the Appellant, and could be recovered back from her only by a suit instituted against her.

When, therefore, Beglar attempted to attach this property so belonging to the creditor of Avietie, the Sudder Ameen, before whom the case came, held, that he was concluded by what had taken place in the first proceedings, and that although his own opinion was, that these transactions were fraudulent, he could not, after what had been determined on the former suits, give effect to that opinion.

From that decree there was an appeal to the Sudder Dewanny Court, and that Court confirmed the opinion of the Sudder Ameen, and referred Beglar to more regular proceedings to give effect to his claim.

Now, if he had thought fit to pursue that course, the real question between these parties would have properly come on for trial.

That instruments to the effect stated had been executed, appears to their Lordships to admit of no [517] reasonable doubt: but considering the nature of the relation subsisting between Avietie and his mistress, considering the state in which the Appellant appears to have been placed, namely, that of a slave girl; considering the pecuniary difficulties at all events which seem at different times to have pressed upon Avietie; undoubtedly the nature of these transactions, as real transactions of mortgage and sale, purchases for considerations actually paid, were open to great doubt, and those doubts would have been solved, and the whole of the facts of these transactions would have been investigated, had Beglar thought fit to prosecute a suit for that purpose as a creditor of Avietie. And if he had prosecuted a suit in that character, what would have been the effect? Would it have been that he would have recovered the whole of the property against the Appellant? Supposing he had substantiated his case, the effect of it would have been this—that as against his debt, as against his claim, these transactions could not have been maintained; but the moment his debt was satisfied, the moment the amount of these two judgments had been satisfied, the remainder of the property would have remained in the hands of the Appellant, subject only to similar claims by persons who could make out a similar case against it as creditors of Avietie.

For some reason which it is extremely difficult to understand, and to which it is hardly possible to attribute any fair motive, the course which Beglar thinks fit to take is this: He has established a demand which clearly was a demand against Avietie, the father, but the judgments are worded in terms which seem to constitute a personal liability on behalf of Gabriel, and, therefore, in the year 1842, he brings

an action [518] in the Supreme Court at Calcutta against Gabriel for the purpose of making him personally responsible to the judgments which had been obtained in the Sudder Court, and which clearly ought to have bound the son only to the extent to which he had either possessed, or neglected to possess, the property of his father.

That action was tried on the 11th of February, 1842, and the only notice we have of what took place on that occasion is a short note, by which it appears that a simple verdict was taken against the Defendant, without reference to his being executor. Upon that verdict the principal and interest are taxed, and the whole amount is found to be Rs. 10,159. Upon that judgment was entered up. But here again, we have no evidence of what the contents of that judgment were.

Under an execution issued upon this judgment, it appears that property alleged to belong to Gabriel, including the property which had been conveyed by the father to the Appellant, was put up for sale in several lots. One of these lots consisted of "the right, title and interest of Gabriel Avietie Ter Stephanos" in a portion of a Talook near Dacca, and Mukeethur Vardoon became the purchaser for the sum of Rs. 20.

He became the purchaser also of other lots; whether the price was equally nominal, I do not know; but I think it somewhere appears that about Rs. 1530 were paid for the whole of these estates. By a Bill of sale executed by the Sheriff on the 26th of June, 1843, it is recited that a writ of *fiery facias* was issued out of the Supreme Court of Judicature, at Fort William, dated the 4th of April, 1842, whereby the Sheriff was commanded to levy upon the houses, lands, debts, and other effects, real and personal, of Gabriel Avietie [519] Ter Stephanos in the writ named, to a certain amount therein mentioned, and to have that money before the Justices of the Supreme Court of Judicature on the 15th day of June, to render to Beglar, in the writ also named. It then recites that the Sheriff, by virtue of the writ of *fiery facias*, did seize "the right, title, and interest of the said Gabriel Avietie Ter Stephanos of, in, and to (amongst other property) all that six anas, six gundahs, and two crantees, share of a Talook situate, lying, and being at Roope Gunge, in the District of Dacca;" that under a writ of *renditione exponas*, this property was put up to sale, and that Mukeethur Vardoon was the highest bidder for the same, at the sum of Rs. 20; and then the Sheriff "doth, as much as in him lies, and he can or may, both at law and in equity, bargain, sell, assign, and transfer to Mukeethur Vardoon, the right, title and interest of Gabriel Avietie Ter Stephanos" in this estate. Similar Bills of sale were executed as to the rest of the property.

On the 12th of December, 1843, about six months after the date of this Bill of sale, the present suit was instituted in the name of Vardoon, as purchaser of the interest of Gabriel Avietie Ter Stephanos in these estates; and Gabriel, and the present Appellant (who was in possession of the property and had been in possession of it for a period of fifteen years), and Beglar, were made Defendants. That case came on to be heard before the Sudder Ameen on the 28th of November, 1844. He was of opinion that all these transactions which had taken place between Avietie and the Appellant were fraudulent, as made with the intention of defeating the creditors of Avietie, and he pronounced a decree in fa-[520]-vour of the Plaintiff in that suit. The case was carried by appeal before the Sudder Dewanny Court, and that Court, by a majority of two Judges against one, confirmed the judgment, and against that judgment the present appeal is brought. There can be little doubt that Beglar was the real purchaser of these estates in the name of Vardoon; and Vardoon having died pending these proceedings, Beglar, on his death, became his representative, and he revived the suit in that character as Plaintiff.

Now, it is not very clear, upon the terms of this decree, what it was that the Court intended to give to the Plaintiff by the effect of its order? The terms of it are: "It is, therefore, ordered, that the Plaintiff's claim be decreed in this case, and that the Plaintiff take possession of four anas of the share of this Talook, and all other property set forth in the plaint, together with the wasilat (mesne profits) from May, 1844, the day of the purchase, to the date of possession."

Now, the first objection which is made to the decree which has been thus pronounced, is this: It is said, "The property which is sought to be recovered in this suit was originally the property of Avietie; you must, therefore, show first, that Avietie on his death, by some means or other, passed this property to Gabriel, either

as his heir, or by devise, or in some other form, and you do not show any mode by which any interest whatever in this property, which belonged to Avietie at the time of his death, could become vested in Gabriel." But it is said further, "If you do show that the property became vested in Gabriel, the next point that you have to make out is this: you must show that the property of Gabriel has become vested [521] in Beglar, and you cannot show that, because the interest of Gabriel, if he had any interest, was such as was not capable of being seized or sold under a writ of execution from the Supreme Court." And they say further, "Supposing these difficulties to be out of the way, Gabriel can claim, under the father, only as a mere volunteer; you can claim only in the same right, as being in the same position in which Gabriel himself claimed; and if these deeds were good against Gabriel, they are good against you. If he could not impeach these transactions, neither can you."

Now, upon the first point, namely, the transmission of interest from Avietie to Gabriel, the case seems to stand thus: It is admitted that Gabriel, although the son, was the illegitimate son of Avietie, and was not the heir of his father, and, in that character, therefore, could not take this property. But then it is said there was a Will, which was made by Avietie, in February, 1835, a few months before his death; under which Gabriel became the devisee and general legatee of the whole of the Testator's property, subject to the charges which were created by that Will. It is said on the part of the Appellant, that that Will was not properly in evidence, for although a Will was produced (or rather an official copy of a Will was produced), there was no examination of witnesses, and though that Will had been proved by Gabriel, as to the personal estate, that would be no evidence against the Appellant; at all events it would not affect the real estate.

If it would be necessary to decide that question, their Lordships would be inclined to hold that the Will was sufficiently in evidence for the purposes of [522] this suit. The Regulation provides that where documents are produced, and they are not disputed, they shall be received without proof.

As to the pleadings on that subject, the case was this: The Appellant, when called on to answer as to the *factum* of this Will, said, "What does it signify if there is such a Will? If such a Will be produced it cannot have any effect against my interest." The official copy of the Will was produced at the hearing, and there does not appear to have been any objection taken to the reception of that instrument, or any demand made on the part of the Appellant that the instrument should be regularly proved by witnesses. If, therefore, it were necessary to determine that point, their Lordships would be of opinion that the Will was, for the purposes of the suit, as against the Appellant, sufficiently established.

Then it is necessary to look to what the nature of the Will really is, in order to see whether it is of such a character as that it would pass to Gabriel the legal estate in this property, in a form in which it could be the subject of seizure under a writ of execution from the Supreme Court, as the law at that time stood.

The Will in substance is this: The Testator declares that his son, Gabriel, shall be his heir and executor for the purpose of executing the intentions of his Will, and thereby, no doubt, he became trustee for the purpose of executing the different dispositions contained in that instrument. Those dispositions were to this effect: there was first a charge by way of annuity of Rs. 1200, in favour of the present Appellant, all the debts were to be paid, there were very large legacies to be discharged, and after all these [523] charges, debts, legacies, and annuities had been satisfied or provided for, as to the remainder of the estate, Gabriel was to be tenant for life, with remainder to his sons. He, therefore, was entitled to nothing for his own benefit but a life-interest in the residue of the real and personal property of the Testator after all the charges upon it had been satisfied and provided for, and after a full administration had taken place of the assets for the purpose of discharging these several dispositions.

Now, was that an interest which could be sold under an execution issued in the Supreme Court against the property of the Testator? We have the concurrent opinion of the two very highest authorities in this country, on the subject, Sir Edward Ryan and Sir Lawrence Peel, who are most clearly of opinion that no such interest could pass under such an execution, and that, therefore, the Bill of sale under it was absolutely null and void. Indeed, the grossest injustice would be done

if the transaction, as it has taken place, could stand. For what is the effect of it? The effect of it is merely this; that there being some uncertain rights in some uncertain property in the District or City of Dacca, at a distance from Calcutta, and being uncertain whether the property was worth Rs. 100,000, or whether the interest of the debtor is worth anything; that property is put up for sale (that is, the right and interest of the debtor in that property is put up for sale) in Calcutta, and I think it appears here to have been bought for mere nominal sums, it being utterly impossible that there could be any satisfactory means of determining the value, or procuring a fair price by the competition of purchasers acquainted with the value, or capable even of ascertaining the [524] value of the property. But beyond that, the effect of it is this; that for these nominal considerations the purchaser is to obtain the whole of this property; although supposing all these deeds to be void against creditors of Avietie, the very utmost that ever could have been demanded against the Appellant out of this property by this suit, would have been the amount of the debt originally due from Avietie, and properly recoverable against his assets.

Now, the fact that the Bill of sale was void and passed nothing to the purchaser would alone be sufficient to dispose of this case, but as it was not the ground on which the Court below proceeded, it will be more satisfactory to advert to the other grounds. The other grounds are these: Although these instruments are open to suspicion, they are open to suspicion at whose instance? They are open to suspicion as between the creditors of Avietie and the Appellant. They are open to no suspicion at all as against the creditors of Gabriel. Gabriel is a mere volunteer. Gabriel's creditors might well dispute any fraudulent assignment which Gabriel had made; but how can Gabriel's creditors, or a purchaser from Gabriel, dispute the validity of transactions which Gabriel, before the institution of this suit, and long before the institution of the suit on which the present claim was established (that is, before the institution of any suit in the supreme Court), had recognised and abundantly confirmed? And, therefore, even if these different objections to which we have adverted, in respect of the form of the suit, and the nature of the proceedings, were removed, the character of the Plaintiff—the character in which he sues, of a personal creditor, asserting a personal liability against Gabriel—would effectually exclude those considerations upon which, and upon which alone, the transactions which are now disputed could be subject to question.

Their Lordships, therefore, are very clearly of opinion that the judgment which has been pronounced must be reversed.

It appears to their Lordships that this has been not only a most irregular proceeding, but that it is impossible to attribute to it any fair motive; we heard none at least assigned at the Bar for the course which had been taken. A most unfair advantage would have been gained if these decrees could have been maintained.

Their Lordships, therefore, are of opinion, that the Appellant is entitled not only to have the decree reversed, but to have the costs repaid to her, which, under the decrees of the Court below, she has paid; to have her costs of those proceedings, and, also, to have her costs of the present appeal. If there be any means by which Beglar can now revert to his original position as a creditor of Avietie, and in that character dispute these different gifts or sales, of course it will be competent to him to do so. If not, by attempting to obtain an unfair advantage in an irregular manner, he will have lost the opportunity of which at one time he, no doubt, might have availed himself.

[526] SREEMUTTY SOORJEE MONEY DOSSEE.—*Appellant*; DENOBUNDOO MULICK and Others.—*Respondents* * [July 4 and 20, 1857].

On appeal from the Supreme Court at Calcutta.

Rules for construing Wills of Hindoos.

Primarily the words of a Will are to be considered. They convey the intention of the Testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the Will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the Testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the Will, or the surrounding circumstances, displace that assumption.

A Testator by his Will made an absolute gift of his real and personal estate to his five sons (an undivided Hindoo family) in equal shares, and in a subsequent part of his Will, in the event of any of his five sons dying without a son or son's son, there was a gift over to such of his sons or son's sons as should be alive. After the death of the Testator the sons lived together, and no partition of the estate was made, the surplus income and the increment being kept with the common stock. Upon the death of one of the sons without leaving a son or son's son, his widow, who was entitled to a life interest in her husband's estate, claimed her husband's share of the accumulation of income, and the increment thereon. Held, upon a construction of the Will, that in the absence of any direction of the Testator that his sons should continue a joint family, such an intention could not be imported into the Will, and that the Testator's intention was that his sons should enjoy during their lives the interest of their respective shares of the property; and, therefore, that, although the deceased co-sharer's share went over to the survivors, the widow of the deceased was entitled to one-fifth of the surplus income which had accumulated since the Testator's death, and during her husband's lifetime, and the increment arising out of such accumulations.

The question raised by this appeal was, whether the accumulations made to and incorporated with joint and undivided immovable and movable property by the manager of a joint and undivided Hindoo family, with the assent of his co-sharers, by means of the surplus income, proceeds, and profits [527] of the movable and immovable property, ought to be, on the death of one of such co-sharers, considered and treated as an increment to the original corpus, and of the same nature, so as to pass entire with such corpus to his co-sharers, or whether the accumulations were to be traced and ascertained by means of an account to be directed by the Court, and then severed from the original corpus and treated as if they formed a part of the separate and self-acquired estate of the deceased co-sharer.

The Bill was filed on the 20th of August, 1855, by the Appellant, the widow of one of five co-sharers, against the Respondents, on the equity side of the Supreme Court at Calcutta. The statements in the Bill were to the following effect: That Bustomdoss Mullick, then deceased, was a Hindoo inhabitant of the town of Calcutta, and there carried on the business of a Banian, and that he left five sons, namely, Beernursing Mullick (since deceased), Surroopchunder Mullick (also since deceased, the husband of the Appellant), and the Respondents, Denobundoo Mullick, Brijobundoo Mullick and Gostobeharry Mullick (since deceased), who was the father of the Respondent, Koonjoobeharry Mullick and the husband of the Respondent, Sreemutty Bhuggobutty Dossee. That, during the lifetime of their father, none of the sons ever, at any time, had any trade or business independent of and apart from their father, or acquired or became possessed of any property or estate separate or

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir William H. Maule.

apart from him; that Surroopchunder Mullick was, for a few years previous to his father's death, perfectly blind, which rendered him totally unfit to take part in or personally interfere with the management of the estate of his father, or [528] the expenditure of his own family after the latter's death. That Bustomdoss Mullick died on the 10th of March, 1841, having duly made his Will, the principal parts of which were the first, eleventh and fourteenth items, which were as follows:— "First Item I have five sons, you four persons, and middlemost son, Surroopchunder Mullick (whose eyes becoming diseased he has become blind), for this reason whatever estate I have in ready money, in loan papers, in jewels, in gold and silver personal ornaments in dresses and cloths and chandeliers and lanterns and lands homesteads etc. agreeably to my ledger book and abstract book and according to the cash book with my own writing therein all the said property remains for you five brothers in equal shares, but so long as the said middlemost Baboo's eyes are not cured so long you four persons will protect and look after all the said estate mentioned above and in drawing the interest of the Company's papers and realizing the outstandings and liquidating the debts and in suits causes and the like whenever it becomes necessary to sign and affix signatures to anything you four persons will do that and in consulting etc. about the worldly affairs and the expenses and disbursements that may become necessary at any time you four persons will be unanimous in that also and incur the same and the said expenses will fall equally to the five shares and among the abovementioned immovable property, if it is requisite to sell any parcel of land in that matter you four persons will affix your respective signatures and one among you four persons whoever he may happen to be having written and signed the name of the said middlemost Baboo will write his own name adding " by his pen " to the same therein no [529] one will be able to make any objection or dispute having sold such parcel of land you will credit the money to the estate. By the will of the Issore should the eyes of the said middlemost Baboo get well in that event the said middlemost Baboo becoming an executor in association with you you five persons will transact every business with unanimity. Eleventh Item. The Issore avert but should peradventure any among my said five sons die not leaving any son from his loins nor any son's son in that event neither his widow nor his daughter nor his daughter's son nor any of them will get any share out of the share that he has obtained of the immoveables and moveables of my said estate. In that event of the said property such of my sons and my sons' sons as shall then be alive they will receive that wealth according to their respective shares. If any one acts repugnant to this it is inadmissible however if my sonless son shall leave a widow in that event she will only receive Rs. 10,000 for her food and raiment. Fourteenth Item. The orders that I have given to you in the above-written items you will be unanimous and do every act agreeably to those and remaining joint in food you will uphold the expenses and disbursements of the family in the manner the same have been hitherto only." That after Bustomdoss Mullick's death his sons, Beernursing and the Respondents, Denobundoo Brijobundoo, and Gostobeharry, proved the Will in the Supreme Court at Calcutta, and took upon themselves the execution thereof. That upon and after the death of the Testator, the whole of the real and personal property of the Testator, was transferred into the joint names of the five sons, and jointly held and possessed by them as owners and [530] proprietors thereof under the Will. That, with a view to improve the estate and property left by the Testator, his son, Beernursing, after the death of his father, as the eldest son and principal manager of the joint estate, with the consent and concurrence of his brothers, made loans of money to divers individuals, upon the security or pledge of portions of the joint property, real as well as personal, bearing interest at high rates, and thereby the joint estate was considerably increased, and very large accumulations accrued thereon; and that from the death of the Testator down to the time of the death of Surroopchunder, the annual income and profits of the joint estate actually received by Beernursing and the Respondents, Denobundoo, Brijobundoo, and Gostobeharry, very greatly exceeded the disbursements and expenses of the five brothers and of the whole of the family of the Testator; and very large accumulations accrued from year to year, and from month to month, by reason of the surplus of income over expenditure, the whole of which accumulations were realised by Beernursing, Denobundoo, Brijobundoo, and Gostobeharry, and were

from time to time invested and employed by them in the same manner as the corpus of the estate and very large gains and profits were thereby realised and the accumulations greatly increased. That there used to be a yearly surplus of about Company's rupees two hundred and ten thousand, which surplus was accumulated and invested, in the manner aforesaid by Beernursing, Denobundoo, Brijobundoo, and Gostobeharry. That after the death of Bustomdoss Mullick, and up to and until the death of Surroopchunder, the five brothers continued to live together, and no division [531] or separation in estate ever took place between them, but that each of them respectively drew and received from and out of the joint estate for the expenses and maintenance of himself and family, such sums of money as he required, and that entries of such respective disbursements were entered in the joint khattah books of account relating to the joint estate; and that during his lifetime Surroopchunder drew or received from the joint estate a very much smaller sum than his other brothers, and that no account was ever rendered to him by his brothers, in respect of the surplus and accumulations, or of their dealings therewith, or of the profits arising therefrom. That Surroopchunder died on the 25th of November, 1847, intestate and without male issue, but leaving the Appellant, his sole widow, heiress and personal representative, according to Hindoo law and custom, and two married daughters, respectively him surviving. That in the month of July, 1849, Beernursing also died, leaving the Respondents, Toolseedoss Mullick and Soobuldooss Mullick, his two sons, him surviving, having first made his Will and thereby appointed the other Respondents, Denobundoo Mullick, Brijobundoo Mullick, and Gostobeharry Mullick, executors thereof. That, subsequently, Gostobeharry died, leaving the Respondent Koonjoobeharry Mullick, his only son, him surviving, having first made his Will, in and by which he appointed the other Respondent, Sreemutty Bhugobutty Dossee, his widow, the sole executrix thereof. That the above several persons respectively had taken possession of the whole of the joint estate, and of the accumulations, additions, and increase thereof, including the share of the late Surroopchunder in such increase, additions, and accumulations accrued during [532] his lifetime, and that they continued to use the same indiscriminately with the corpus of the estate. And the Appellant submitted that she, as such Hindoo widow and immediate heiress and representative, was entitled, for and during the term of her natural life, to the share of Surroopchunder Mullick of or in the surplus income and accumulations that accrued during the lifetime of Surroopchunder Mullick from or in respect of the joint estate, to be held and possessed by her as a Hindoo widow in the manner prescribed by Hindoo law, and that she also became entitled, on her husband's death, to have the legacy of Rs. 10,000 given by the Will of Bustomdoss Mullick paid to her for her food and raiment, and to such further sum out of the joint estate as this Court might consider requisite for her suitable maintenance, including the performance by her of the usual religious acts and ceremonies; and the Bill prayed, First, that it might be decreed and declared that Surroopchunder Mullick, as one of the five sons of Bustomdoss Mullick, and as taking a vested interest under his Will in one-fifth share of his property, became and was, from and after the death of Bustomdoss Mullick, absolutely entitled to one-fifth share of the accumulated income of the joint estate which accrued during his, Surroopchunder Mullick's, lifetime, and to one-fifth of the additions to and increase of the original estate of Bustomdoss Mullick, and that, on the death of Surroopchunder Mullick, the Plaintiff, as his widow and immediate heiress and representative, became entitled to all accumulations and additions to the fifth share of the undivided estate made or accrued in the lifetime of Surroopchunder Mullick, as and being estate absolutely vested in Surroopchunder Mullick, deceased, at [533] the time of his death, and which passed to his own legal heirs and representatives in estate. Second, that an account might be taken of the real and personal estate of or to which Bustomdoss Mullick died seised, possessed, or entitled, and of the total and annual value and proceeds thereof at the time of his death, and that a like account might be taken of all and singular the proceeds and income of the estate which during the lifetime of Surroopchunder Mullick were possessed or received by the Defendants, or by Beernursing Mullick and Gostobeharry Mullick, and of all investments of such proceeds and income, or by any part thereof, and of the profits arising therefrom, the Plaintiff thereby offering to allow to the De-

endants, and of the estates of Beernursing Mullick and Gostobeharry Mullick respectively, credit for all moneys which, on taking the account, should appear to have been received by or paid on account of Surroopchunder Mullick during his lifetime. Third, that the Defendants might be decreed and directed to pay or to transfer to the Plaintiff, as such immediate heiress as aforesaid of Surroopchunder Mullick, one-fifth share of the amount of the annual income of such estate of Bustondoss Mullick, deceased, during the lifetime of Surroopchunder Mullick, and of all accumulations and increase which should appear to have been made or to have accrued during the lifetime of Surroopchunder Mullick upon taking the accounts, after deducting from such one-fifth share all monies received by or paid for Surroopchunder Mullick during his lifetime as aforesaid. Fourth, that the rights of the Plaintiff, under the Will of Bustondoss Mullick, might be declared, and that the Defendants might be decreed and directed to pay over to the Plaintiff, out of the joint [534] estate, the legacy or sum of Rs. 10,000 for food and raiment in the Will mentioned, with interest thereon from the death of Surroopchunder Mullick. Fifth, that if the Court should be of opinion that the Plaintiff, as widow of Surroopchunder Mullick, was entitled to maintenance, including the performance by her of the religious acts, out of the joint estate, irrespective of or in addition to the legacy or sum of Rs. 10,000, then that it might be referred to the Master to inquire and ascertain what would be a sufficient and proper sum to be allowed to the Plaintiff for such maintenance, and that all necessary directions might be given for payment of such maintenance to the Plaintiff as from the death of her husband, and for securing the payment thereof for the future, and for further relief.

The Respondents, Denobundoo Mullick and Brijobundoo, filed a joint demurrer and answer to the Bill, and thereby demurred generally, for want of equity, to the whole of the Bill, except so much of it as sought for payment of the legacy of Rs. 10,000, and the other Respondents also filed a joint demurrer generally, for want of equity.

The demurrers were argued on the 4th of December, 1855, when the Supreme Court delivered judgment as follows:—"The material question raised by these demurrers is novel and important, but it seems to us to lie in a narrower compass than that to which the very able and ingenious arguments which have been addressed to us on the subject were confined. The Testator, a Hindoo, had five sons, one of whom, Surroopchunder, was afflicted with a partial blindness that incapacitated him from business. With reference to this state of his family, the Testator [535] made a Will whereby he appointed his four other sons executors, but gave to the five sons (subject to a few legacies) the whole of his property in equal shares. He gave very particular directions as to its management, and amongst them, a direction that, should the eyes of Surroopchunder get well, he also should become an executor. The clause, however, upon which the principal question in the cause arises is the eleventh. By that it was provided that if any of the five sons should die without leaving a son from his loins, or any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them, should get any share out of the share which the son so dying had obtained of the immoveables and moveables of the Testator's estate. In that event such of the Testator's sons and sons' sons as should then be alive were to receive that wealth, according to their respective shares, and the widow of the son dying without issue in the male line was to receive a legacy of Rs. 10,000, for food and raiment. On these pleadings it must be taken as admitted (and we see no reason for doubting what is so stated), that the brothers during the lifetime of Surroopchunder constituted an undivided Hindoo family, joint in estate, as in food and worship; that the joint and separate expenditure of the members of this family fell far short of the income of the joint estate; that the surplus income was during the lifetime of Surroopchunder profitably employed, and by its accumulations greatly increased the joint estate; and further, that the sums drawn or received by Surroopchunder out of the common stock for the expenses of himself and his family, were to a much smaller amount than those drawn by his brothers for similar [536] purposes. Surroopchunder died on the 25th of November, 1847, intestate, and without issue in the male line. His immediate heiress and representative was the Plaintiff, his widow, but he also left daughters who have sons. The effect, therefore, of the eleventh clause, so far as

it is operative, is not merely to disinherit the widow in favour of those who would take in her absence, but to break the legal order of succession altogether. That this has been effectually done, so far as relates to that which actually passed to Surroopchunder under his father's Will, *i.e.* the corpus of his share, the Bill properly admits, for in the present state of the authorities it would have been idle to contend that under the Hindoo law, as it exists in Bengal, the Testator had not the power of disposing of his property by Will, or that by that particular instrument he has not to the extent just stated effectually altered the right of succession to it. But the Plaintiff seeks to distinguish that part of her husband's share being the principal which passed to him under his father's Will, from that which arose from the accumulations of income which accrued during his life. She would treat the latter as his own estate, unaffected by his father's disposition, and claims it as his heiress-at-law; and the first and principal object of her Bill is to have these latter funds ascertained, separated and made over to her. It was, we apprehend, competent to this Testator, if he had been so minded, expressly to provide for the accumulation of the surplus income of his estate, within the limits allowed, by law, and to make these accumulations subject to the limitation over in the event of any son dying without leaving issue in the male line; but he does not appear to us to have done so, either [537] expressly or by necessary implication. If, therefore, we were to decide this case by English law, adverting to the jealousy with which that law protects the rights of the natural heirs, and regards all attempts to put fetters on the enjoyment of an estate actually given; and to the effect of the first clause of the Will, which, however controlled by the eleventh clause, cannot be taken to have given less than a life estate in his one-fifth share of the residue to Surroopchunder (in our opinion it gave him an absolute interest, subject to be divested in the event which happened), we should be of opinion that the Plaintiff's contention was correct. The annual income as it accrued would have been Surroopchunder's own absolute property, and his father, to whom it never belonged, could have had no power of disposing of it by Will or otherwise. But in dealing with this case we must not only put ourselves as far as possible in the position of a Hindoo father making a Will, in order to collect the Testator's intention from his expressions, but we must consider what, according to Hindoo law, is the nature and what the incidents of property taken by the five brothers under their father's Will, and held and enjoyed by them during their joint lives as joint estate; because upon that consideration must very much depend the effect to be given to the Testator's intention, when ascertained. The Testator's general intention of making a limitation of each son's share in a certain event in favour of his surviving sons and their sons, and to the exclusion of the widow, or heirs, in the female line of the deceased son, as already said, is admitted. We cannot collect from the Will the further intention attributed to him in the course of the argument for the Defendants, that his property [538] should continue to be held and enjoyed as joint estate; we think that he contemplated such an enjoyment as probable and proper, but we cannot find that he has made it imperative, or by any clear expression of intention has taken away from the co-sharers that right of demanding a partition which under the general Hindoo law each would have. Our view of his Will is, that, subject to the legacies and certain special direction, he left his property to his five sons as an undivided Hindoo family, controlling their rights as co-sharers in a joint Hindoo estate in one particular only, namely, that in a certain event, certain substituted heirs should succeed to a son's share to the exclusion of his natural heirs. If, then, Surroopchunder during his lifetime had claimed and exercised his right of having a partition, we are disposed to think that the income of his share after the partition and its accumulations being his separate property, could not have been treated as subject to the limitations of his father's Will; nothing more than the corpus of his share are taken on the partition could have passed under that disposition. But there was no partition in his lifetime, and the question simply is, whether his heir after his death, who, it is admitted, cannot stand in his shoes as to his whole interest in the common stock, can sever from that common stock his share of the increment which was made to it in his lifetime; or whether the increment is of the same nature with and follows the principal, and must, therefore, pass with it. Now, what are the peculiar characteristics of joint property held and enjoyed by an undivided Hindoo family? Dealing

here with persons and property in Bengal, we must of course follow the *Daya Bhaga*, whenever it differs [539] from the *Mitashara*, upon the authority of which some of Sir Thomas Strange's propositions rest. Yet, according to the law as modified in Bengal, these propositions concerning property so held and enjoyed seem to be incontrollable. First. Each of the co-sharers has a right to call for a partition (*Daya Bhaga*, ch. iii. sec. i. par. 16), but until such partition takes place, and even an inchoate partition does not seem to vary the rights of the co-sharers; see *Pran-kissen Mitter v. Sreemutty Bomasoondery Dossee* (Fult. 110), the whole remains common stock; the co-sharers being equally interested in every part of it. Second. On the death of an original co-sharer his heirs stand in his place and succeed to his rights as they stood at his death; his rights may also in his lifetime pass to strangers, either by alienation, or, as in the case of creditors, by operation of law, 1 Strange's 'Hindu Law,' p. 178, and the authorities there cited; but in all cases those who come in, in the place of the original co-sharer, by inheritance, assignment, or operation of law, can take only his rights as they stand, including of course the right to call for a partition. Third. Whatever increment is made to the common stock whilst the estate continues joint, falls into and becomes part of that stock. On a partition it is divisible equally, no matter by what application of the common funds, or by whose exertions it may have been made; the single exception to the rule being, that on the acquisition by one co-sharer of a distinct property, with the aid only of the joint funds, the acquirer may take a double share in that property. The case cited of *Gooroochurn Doss v. Goluckmanoy Dossee* (Fult. 165), and the authorities there collected and enforced, [540] abundantly prove both the rule and the exception; the increment arising from the accumulations of undrawn income is obviously within the general rule. Fourth. A question arose in the course of the argument: it related to the right of co-sharers on a partition to make those who, whilst the jointure of estate continued, had drawn more than their due shares out of the common stock, account for the difference. The authorities certainly show that in respect of those expenses which properly fall upon the joint funds, as disbursements for marriages and certain religious and charitable purposes, there exists no liability to account, though from the largeness of his family or other cause, one co-sharer may have received greater benefit from the joint funds than another. But, on the other hand, there are authorities, and those ancient authorities (we may instance *Colebrooke's Digest*, art. cccxxviii. vol. iii. p. 391), which plainly show that a co-sharer may make himself liable for money spent for enjoyment, or other purposes, which are not for the benefit of the family considered as a whole. And we apprehend that at the present day, when personal luxury has increased, and the change of manners has somewhat modified the relations of the members of a joint family, it is by no means unusual that in the common *Khatta Book* an account of the separate expenditure of each member is opened and kept against him; and that on a partition, even in the absence of fraud or exclusion, those accounts enter into the general account on which the final partition and allotment are made. It is not, however, necessary to go at length into this consideration for the decision of the question before us, because the right to demand such an account, when it exists, is [541] incident to the right to require a partition; the liability to account can only be enforced upon a partition. If then this be the state of an undivided Hindoo family, and these the rules relating to their joint property, does it not follow that if the law permits an ancestor by Will to substitute for the natural heirs of a co-sharer certain *haeredes facti*, the persons so substituted must stand with reference to the joint property precisely in the shoes of the deceased co-sharer? If they take his share of the corpus, they have clearly, in respect of that share, the right to demand a partition. Now, if we were to suppose that the substituted heir was not, as in this case, the co-sharers themselves, but another person, and that a partition had taken place on the death of Surroopchunder, the four surviving brothers would each have been entitled to one-fourth of the joint fund, including the increment as it then stood. They could not, we think, have been subjected to a double account, to an account with the substituted heir in respect of the original share, and to an account with the natural heir in respect of the increment. Nor do we think that there could have been an account between the two classes of heirs, the *haeres natus* and the *haeres factus*, in order to distinguish

principal from increment. We think it more agreeable to the Hindoo law to hold, that what the person substituted by the Will for the natural heir takes is the right, whatever it may then be, of a co-sharer in the joint estate, and that in that, as in the ordinary case, the fund is single, and the increment passes with the principal. The difficulty is caused by engrafting, as has happened in Bengal, the testamentary power on the Hindoo law. The precise point before us has never, so far as [542] we know, been decided; but we are of opinion, that we do less violence to the Hindoo law in holding that the effect of such an exercise of the testamentary power is to substitute, for all purposes, as regards the joint estate, the person in whose favour the disposition is made, for the natural heir, than we should do were we to admit the principle of a double representation as to a share in an undivided estate. We have already said that we should apply a different rule to the separate estate of Surroop-chunder, even though it had become separate by partition in his lifetime, and as to its principal remained subject to the testamentary disposition. On the whole, therefore, we think the demurrer on the principal question must be allowed. The result is, that the suit will be dismissed against all the Defendants but the executors, and will continue as against them as a mere legatee's suit. A further question arises, however, on the demurrer of the Defendants represented by Mr. Peterson, which it is necessary to consider, as it may have a bearing on the question of costs. It was argued by him, that whatever might be the judgment of the Court on the principal question, the general demurrers of his client, or of some of them, must be allowed, because they were not necessary parties to the trial of that question. To that view we cannot accede. We, of course, fully admit the general principles laid down in *Holland v. Prior* (1 Myl. and Keen, 237); and as regards the necessity of making the representative of a deceased representative (which seems generally to depend on the question whether the suit involves the general administration of the estate), we bow, as we are bound, to the English authorities. But the present suit is a peculiar one: so far as it involves the board [543] question with which we have dealt at such length, it is a contest between one claiming a portion of a fund adversely to a joint and undivided Hindoo family, who claim to retain the whole as their joint estate. That some of the parties may be only the legal personal representatives of deceased co-sharers, and others only beneficially interested in the joint funds sought to be diminished, does not, we think, materially affect the question. If we had decided in favour of the right to the accumulations claimed by the Plaintiff, we should not in this stage of the suit have seen our way to dismiss any of the Defendants. All are interested in the joint defence of the common fund. Therefore, on the reason of the thing, as well as upon the language of the twenty-first paragraph of the Bill, the general demurrer cannot prevail on the ground that these parties, or any of them, are improperly made Defendants. The joint demurrer filed by these particular Defendants is peculiar in form. There is a general demurrer for want of equity and for multifariousness, but the last point was not pressed in the argument. There is a partial demurrer to so much of the Bill as seeks an account of the legacy of Rs. 10,000, and also a demurrer on different grounds to the rest of the Bill. The two last are well founded, but in fact they are not necessary, because the whole benefit of them is gained by the allowance of the general demurrer for want of equity, which on our construction of the Will must, as to these Defendants, prevail. The partial demurrer of the executors must be allowed, but the suit will proceed against them in respect of the legacy. This being our view of the case, we cannot but feel that this being a suit by an heiress-at-law, seeking to have the judgment of [544] the Court on the construction of an unusual and not very simple testamentary disposition, in order to ascertain to what extent she has been deprived of her natural rights of inheritance, the costs of the litigation ought on general principles to come out of the estate. The misfortune is, that we are not now in a condition to decree costs out of the estate, and it is necessary to provide for the costs of the Defendants who are to be dismissed from the suit. This might be done by allowing their demurrer with costs to be paid by the Plaintiff, and giving her leave to add those costs to her own costs of suit. But as this might expose her to being harassed by executions, and the Defendants have personally the means of obtaining payment of their own costs out of the estate, we think it best to allow the demurrers without costs, and without prejudice to the question whether

the Plaintiff will be entitled to her costs of these proceedings out of the estate as part of her general costs of the cause."

The present appeal was from two Orders founded upon this judgment, and now came on for hearing.

Mr. R. Palmer, Q.C., Mr. Rolt, Q.C., and Mr. W. Pearson, for the Appellant. No doubt the point in dispute is novel and important, as stated in the judgment of the Court below; but the error of that Court proceeds upon the reasoning that by the Hindoo law the accumulations follow the corpus, and that the co-shares in this case are to remain a joint undivided family, instead of looking for the intention of the Testator to be collected from the Will, according to the rules of construction adopted by Courts of Equity in England, which must, we submit, be applied to this case. The fact of the [545] power to make a Will is not questioned, although the exercise of testamentary power by Hindoos was first engrafted by the Supreme Courts in India, on the native law of succession, 1 Strange's "Hindu Law," p. 121 (2 Edit.); for an instrument in the nature of a Will was not known by the ancient Hindoo law, yet a testamentary instrument like the present is now held valid as a Will. The only question, then, is one of construction, which is not inconsistent with the Hindu law. Now, by the first item of the Will, there is an absolute gift of one-fifth of the Testator's property to each of the five sons, but that devise and bequest is cut down by the eleventh item, which provides that the share of any of the sons of the Testator who should die without leaving any son, or son's son, shall go over to such of the Testator's sons or sons' son as should be then alive; but this applies only to the real and personal estate of the Testator, which passed by the Will; it was clearly a gift of one-fifth part of the specific property the Testator then had, and does not affect any surplus income which accrued on such share during the lifetime of a son who should die, or any accretions derived from such surplus income. The Appellant's husband, therefore, had an absolute vested interest in one-fifth part of the surplus income accruing during his lifetime from the joint estate after paying the joint expenses and disbursements, and also one-fifth share of the accretions and increment arising from such surplus, which, by the Hindoo law, at his death passed to the Appellant for life, as his widow, 1 Strange's "Hindu Law," p. 121 (2nd Edit.); Daya-Bhaga, ch. xi. sec. i. par. 7. There is nothing in the Will to carry over the accumulations, or to show that the Testator intended the [546] continuation of the five sons to remain joint in estate. The fourteenth item expressly requires that they should be joint "in food." But there is nothing to show that they are to be joint in worship, or that it was the Testator's intention that they should remain joint in property. He leaves them perfectly free to separate and divide. The Hindoo law does not require that a joint Hindoo family should be joint in all respects. F. Macnaghten's "Con. of Hindoo Law," p. 55; 1 Strange's "Hindu Law," p. 225 (2nd Edit.). These five co-sharers had all the rights of absolute ownership except those expressly divested by the eleventh item of the Will. The Testator in fact has done nothing to prevent the exercise of the inherent right by the Hindoo law in each co-sharer to obtain a partition. Daya-Bhaga, ch. iii. sec. i. par. 16; *Praonkissen Mitter v. Sreemutty Bomasoondery Dossee* (Fulton's Rep. 110). An alienation may take place before partition. The Hindoo law says nothing as to the rights of a stranger, it treats only of the joint Hindoo family; but it must be admitted, that equality cannot enure so as to affect a stranger, intervening as assignee or purchaser. Suppose the case of the property diminishing in value, and the remainder man had been a stranger, he would be entitled to be paid his full share. The case of *Goorouchurn Doss v. Goluckmoney Dossee* (Fulton's Rep. 165) establishes an exception to the rule of equal partition, when part of the estate is by the acquisition of one co-sharer; he was in that case held entitled to a double share of the accumulations. No authority is given by the Court below to show that the increment arising from the accumulations [547] of income of the joint stock becomes part of that stock.

The Attorney-General (Sir Richard Bethell), Mr. Cairns, Q.C., and Mr. Leith, for the Respondents. The difficulties in this case have been caused by what the Court below describes by "engrafting testamentary powers on the Hindoo law;" but we contend that the Appellant is not, upon the statements contained in the Bill, and with reference to the Hindoo law applicable to the subject, entitled, as widow and heiress of her deceased husband, to any share of the increment formed of the surplus income and proceeds of the joint property. The income with the principal passed by the

eleventh item of the Will to the four surviving brothers. Both by the plain language of the Will in question, and by the admission of facts in the Bill, these five brothers are to be considered as a joint and undivided family. The Hindoo law shows that the whole estate, corpus and increment, is indivisible until partition. An improved estates is equally divided; *Mitaeshara*, ch. i. sec. iv. par. 30; *Daya-Bhaga*, ch. vi. sec. i. pars. 1. 5. 50, ch. viii. par. 1; 1 *Strange's "Hindu Law,"* p. 198 (2nd Edit.); 2. *W. Macnaghten's "Princ. of Hindoo Law,"* 162: increment, therefore, follows the principal. These authorities show that the improved estate is to be equally divided. The case of *Gooroochurn Doss v. Goluckmoney Dossee* (Fulton's Rep. 165) expressly points out the difference between distinct property and increment. Now, the [548] Bill admits that the additions are increment. Our notion of the English law relating to tenancy in common is likely to mislead, but by the Hindoo law there can be no separate share of co-sharers till partition takes place.—[The Lord Justice Turner: Do these authorities go further than to say, that between co-sharers there is no right to an account of increment, as distinct from capital? but when capital goes one way and increment another, would there not be a right to account?—Until partition, there is no distinction between capital and income.—[The Lord Justice Turner: Suppose each son had a life estate only.]—That would be a gift of the usufruct only, and does not resemble this case. The Testator obviously intends that the family should continue a joint family; he addressed his sons as an undivided family; they were in the father's lifetime a joint family; he even treats of their commensality, which is evidence by itself of their constituting a joint family. They in fact continued joint. One of the tests by which partition is proved is separate income. *Daya-Bhaga*, ch. xiv. par. 8; *Colebrook's Digest*, art. cccxviii. (vol. iii. p. 386). Here the unity of the fund is admitted by the Bill. If then we only refer to the Hindoo law in ascertaining what the Will gives, it is plain that the Bill must be dismissed. The share of the Appellant's husband could not be ascertained until separation and partition. With regard to the other point urged by the Appellant, as to the remainder man having a right to the full share in the event of any loss of the corpus, we submit that if there was not enough income to provide for the charges created by the Will, the principal would be rightly expended, and the share to go over would be less than expenditure.

[549] Mr. Rolt, Q.C., in reply.

The consideration of the judgment was reserved, and was afterwards delivered, as follows, by

The Right Hon. The Lord Justice Turner (Feb. 5, 1858).—Sree Mutty Soorjee-money Dossee, the Appellant in this case, is the widow and personal representative of Surroopchunder Mullick; who was one of the five sons of Bustomdoss Mullick, the Testator in the cause out of which the appeal arises. Bustomdoss Mullick, by his Will, dated the 8th of March, 1841, made the dispositions contained in that instrument. He died on the 10th of March, 1841. Surroopchunder Mullick survived him; but afterwards died on the 25th of November, 1847. On the 20th of August, 1855, the Appellant filed her Bill in the Supreme Court of Judicature at Calcutta, in Bengal, against the Respondents, who are, or represent, the four other sons of Bustomdoss Mullick, claiming to be entitled to one-fifth of the income which arose from his estate in the interval between his death and the death of Surroopchunder Mullick, and to one-fifth of the accumulations made from that income. This Bill was met by demurrers for want of equity, and as to some of the parties, upon other grounds also; which, however, were not insisted upon in the argument before us. Upon the argument of these demurrers they were allowed by the Supreme Court, and the appeal before us is from the Orders by which they were allowed. The decision having been made upon demurrer, it must, of course, depend upon the allegations of the Bill, whether it ought to be upheld or not. [His Lordship here stated the Bill, as already set forth (*ante*, [Moo. Ind. App.] p. 527).]

[550] The case, therefore, which is made by this Bill is, that the income of the estate of Bustomdoss Mullick, which accrued between the time of his death and the death of Surroopchunder Mullick, was joint estate of the five brothers, and that the Appellant, upon the death of Surroopchunder Mullick, became entitled to his share of that income. That the Appellant, or the Appellant and her daughters, would be so entitled if the income in question is not affected by the gift over, contained in the

eleventh item of the Will, is not attempted to be denied; but it is insisted on the part of the Respondents, that by virtue of the gift over, the income passed with the principal to the four surviving brothers.

This, therefore, is the question which we are called upon to decide. It is a question between the estate of Surroopchunder and the parties claiming under the gift over; and, as it seems to us, it must depend wholly on the construction of the Will. In determining that construction, what we must look to, is the intention of the Testator. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the Testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made [551] and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the Testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption.

These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of this Testator to be collected from the words of his Will. Now there is here, in the first item of the Will, an absolute gift of one-fifth of all the Testator's property to each of his five sons; but in the eleventh item of the Will, in the event of any of the five sons dying without a son, or a son's son, there is a gift over to such of the other sons, or sons' sons, as may then be alive. Upon the literal construction of these dispositions, what is given in the first item is, in effect, taken away by the eleventh; for if full effect be given to the eleventh item, it would rest in contingency during the life of each son, whether his share would belong to him, or to his brothers, or nephews, depending upon whether he should die leaving a son or a son's son; but this construction cannot, of course, be admitted. To adopt it, would be to impute to the Testator this inconsistency, that he intended at the same time to give absolutely and contingently. This cannot have been his meaning. He must have intended that those to whom he gave absolutely should have some enjoyment of that which he gave to them. That enjoyment could not be less than the enjoyment of the income of their shares. It was suggested, in-[552]-deed, in the argument before us, that the words "the share that he has obtained of the immoveables and moveables of my estate," would reach the income no less than the capital. But, independently of what has been already said, this suggestion cannot, as we think, be maintained. The Will of a Testator must, *prima facie* at least, be taken to refer to that which is the subject of his disposition; the property which he has himself to give; and if he has evinced his intention to give that property, very strong and clear language must be required to counter-vail that intention, and subject the property which he has once given to his further disposition. No such intention can, as it appears to us, be collected from this Will; and so far, therefore, as the intention of this Testator is to be gathered from the words which he has used, we think that we are safe in concluding that his intention was, that his sons should, in any event, enjoy, during their lives, the income of their shares of his property. It is satisfactory to find that, in this respect, we agree in opinion with the Court whose judgment we are called upon to review.

Such, then, being the intention of the Testator, to be collected from the first and eleventh items of the Will, it is next to be considered whether the other dispositions of the Will evince any different intention, and it does not appear to us that they do. They seem to relate only to the mode in which the estate is to be administered, and to the burthens to which it is to be subjected.

If, therefore, we are to impute to this Testator any intention different from that which is to be collected from the words of his Will, it must be upon the ground that there are intrinsic circumstances which [553] disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive, to prevail, unless the different intention be clearly demonstrated. We may doubt

whether the Testator really intended what his words import, but a Court of construction must found its conclusions upon just reasoning, and not upon mere speculative doubts. What, then, are the extrinsic circumstances upon the faith of which we are called upon to conclude that it was the intention of this Testator that the income of his sons' shares of his property should not form part of their estates, but should go over with the principal of their shares? They are two: first, that this was a joint family, and that the sons were joint in estate; and secondly, that by the Hindoo law, where parties are joint in estate, the increment follows the principal. As to the first of these grounds, it does not seem to us at all to affect the question we are called upon to decide; for, admitting the family to have been joint, and the sons joint in estate, the right of any one of the co-sharers would not, under the Hindoo law, pass over, upon his death, to the other co-sharers; it would be part of the estate of the deceased co-sharer, and would devolve upon his legatees, or his naturel heirs. It does not, therefore, seem to us that it would follow from the sons having been joint in estate, that what was given to one was meant upon his death to go over to the others, even if the joint estate had been constituted by the Will; much less so if, as the Court in India had thought, and as we think, the Testator has not by his Will imposed upon his sons the obligation of continuing joint in estate.

[554] Then as to the rule of the Hindoo law, that the increment follows the principal where the parties are joint in estate. It is not necessary for us to give any opinion upon the extent and limits of this rule, and we desire not to be understood as intimating any opinion upon those points. The question in this case, as we view it, is, whether the rule is properly applicable to the case before us; and we are of opinion that it is not; assuming that the Testator could, if he had thought fit, have attempted to impose upon his sons the obligation to continue joint in estate; a point on which also we give no opinion. He has not, as we think, imposed that obligation, and we do not think that a rule which might well have been applicable had the obligation been validly imposed, can properly be applied in a case where the obligation has not been imposed. It was argued, indeed, at the Bar, that the Testator contemplated that his sons would continue joint in estate, and the learned Judges of the Supreme Court seemed to have so considered, and thence to have deduced the inference that he meant the income of each son's share to go over with the principal. We think, however, that the learned Judges were not justified in applying this assumption to the construction of the Will. The Testator must, of course, have known that his sons were joint in estate, and he has not attempted to interfere with their election whether they would continue so or not. If they had several in estate, there can be no doubt that the income of each share would have belonged to the owner of that share. Can we say that the Testator did not contemplate that there might be such a severance? and if not, on what ground are we to rest the inference which the Court has deduced? [555] Can we say that the Testator intended that if his sons continued joint in estate, the income of their shares should go over with the principal, but that if they severed in estate each should take his share of the income? We think not. Such an intention might have been expressed, but the Testator has not expressed it, nor, so far as we can see, does his Will furnish any sufficient ground for presuming that he so intended. In the absence of express declaration, or of what may be called necessary inference, we are of opinion that such an intention cannot be imported into the Will. The effect of it would be to render the disposition of the property dependent, not upon the Will of the Testator, but upon the subsequent acts of his legatees. The character and position of a legatee may well form the inducement to the gift in his favour, but we think it is going too far to say that in the absence of express declaration or necessary inference, the extent of the gift can be measured by the legatee's continuing or not continuing to hold that character and position. Such considerations do not, as we conceive, form legitimate elements in the construction of a Will. We collect from the judgment, that the learned Judges considered that it was more constant to the principles of the Hindoo law to hold that the increment should go over with the principal than that it should pass to the naturel heirs; but the construction which the learned Judges have put upon the Will by enlargement of its terms, seems to us to be at variance, rather than in consonance, with the spirit of the Hindoo law. Equality among the heirs is, as we

understand, the spirit of that law. The law does not treat the principal and the increment as undistinguishable in their nature, [556] for there is no doubt they may be severed, but it treats them as united for the purpose of dividing them equally amongst all the united family, that is, all the heirs; and if that entire equality cannot, as in the present case in consequence of the dispositions of the Will it cannot, be attained, the partial attainment of it seems to us to be more in the spirit of the Hindoo law, than its total rejection.

Upon these grounds, we find ourselves unable to agree in the opinion of the Supreme Court, and are of opinion that these demurrers ought to have been overruled; we shall, therefore, humbly recommend to Her Majesty that these Orders be reversed, and the demurrers overruled. The Supreme Court has thought that the costs of the demurrers in that Court ought to be paid out of the estate, and we think that the costs of the appeal ought to be so paid also, and we shall accordingly add this provision to our recommendation.

[See *Bissonauth Chunder v. Sreemuttu Bamasoondery Dossee*, 1867, 12 Moo. Ind. App. 60; *Juttendromohun Tagore v. Ganendromohun Tagore*, 1872, L.R. Ind. App. Sup. Vol. 65; for subsequent proceedings see 9 Moo. Ind. App. 123.]

APPENDIX

RULES AND REGULATIONS OF THE JUDICIAL COMMITTEE.

ORDER IN COUNCIL, 31st of March, 1855.

Whereas doubts have arisen with reference to the power of the Judicial Committee of the Privy Council to suspend or relax, under certain special circumstances, the Regulations in Appeal Causes established by Her Majesty's Order in Council of the 13th of June, 1853; Her Majesty, by and with advice of Her Privy Council, is pleased to order, and it is hereby ordered, That in Appeal Cases, in which a Petition of Appeal to Her Majesty shall have been lodged, and referred by Her Majesty to the Judicial Committee, the said Regulations shall be subject to any Order or Direction which, in the opinion of the Lords of the Judicial Committee, the justice of any particular case may seem to require.

C. C. Greville.

March 31, 1855.

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1857-60. By EDMUND F.
MOORE, Barrister-at-Law. Vol. VII.

GOOROOCHURN SEIN,—*Appellant*; RADANAUTH SEIN and Others,—*Respondents* * [June 15, 1857].

On appeal from the Supreme Court at Calcutta.

After an appeal from Calcutta had been set down for hearing, intelligence reached England shortly before the day appointed for the hearing, that the Appellant had been adjudged an Insolvent under the Indian Insolvent Act, 11th Vict., c. 21.

Upon the appeal being opened, the Court postponed the hearing for six months, to enable the Official Assignee in Insolvency at Calcutta, to revive the appeal and prosecute the same; and, in default, the appeal to be dismissed; and directed the Respondents to serve the Official Assignee in India with such notice.

No steps having been taken by the Official Assignee within the time limited for prosecution, their Lordships refused a further extension of time, and dismissed the appeal.

After this case was set down for hearing, intelligence reached this country just before the day ap-[2]-pointed for hearing, that the Appellant had been declared an Insolvent under the provisions of the Indian Insolvent Act, 11th Vict., c. 21, and that by an Order of the Court for the relief of Insolvent debtors at Calcutta, dated the 25th of February, 1857, the estate and effects of the Appellant were vested in the Official Assignee of that Court. The fact of the insolvency of the Appellant, and the vesting of his estate, was verified by an affidavit of the Respondents' agents in the appeal. No communication from the Official Assignee of the Insolvent Court at Calcutta had been received at the Council Office.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant, offered to proceed with the appeal, if the Court would permit the hearing.

Mr. Rolt, Q.C., and Mr. W. Knox Wigram, for the Respondents, submitted that the Court had no authority to bind the Official Assignee in Insolvency, in his absence, by any Order they might make in the appeal.—[The Lord Justice Knight Bruce: We have no authority.]—That being so, we then ask that the appeal be revived

* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir William H. Maule.

within a reasonable time by the Official Assignee in Insolvency, or that the same be dismissed with costs.

The Lord Justice Knight Bruce.—It is impossible to make an Order binding, in his absence, the Official Assignee in Insolvency at Calcutta; therefore, their Lordships cannot now enter into the merits of the appeal. The course their Lordships will pursue is this: to let the appeal stand [3] over for a limited time; the Respondents to serve the Official Assignee in Insolvency with notice, that unless the appeal be effectually revived, so as to be ripe for hearing at the sittings of this Court in February next, it will be dismissed with costs; liberty being given to the Official Assignee in Insolvency to take such steps as may be advised.

By the Order made thereon it was directed that the hearing of the appeal should stand over till the sittings of the Judicial Committee after Hilary Term, 1858, in order that notice should be served by the Respondents on the Official Assignee of the Court for relief of Insolvent debtors at Calcutta, and that the Official Assignee should be at liberty to take such proceedings as he might be advised therein, in default of which their Lordships would dismiss the appeal.

This order was served on the 8th of August, 1857, upon the Official Assignee at Calcutta, but no steps were taken by him to revive and prosecute the appeal.

Mr. R. Palmer, Q.C., now moved on behalf of the Appellant for an extension of the time for reviving the appeal. The application was supported by an affidavit of the Appellant's agent in London, stating, that there was a prospect of the Appellant arranging with his creditors so as to supersede the adjudication of insolvency.

Mr. Rolt, Q.C., in opposition.—The delay has already been prejudicial to the Respondents. The Official Assignee in Insolvency has been served with notice so long back as the 8th of August last, but he does not appear, or ask for time. [4] The Order of the Court made in June was conclusive that the appeal was to be revived by this sitting, or in default to be dismissed.

The Lord Justice Knight Bruce.—It was clearly understood at the last sittings, that the Appellant was in no circumstances to be heard. Justice to the Respondents requires that there should be no further delay. The Official Assignee in Insolvency has been served with notice so long ago as August last, but has not revived or even appeared here. The appeal must be dismissed, but each party must pay their own costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; c. *Dismissal for want of Prosecution*. S.C. 11 Moo. P.C. 76.]

SREE MUTTY BRINDASOONDERY DOSSEE, and MUDDOOSOODUN GHOSE,
—Appellants; ROODERPERSAUD MOOKERJEE, and Others,—Respondents * [Nov. 26, 27, 1857].

On appeal from the Supreme Court at Calcutta.

Where a long lapse of time since the right to sue arose, appears upon the face of the Bill, although there be no statutory bar, it may be met by demurrer; but to entitle the Defendant to demur to the Bill instead of putting in an answer, the case must be perfectly clear [7 Moo. Ind. App. 13].

Disputes arose in a joint Hindoo family, and a suit was brought in 1810 in the Supreme Court, to ascertain the respective rights of the members of the family in the joint estate. In 1811, a compromise was entered into by two of the Defendants, members of the family, and the Plaintiff, who executed a release to them. The litigation of the suit continued, and, in 1820, these two Defendants were allowed by the Court to rely upon the release, and the

* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

Plaintiff to impeach it; but it did not appear that the release had ever been the subject of adjudication. In 1853, the cause was heard upon further direction, when a considerable sum was found to be due to the then Plaintiff, by one of the Defendants so released in 1811, by the original Plaintiff. Upon a Bill filed by the representatives of one of these Defendants, setting up the release, which was charged by the Bill not to have been at issue in the previous litigation, a demurrer overruled upon appeal, as it was not clear by the Bill that the length of time from the date of the release operated as a bar to the relief sought, so as to allow of such a demurrer. Liberty, however, was allowed to the demurring Defendants to insist upon the same ground of defence by answer, and no costs given.

The question in this appeal arose on a general demurrer of the Respondents to a Bill filed by the Appellants, on the equity side of the Supreme Court.

[5] The Bill stated the details of former proceedings in equity, commencing in the year 1810, and terminating by a second decree, on further directions, in the year 1853. From the statements in the Bill it appeared, that the object of the litigation was for the division of the joint estate of a Hindoo family, which, in 1805, consisted of two brothers, named Kistnochunder Paul Chowdry, and Sumbhochunder Paul Chowdry, and the son, Buddinauth Paul Chowdry, of a deceased brother, named Ramneedy Paul Chowdry. Buddinauth Paul Chowdry was the Plaintiff in this original litigation. The two brothers had both died before the commencement of the suit, each leaving children who were the original Defendants to the suit. Two of the children of Kistnochunder Paul Chowdry, named Premchunder Paul Chowdry and Isserchunder Paul Chowdry, defended separately, and, after their answer to the Bill was put in, a settlement and release of all claims, dated the 29th of March, 1811, was come to between them and Buddinauth Paul Chowdry, the Plaintiff, in consideration of the sum of Rs. 49,000, paid by them to the Plaintiff. They, and their repre-[6]-sentatives after their respective deaths, were, however, kept before the Court in the original litigation, and the settlement and release were stated on their behalf in an answer to one of the many Bills of Revivor, and supplemental Bills, in the suit; and by a Decree, dated the 12th of December, 1820, after directing (*inter alia*) accounts of the joint estate, liberty was given to these Defendants to rely on the release of Buddinauth Paul Chowdry, with liberty also to Buddinauth Paul Chowdry to impeach it. Afterwards, in the year 1825, on the occasion of another supplemental Bill by Buddinauth Paul Chowdry, the release was pleaded in bar by Isserchunder Paul Chowdry, and the representatives of Premchunder Paul Chowdry, who was then dead. This plea was overruled. The Master's report was made in 1847, and confirmed; and the decree on further directions was made in 1850, whereby the rights of Buddinauth Paul Chowdry in the joint estate, as found by the Master's report, were declared, and an account of his share with interest directed, and also a partition of the immovable estate. A further report was made in 1853, and, afterwards, on the 1st of April, 1853, a second decree on further directions, was made by the Court, by which considerable sums were ordered to be paid by the Defendants, including the representatives of Premchunder Paul Chowdry and Isserchunder Paul Chowdry, to the representatives of Buddinauth Paul Chowdry, the Plaintiff, who had in the meantime died; and proceedings were afterwards taken to enforce this Decree.

In consequence thereof, the Bill which gave rise to the present appeal was filed on the 2nd of March, 1854, by the representatives of, or parties claiming under, Isserchunder Paul Chowdry, one of the original [7] Defendants claiming under the release, and, after stating the proceedings in the former litigation and the facts above detailed, the Bill set up the agreement and release of the 29th of March, 1811, charging to the effect that the release was a valid and subsisting release, and had not been pronounced upon or referred to in any of the Orders or Decrees of the Supreme Court, except that of the 12th of December, 1820, and that the Plaintiffs, as Executrix and Executor, were entitled to the benefit of it, and praying, in substance, that the Plaintiffs in the original litigation might not have execution of their decree against the Plaintiffs in the present suit, or against any other party in respect of anything released by Buddinauth Paul Chowdry, by the release, and

that an injunction might be granted to restrain the execution of the Decree contrary to the effect of such release.

The Respondents, the representatives of Buddinauth Paul Chowdry, filed a general demurrer to this Bill, for want of equity, and also because the Bill was altogether novel and unprecedented, and was filed contrary to the course and practice of the Court, and was defective in form as well as substance, being neither a Bill of Review nor a Bill in nature of a Bill of Review, nor a Bill of Supplement, and yet seeking to restrain the effect of Decrees and Orders made in former suits therein referred to, and to set those Orders and Decrees aside.

The demurrer came on for argument on the 7th of April, 1854, when the same was allowed by the Supreme Court, with costs. Against the Order allowing the demurrer, the present appeal was brought.

[8] Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellants.—The demurrer ought to have been disallowed, and the Defendants made either to answer or put in a plea to the Bill. The facts stated and charged by the Bill, disclosed a case which entitled the Appellants to the relief prayed, and it was for the Defendants to answer and to explain any facts relating to the release which might not appear upon the Bill. In *Bainbrigg v. Baddely* (13 Beav. 355 (reversed on appeal, 3, Mac. and Gor. 413), there was great delay on the part of the Plaintiff, but the Master of the Rolls held that the Plaintiff was not thereby deprived of any right he might have. The Bill in this case is to establish the release and settlement executed in 1811, and there is no bar to the Plaintiff's rights. The Bill was properly framed according to the principles and practice of equity pleading in the Supreme Court at Calcutta.

Mr. Rolt, Q.C., Mr. Rogers, and Mr. W. Jervis, for the Respondents.—No case is shown by the Bill to entitle the Appellants to any relief in equity against the Respondents. The alleged release and settlement was dealt with by the Supreme Court in the former litigation, and it must be presumed that the rights of all litigant parties in any way depending thereon, were finally determined by the Court in that litigation. The release upon which the Appellants rely, is by the Bill alleged to have been executed more than forty years ago: if, therefore, the questions arising thereon have not been fully and finally determined, the Appellants [9] have lost all right to relief in respect thereof, by lapse of time, laches, and acquiescence. But the Bill is altogether novel and unprecedented, and is contrary to the practice of Courts of Equity, and in any view of the cases no such relief as prayed for can be had. The Bill seeks to reverse or vary the effect of Decrees and Orders in former suits and proceedings, and yet it is neither a Bill of Supplement nor a Bill of Review, nor a Bill in the nature of a Bill of Review. The demurrer, therefore, was properly allowed by the Court below.

Judgment was delivered by

The Lord Justice Knight Bruce.—This is a question of allowing or overruling a demurrer to a Bill. The Bill was filed in 1854, by the executors of a Hindoo, named Isserchunder Paul Chowdry, and the story which it tells is in effect this, that in or before the year 1810, disputes arose in a numerous and wealthy family of Hindoos, concerning the division and amount of a large property, and the accounts connected with it. The disputes produced a suit, in which the Plaintiff was Buddinauth Paul Chowdry, a member of the family: the Defendants were many. Two among them became desirous of settling the matter, either generally, or so far at least as they were concerned, with the Plaintiff, and in the year 1811, a compromise was negotiated and arranged on the terms of paying the Plaintiff Rs. 49,000, and giving him certain other benefits which it is not necessary to specify, in exchange for a general release to be executed by him: and in that year the sum of Rs. 49,000 was accordingly paid by the compromising Defendants to the Plaintiff, who thereupon [10] executed a release to them. The suit appears to have continued: deaths from time to time happened (as they were likely to happen among so great a number of persons), and a Bill of Revivor, or Revivor and Supplement, having been filed in or shortly before the year 1819, Sumboochunder Paul Chowdry and Isserchunder Paul Chowdry, who were released by the instrument of release, if valid and effectual, and of whom the latter is represented by the Appellants now before us, in answering

that Bill, stated and relied upon the release of 1811, as a bar, or as binding the Plaintiff.

In the following year the cause was heard. By the Decree, certain directions were given and accounts ordered: among which directions it was, with reference to the release already mentioned (it having been proved in the cause), provided that the Defendants should be at liberty to rely on the release before the Master, and that Buddinauth Paul Chowdry should be at liberty to impeach before the Master the validity of it.

Nothing more is heard of the cause until the year 1825, when another death, or more deaths, having happened in the ordinary course of humanity, a plea was put in by Isserchunder Paul Chowdry, alleging the release as a ground why the suit should not be prosecuted. That plea was (and probably with propriety) overruled; there were numerous Defendants before the Court, and it might have been essential to justice among them all, that Isserchunder Paul Chowdry, whether released or not released by the Plaintiff, should remain on the record. That plea contains the last that we know or hear of the release: but after the lapse of nearly half a century, a report [11] is obtained in the cause, dated in February, 1847, which report, so far as the Bill before us states, and so far as we know, is absolutely silent with respect to the release, notwithstanding the direction, or at least permission, concerning it, contained in the Decree made more than twenty-six years before, which had produced the report; a report confirmed in the month of July, 1847. The cause is heard on further directions in the month of August, 1850. Still nothing is said of the release; the Order on further directions being just such an Order as would have been made if the release had never existed. This Order, as I understand, sends the matter, or part of the matter (of course not the release), again to the Master, which produces a further report in February, 1853. Still he was silent as to the release. The case was again heard on further directions in the month of April, 1853; the result being, that a considerable sum is found due to the original Plaintiff, or his representatives, and directed to be paid by various Defendants, including Isserchunder Paul Chowdry, or those representing his estate: against whom execution appears to have been issued accordingly. Whereupon this Bill was filed, stating circumstances previous to the release, and (among other allegations) containing this charge: "Your oratrix and orator charge, that the instrument of release signed and sealed by Buddinauth Paul Chowdry, and delivered to Premchunder Paul Chowdry and Isserchunder Paul Chowdry, as aforesaid, is a valid and subsisting release, and has in no way become void or vacated, set aside or cancelled; and that your oratrix and orator, as the surviving executrix and executor as aforesaid, are entitled to the full benefit and advantage thereof, and to [12] have the same carried into effect. And your oratrix and orator further charge, that the release, though after the original cause was at issue it was set up and relied upon by Isserchunder Paul Chowdry and Joynarain Paul Chowdry, in their answer to the Bill of Revivor and Supplement filed by Buddinauth Paul Chowdry, on the death of Premchunder Paul Chowdry, was not a matter in issue in the original, revived, and supplemental suits; or if in issue at all in the suits, was in issue only as to the right to revive the suit against Isserchunder Paul Chowdry and Joynarain Paul Chowdry by the Bill of Revivor of Buddinauth Paul Chowdry, or the supplemental matter thereof. And your oratrix and orator charge, that the release was never pronounced upon, nor the validity or invalidity or effect thereof decided by this Honourable Court, nor is the release mentioned in any of the Orders or Decrees of this Honourable Court in the suits, except in the Decree hereinbefore mentioned, bearing date 12th day of December, 1820, whereby liberty was given to Isserchunder Paul Chowdry and Joynarain Paul Chowdry to rely thereon, as evidence before the Master."

To this Bill the demurrer before us has been filed, and the question is, whether a case has been stated by the Bill, requiring to be met by plea or answer: a question in some degree embarrassing, if not distressing. Litigation has been existing in this family for very nearly half a century. All the original parties, I believe, are dead, and it is impossible, I think, to read these papers, without being impressed with an opinion of the probability that much of what is important to the case is kept back, and that those who have to deal with the record in its actual shape must

[13] be dealing with less than half of the merits. Still, as Mr. Palmer has said, this may, in a sense, be through the act of the demurring Defendants, who may be said to prevent the whole story from appearing, if now it does not appear. We cannot say that they are much, if at all, to blame for desiring that a term should be put as speedily as possible to a litigation which, at so exhausting an expense, has lasted so many years. Still, however, if the case upon the Bill is one requiring a plea or an answer, a plea or an answer there must be; and their Lordships, almost with regret, find themselves obliged to come to that conclusion: a conclusion as to which they would possibly have felt even more unwillingness than they do, had they been informed of the reasons upon which the Judges of the Supreme Court proceeded in allowing the demurrer. They have been unable, however, to procure from either side, or from any quarter, a statement of what those reasons were.

The first point on which reliance has been placed by the Defendants in support of the demurrer is, the length of time that has elapsed since the transactions of 1811, coupled with the other circumstances appearing on the Bill; and it is unquestionably true, that there are cases in which length of time, the lapse of time appearing on the Bill since the right to sue arose, may be effectual in favour of Defendants on a demurrer: but such cases, especially where the bar is not statutory, as here it is not statutory, must be perfectly clear.

Their Lordships are of opinion, that it is not so clear upon this Bill that time has operated as a bar, as to render it right to allow the demurrer on such [14] a ground; especially (and what I am now about to say belongs also to the rest of the case), as the release was brought under the attention of the Master by the Court, at least so far as the Court could do it without the intervention of the parties in the Master's office. So far as this record shows, it is not afterwards noticed: a circumstance to be possibly accounted for in this way—that the presence of the released Defendants might have been reasonably considered necessary to the obtaining of justice between the Plaintiff and the other Defendants, so as to delay the practical operation of the release until the conclusion of the cause.

The next point was, that the invalidity of the release must be regarded as having been adjudicated by reason of the long silence in these proceedings on the subject, and the absence of notice of it in the first report. Their Lordships are of opinion that, as far as at present appears, it would be unsafe to ascribe that effect to the proceedings which have taken place; and that mainly for the reason already given, namely, that justice, as between the Plaintiff and the Defendants not released, and among all the Defendants, might have required the released parties to continue to the end of the cause, an end (wonderful as it may seem) which the representatives of the original parties have only just reached.

The third point raised was, that a new Bill was unnecessary, and was superfluous: especially by reason of the reference or permission upon the subject of the release contained in the Decree.

Their Lordships, however, are not of that opinion: they consider that it is at least very uncertain whether, without a Bill, effect could be given to the release for [15] any purpose useful to either of the parties, and that if the Plaintiffs (the Appellants here) are entitled to the benefit of the release, the proper course seems to have been to file a Bill for that purpose. Their Lordships, though impressed, as I have said, with a belief of the probability that ultimately the Appellants may be found to have no case, and impressed with a strong suspicion that important facts remain behind, of which no knowledge, no information, has been communicated by the present record, still think, that if the Plaintiffs will insist upon having this Bill met by a plea or an answer, they are entitled to do so; but considering the great length of time which has been allowed to elapse, considering the long silence on the subject of the release in the proceedings, considering that in effect the Bill seems almost to have invited a demurrer, their Lordships think that, overruling the demurrer, they should do so expressly without any costs, either in the Supreme Court or here, and without prejudice to the right of the demurring Defendants to insist upon the same ground of defence by answer.

[16] RANEE HURROSOONDREE DIBIAH,—*Appellant*; RAJAH PRAN KISHEN SING,—*Respondent* * [Dec. 7, 1857].*On appeal from the Sudder Dewanny Adawlut, Bengal.*

Restoration of an appeal allowed, upon condition of the Appellant lodging in England security for costs of the appeal. Six months having elapsed without the Appellant having lodged the required security, the Respondent applied to dismiss the appeal by reason of the non-performance of that condition. As it appeared that the Appellant's agent was in daily expectation of funds from India, the case was, upon the Appellant paying costs of the day, ordered to stand over for three months, for the Appellant to perform that condition: in failure thereof the appeal to stand dismissed.

The facts relating to the restoration of this appeal are reported in 6 Moore's Ind. App. Cases, p. 491. A petition was now presented by the Respondent to dismiss the appeal. The petition set forth that six months had elapsed since the date of the Order in Council, but that the Appellant had not complied with the terms on which the conditional Order restoring the appeal was made, and, in particular, had not given such security for costs as therein prescribed, or any security whatever, and, that the Appellant had not lodged a petition of appeal, although she was proceeding with the printing of the transcript, and thereby involving the Respondent in unnecessary expense and costs before any petition of appeal lodged, or security given. This petition was opposed and an affidavit filed by the Appellant's agent, setting forth, that a petition of appeal had been lately lodged and that the printing was going on, but that the appeal could not [17] be heard before the February sittings; that he had not yet received from India the amount of the securities required to be lodged in the Council Office for costs, etc., but that he was in daily expectation of receiving the same.

Mr. Leith, for the Respondent, urged that there was no excuse for the delay and non-compliance with the Order in Council.

Mr. Wigram, Q.C., for the Appellant, submitted that there had been no real delay, and that the only fault arose from not depositing security, which the agent of the Appellant being without remittances, had been compelled to omit, but being in daily anticipation of receiving funds, that omission would be immediately supplied.

The Lord Justice Knight Bruce.—In the circumstances, we think that the Appellant should have three months more time, but she must pay the costs of this application, and expedite proceedings so that the case may be heard at the sittings in February next. A peremptory Order will be made that the appeal stand dismissed, unless within three months from this day the security be perfected as previously ordered.

It was, therefore, ordered by their Lordships, that the costs of the Respondent on this application should be forthwith taxed by the Registrar of the Privy Council and paid by the Appellant, or her agents in this country, and, that their Lordships would report to Her Majesty, that the appeal be dismissed, unless the sum of £500, for security for costs, be deposited with the Registrar on or before the 7th of March next.

[18] The costs were taxed accordingly, but the Appellant having failed to comply with the condition imposed by the Order, it was finally ordered, that the appeal be dismissed, and the Appellant further condemned in the costs incurred by the Respondent on the application on the 7th of December, 1857.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; d. *Restoring*. S.C. 11 Moo. P.C. 305. See O. in C. of 13th June, 1853, s. 5 (Stat. R. and O. Rev. iv. p. 304).]

* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. The Lord Justice Turner.

CHUOTURYA RUN MURDUN SYN. —*Appellant*: SAHUB PURHULAD SYN
Respondent * [Nov. 27, 28, and 30, and Dec. 8, 1857].

On appeal from the Sudder Dewanny Adawlat at Calcutta.

An illegitimate son of a Khatri, one of the three regenerate castes, by a Soodra woman, cannot by the Hindoo law of inheritance, succeed to the inheritance of his putative father; but he is entitled to maintenance out of his deceased father's estate [7 Moo. Ind. App. 50, 51].

So held in the case of a disputed succession to the Rajdom and Zemindary of Rannuggur, in the Presidency of Bengal, the Rajah last seized, the putative father, being a Rajpoot of the Khatri class.

Secus. In the case of the Soodra class, illegitimate children being qualified to inherit.

Inquiry into the history of the Khatri class. Such class held not to have lost caste and sunk into the Soodra class [7 Moo. Ind. App. 45, *et seq.*].

The Rajpoots of Central India, and in the District where the Rajdom of Rannuggur is situate, held to be of the Khatri class, and that the right of succession to the Raj and Zemindary was to be determined by the laws and customs of that class.

The question in this appeal involved the right of succession to a Raj; the issue raised being, whether [19] the Appellant was, according to the Hindoo law and right of caste, entitled to succeed to the Rajdom and Zemindary of Rannuggur, in the District of Sarun, in the Presidency of Bengal.

The circumstances out of which the appeal arose were as follow:—

The late Rajah Umur Purtab Syn died on the 26th of November, 1834, being at the time of his death in the undisputed possession of the estate, the right to which formed the subject-matter of this appeal. He was the half brother of Rajah Tej Purtab Syn, who died on the 1st of June, 1832, leaving three widows, Maharanee Telotman Dabee, Ranee Shree Kanta Dabee, and Ranee Tej Koomaree Dabee, him surviving. Soon after his death, his widow, Maharanee Telotman Dabee, asserted a claim to the whole of the Rajdom, by virtue of a deed of gift alleged to have been executed by her husband in his lifetime; and a dispute having arisen between her and the late Rajah Umur Purtab Syn, as to the right of succession to the Rajdom and Zemindary, such dispute was ultimately compromised by the Maharanee Telotman Dabee agreeing to accept during her life the revenue of thirty-nine of the villages belonging to the Rajdom and Zemindary for her maintenance, and she thereupon withdrew her claim to the rest of the property.

The late Rajah Umur Purtab Syn was a Rajpoot, and had, as it was alleged, three wives. By the first alleged wife, Ranee Lutchmee Dya Dabee, who predeceased him, he had one son, the Appellant. This marriage was denied by the Respondent, and that fact was one of the questions in dispute. He had no children by his two other wives, one only of whom, Ranee Umur Raj Lutchmee Dabee, survived him. For [20] several months previous to his death, the Rajah, being unequal to the transaction of public business, with the view of providing for the efficient discharge of the duties of the Rajdom, formally invested the Appellant co-ordinately with himself with all proper authority for the conduct and management of the affairs of the Rajdom. For about three weeks previously to his death, the Rajah was both physically and mentally incapable of any effort. Upon his death, the Appellant performed his obsequies. His widow, Ranee Umur Raj Lutchmee Dabee's name was entered on the Collector's books as heir, and she entered into the possession and beneficial occupation of the Rajdom, and continued in such occupation until her death, which event took place on the 24th of February, 1840. Shortly after her death, the Collector of the District was directed to keep the estate under attachment until the

* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

title to its succession, which had in the meantime been claimed by several persons, and, among others, by the Government claiming by escheat, was ascertained.

The first of such claims was made on the 31st of August, 1835, by a suit instituted in the Zillah Court at Sarun, by Oodey Purtab Syn, against Maharanee Telotman Dabee, Rancee Sree Kanta Dabee, and Rancee Tej Koomaree Dabee, the three widows of the Rajah Tej Purtab Syn, and against Rancee Umur Raj Lutchmee Dabee, and the Appellant, in which suit the Plaintiff alleged that the Appellant was the son of a slave girl. The Plaintiff founded his claim to the succession as being heir to the late Rajah Umur Purtab Syn.

On the 5th of May, 1836, another suit was instituted for possession of the entire villages appertaining [21] to the Rajdom by the Respondent, then suing as father and guardian of his son, Futeh Bahadoor Syn, an infant, against the aforesaid widows of the Rajah Tej Purtab Syn; Rancee Umur Raj Lutchmee Dabee; and Oodey Purtab Syn. The claim of the infant, Futeh Bahadoor Syn, was based on the allegation, that the late Rajah Umur Purtab Syn had, while dangerously ill and despairing of life, executed an Ijazut Puttur (Power and Will) in favour of the three widows of his deceased brother, the Rajah Tej Purtab Syn, and of his own widow, Rancee Umur Raj Lutchmee Dabee, directing them to confer the Rajdom after his death, upon the infant, Futeh Bahadoor Syn; that, in pursuance of such direction and authority, a Soorut Hal (representation of facts) acknowledging the right of Futeh Bahadoor Syn, had been agreed to by the four widows, and duly attested by the Raj Gooroo and Purohuts (Head Priest and Priests) and other respectable men; and that, after the expiration of the usual term of Birkhee (mourning) the Rajdom had been duly conferred, by the above named four widows, upon the infant, Futeh Bahadoor Syn.

On the 9th of June, 1836, Maharanee Telotman Dabee put in her answer to the plaint of Oodey Purtab Syn, and in that answer, for the purpose of showing the invalidity of the claim in that suit, she relied upon the alleged bestowal of the Rajdom on the infant, Futeh Bahadoor Syn, in the manner asserted by the Respondent in his plaint; and she also alleged that Rancee Umur Raj Lutchmee Dabee had, some time previously thereto, recognised and acknowledged the Appellant as the son of the late Rajah Umur Purtab Syn.

The answer of Rancee Umur Raj Lutchmee Dabee to the plaint of the Respondent, was put in on the 6th [22] of October, 1836, some time before the Appellant was made a party to that suit; and in that answer she urged among other reasons, against the validity of the infant's claim, that the Ijazut Puttur could never have been executed by the late Rajah Umur Purtab Syn while the Appellant, his son, was alive; and she there inaccurately stated, that the Appellant was the son of the second wife of the late Rajah Umur Purtab Syn.

On the 11th of March, 1837, the Respondent, in his then character of guardian of his infant son, Futeh Bahadoor Syn, filed his replication, relying upon the validity of the Ijazut Puttur, and on the subsequent bestowal of the Rajdom in pursuance thereof by the above-named four widows.

On the 7th of January, 1838, Rancee Umur Raj Lutchmee Dabee filed her rejoinder to the plaint, wherein she repudiated the claim made on the infant's behalf by the Respondent as fraudulent.

By an Order of the Zillah Court, bearing date the 26th of March, 1838, the Appellant was for the first time called upon to oppose the claim asserted by the infant son of the Respondent; the Appellant accordingly appeared, and was instrumental in refuting and exposing the fabricated evidence and forgery upon which the claim of the Respondent's son was based: but, as that claim was also founded upon the imputation of the Appellant being illegitimate, and as such incapable of inheriting, the Appellant's pleading and evidence was principally directed to the repudiation of such a charge, and he adduced several witnesses to prove the marriage between the late Rajah Umur Purtab Syn and his mother.

On the 7th of July, 1838, a supplementary [23] petition was filed in this suit by Rancee Umur Raj Lutchmee Dabee and the Appellant, for the purpose of correcting the statement made in the answer of Rancee Umur Raj Lutchmee Dabee, to the effect that the Appellant was the son of the second wife of the late Rajah Umur Purtab

Syn, and of recording that the Appellant was the son of the late Rajah Umur Purtab Syn by his alleged first wife, Rancee Lutchnnee Dya Dabee.

The suit of the infant, Futeh Bahadoor Syn, by his guardian, the Respondent, together with the other suit, in which Oodey Purtab Syn was Plaintiff, came on for hearing before the Zillah Court at Sarun, on the 7th of May, 1849, on which occasion both suits were dismissed with costs, and the claim of the infant, Futeh Bahadoor Syn, was adjudged to have been based on fabricated evidence and forgery. The reasons given by the Court for dismissing the suit of Oodey Purtab Syn were, that, although the present Appellant had been proved to be the son of Rajah Umur Purtab Syn, the question of his title to succeed to the Rajdom in the lifetime of Rancee Umur Raj Lutchnnee Dabee was not one which arose in that case, because between him and the Rancee Umur Raj Lutchnnee Dabee there was no disagreement or complaint; and, whether the present Appellant was entitled or not to the Rajdom, the Plaintiff, Oodey Purtab Syn, on the plea of being connected in the agnatic line, could have no right to possession during the life of the Rancee.

Against the dismissal of these suits, Oodey Purtab Syn, and the Respondent on behalf of his infant son, respectively appealed to the Sudder Dewanny Court.

[24] After the appeal of Oodey Purtab Syn had been presented, before any further proceeding was taken, and on the 24th of February, 1840, Rancee Umur Raj Lutchnnee Dabee died, and thereupon the Plaintiff, Oodey Purtab Syn, and the Respondent (as father and guardian of the infant, Futeh Bahadoor Syn), each presented separate petitions to the Sudder Dewanny Court, claiming the heirship to the deceased Rajah Umur Purtab Syn, and Mr. John Fleming Martin Reid, one of the Judges of the Sudder Court, ordered that the Principal Sudder Ameen of the Zillah Court should receive their proofs of being heirs to the deceased, while in the interval the estate of the deceased was to be attached by the Collector under the order of the Judge, and placed under a manager. A proclamation was also issued, under the Order of the Sudder Court, for the attendance of the heirs of the deceased, under which the Plaintiff, Oodey Purtab Syn; the Respondent, as guardian aforesaid; the two surviving widows of Rajah Tej Purtab Syn, and the present Appellant, attended before the Zillah Court to prove their respective claims to heirship; such proofs as were offered by them respectively were taken by the Principal Sudder Ameen of the Zillah Court, and forwarded to the Sudder Court.

After these proceedings had been taken, and on the 7th of November, 1840, the papers were again brought before Mr. Reid, who considered it proper to take a Bywasta (opinion) from the Pundit attached to the Sudder Court, on the question, whether among Hindoos, a son by a woman of unequal rank, while lineal relations were forthcoming, would be entitled to inherit the estate of his deceased father. To which the Pundit stated his opinion to the following effect:—[25] "To the best of my judgment, among Hindoos of the Rajpoot caste, a son who is not born from a woman of equal rank and caste, can be reckoned as son, and will be entitled to the estate of a deceased father, a near relative of lineal descent living notwithstanding; because a Rajpoot is of the Soodra caste, and a son born to an individual of the Soodra caste, even from the womb of a slave, etc., such son is reckoned his son by the Shaster laws, and is entitled to succeed to his father's estate, a near relative of lineal descent living notwithstanding;" and he added, "The meaning of the Guranth Mootuchtera, etc., is, that a son born of a slave woman, that is, of an unmarried woman of the Soodra caste, during the lifetime of his father, according to his father's pleasure, can obtain a share of his property; and after the death of his father, brothers born in wedlock from a woman of the Soodra caste are required to give to their illegitimate brother a share in the property of the father, in proportion to one half of their own share; but if there be no legitimate offspring, that is to say, no issue from a married woman, in such a case the illegitimate son from an unmarried Soodra woman will be entitled to the whole of his father's estate."

On the 5th of February, 1841, the case in which Oodey Purtab Syn was Appellant, was again brought before Mr. Reid, together with the Bywasta and the papers in the infant's suit; when Mr. Reid held, that although the Bywasta was in favour of the present Appellant, it was inexpedient to consider the case summarily and without going into its full merits, as well as into the case of the infant then suing by the Respondent, his guardian, inasmuch as it also related to a claim of inheritance of

the property of the late [26] Rajah Umur Purtab Syn; and he accordingly adjudged that, until the decision of the two cases, the property in dispute should continue attached by the Collector; and that it was proper that the two cases should be taken up and tried together, without regard to their respective numbers; and that all claimants should be left at liberty to come forward; and that the name of the individual whose claim to the estate should be found good and valid, was to be entered in the Collector's records; and that it was incumbent on all parties to take early steps to bring the subject-matter of both the cases to a speedy termination.

On the 23rd of May, 1842, the two cases came on to be heard before Mr. Edward Lee Warner, and Mr. James Shaw, two other of the Judges of the Sudder Dewanny Court, who said that, after deliberate consideration, they perfectly agreed in the opinion pronounced by the Principal Sudder Ameen on the 7th of May, 1839, in regard to the invalidity of the Ijazut Puttur, filed by the Respondent, and of certain letters filed by Oodey Purtab Syn; but they added, "As inquiry into the agnatic descent of the Appellants in both cases, and the objections made by Chuoturya Run Murdun Syn, and his marriage in a Rajpoot family, has been neglected by the Principal Sudder Ameen, we return the decisions of the Principal Sudder Ameen, dated the 7th of May, 1839, as incomplete; and, under cl. 2, sec. 2, of Reg. IX, of 1831, hereby order that the papers of this case and of case No. 50, of 1840 (the case now under appeal), with copy of this proceeding, be sent back to the Principal Sudder Ameen of Sarun, accompanied with a precept with this order, that he restore both the cases to their [27] former number; and, as regards this case, he should inquire whether the marriage of Chuoturya Run Murdun Syn, who declares himself to be the son of Rajah Umur Purtab Syn, and whose marriage by the papers appears to have taken place in the village of Bel Ghat in Zillah Goruckpoor, in the family of Hindoo Saltee, of the Rajpoot caste, had actually taken place in a Rajpoot family, and whether he eats and drinks with them or not, and whether the marriage of Rajah Umur Purtab Syn with Lutchmee Dya Dabee, the mother of Chuoturya Run Murdun Syn, was solemnized according to the custom and practice of his family or not; and after requiring and obtaining from Sahub Purlulad Syn, father and guardian of Futeh Bahadoor Syn, the Plaintiff in case No. 50, of 1840, a petition in regard to his agnatic descent and a genealogical table and documentary proofs and witnesses from both the parties, to try and decide the two cases, as may be most consistent with justice and equity, as regards the heirship of Chuoturya Run Murdun Syn to the estate of his father Rajah Umur Purtab Syn, and the relationship of the parties according to the genealogical table given in by both."

Under this Order, the Respondent, on the 5th of November, 1842, filed a supplemental petition, wherein he abandoned all claim on behalf of his infant son, under the Ijazut Puttur previously set up by him, and for the first time claimed in his own right to be entitled to succeed as heir to the Rajdom and estates, by reason of an agnatic descent in the seventh degree alleged by him from one Rajah Purtab Syn, whom he alleged to have been the common ancestor of himself and the late Rajah Umur Purtab Syn; and that petition, among other statements, averred, [28] that the Principal Sudder Ameen had stated that the mother of the Appellant was not of equal caste with the late Rajah Umur Purtab Syn, and that the Ranee Umur Raj Lutchmee Dabee had presented a petition on the 19th of February, 1836, in which she had stated that the Appellant was illegitimate.

The whole question as to the right of succession to the Rajdom and estates having been remitted by the Order of the 23rd of May, 1842, to the Zillah Court at Sarun, various other claimants came forward, including Oodey Purtab Syn, and the surviving widows of Rajah Tel Purtab Syn, and the Government, claiming by escheat; but inasmuch as none of these claimants, except the Appellant, appealed from the decree of the Sudder Dewanny Adawlut, ultimately pronounced on the 9th of September, 1846, it is unnecessary to refer more particularly to any of such claims.

On the 17th of July, 1844, the Vakeel of the Appellant stated in answer to a question from the Court, that Reet Ram was the maternal grandfather of the Appellant; and that he (Reet Ram) resided in the mountains of Bhurkut, in Nepaul; and at a subsequent sitting of the same Court on the 3rd of August, 1844, the Appellant's Vakeel corrected a statement made by the Vakeel of the Respondent, to the effect that Oomraotee Dabee was the first wife of the late Rajah Umur Purtab Syn; and

stated, that the name of the late Rajah Umur Purtab Syn's first wife was Ranee Lutchmee Dya Dabee, the mother of the Appellant. The Appellant and the Respondent, and the other claimants for the right of succession, produced various depositions and documentary evidence in proof of their respective claims, before the Principal [29] Sudder Ameen, to establish that the late Rajah Umur Purtab Syn was married according to the custom of his family to Ranee Lutchmee Dya Dabee; that he was a Rajpoot; that the Rajdom was duly conferred upon the Appellant by his father, the late Rajah Umur Purtab Syn, by the ceremony of investing him with the sacerdotal cord, and by placing him on the Guddee; and that the title of "Choturiya" was accorded to him by the late Raja Umur Purtab Syn; that such title was, in conformity with the custom of the family, only assumed by the heir apparent to the Rajdom, and had been assumed by the late Rajah Umur Purtab Syn in the lifetime of his half-brother, the late Rajah Tej Purtab Syn; that the Appellant was in the habit of eating and drinking, both with the late Rajah Umur Purtab Syn, and his half-brother, the late Rajah Tej Purtab Syn; that he duly performed the funeral rites of the late Rajah Umur Purtab Syn; that he was married to the daughter of Hindoo Sahee, a Rajpoot; and that the Appellant was in the habit of eating and drinking with Hindoo Sahee. The Appellant examined no witnesses to establish the marriage, but he gave evidence to show that the Rajdom and estates were neither founded nor acquired by Purtab Syn, whom the Respondent alleged to have been the common ancestor of himself and the late Rajah Umur Purtab Syn, the Rajdom having been founded by Doorg Bijey Syn, the grandson of the alleged common ancestor, and the estates having been acquired by Run Dutt Syn, the son of Doorg Bijey Syn. He also gave evidence to show that in the year 1829, five years before the death of the late Rajah Umur Purtab Syn, an estate had been purchased by him in the name of and for the Appellant, [30] as his acknowledged son; and that such relationship was substantiated by the fact of the Appellant being described as the son of the late Rajah in the receipt and bill of sale of the estate, as well as by the corroborative testimony of the witnesses before alluded to. In addition to the above evidence, and with the view of refuting an imputation made in the course of the proceedings, that the Appellant's mother was not of equal caste with the late Rajah Umur Purtab Syn, the Appellant filed a genealogical table of his maternal ancestors, whereby it appeared that his mother, Ranee Lutchmee Dya Dabee, was the daughter of Baboo Urut Ram, who was the son of Rajah Anunt Khan, who was the son of Raja Moon Muhdur Khan, who was the Rajah of Bhurket. The Appellant, moreover, contended that, even assuming his father and mother not to have been married, or that he was unable to adduce sufficient evidence of their marriage, yet, that as the late Rajah was a Rajpoot and a Soodra, the Appellant, as his son, was capable of inheriting the Rajdom and estates, and was entitled, in default of a legitimate son, to succeed thereto in preference to all collateral relatives whomsoever.

Witnesses were also examined by the Respondent to show his agnatic descent from a common ancestor of the late Rajah Umur Purtab Syn. The Respondent also entered into evidence to prove that the Appellant's mother was not the wife, but the concubine, of the late Raja Umur Purtab Syn; and in support of such allegation, he relied upon a proceeding before a magistrate on the 3rd of March, 1836, in which the Appellant's mother was described as "Bhutranees," or a concubine.

On the 21st of September, 1844, the Principal [31] Sudder Ameen deemed it necessary previous to entering on the merits of the several claims, to call for a Bywasta of the Pundit of the Patna Court upon certain questions respecting the title of the Claimants to succeed to the Rajdom. The Appellant remonstrated, by petition dated the 23rd of September, 1844, against such a course of proceeding, on the ground that a Bywasta had been already obtained at the instance of Mr. Reid, one of the Judges of the Sudder Dewanny Court, upon the main point, and that the Respondent and Sree Kanta Dabee were both very largely indebted to influential merchants at Patna, by whom in all probability the Pundit there would be biassed. The Principal Sudder Ameen, however, called for the Bywasta of the Pundit of the Patna Court. The question submitted to that Pundit stated that the Appellant's mother was of a different caste from that of the deceased Rajah Umur Purtab Syn. The Bywasta of the Patna Pundit was to the effect, that the Appellant was entitled to maintenance only.

On the 27th of February, 1845, the Principal Sudder Ameen of Sarun delivered his judgment, rejecting the Appellant's claim to the inheritance, and affirming the title of the Respondent as heir to the deceased Rajah Umur Purtab Syn, and finding the Appellant entitled to Rs. 6000 per annum for his maintenance, and he ordered that each party should bear his own costs of the suit. In coming to these conclusions, the Principal Sudder Ameen grounded himself principally upon the Bywasta obtained from the Pundit of the Patna Court, and upon the assumption that the decree of the Sudder Court, dated the 23rd of May, 1842, was limited only to an inquiry whether the mother of the Appellant was married, and that he [32] was precluded thereby from entering into the question of the Appellant's right to succeed as heir, even if not born in wedlock.

The Appellant appealed from this decision to the Sudder Dewanny Adawlut at Calcutta, which Court, on the 9th of September, 1846, affirmed the decision of the Zillah Court, with the exception of that portion which gave the Appellant maintenance out of the deceased Rajah's estate, which was reversed and disallowed, and also the costs of the Respondent in the Zillah Court, which the Appellant was ordered to pay; and the Court dismissed the appeal with costs, holding that it was not open to the Appellant, after the pleadings and proceedings in the original suit, and the Order of the 23rd of May, 1842, to claim the succession as heir, without establishing the marriage of his parents, and that he had failed to establish the fact of such marriage.

The present appeal was from this decree.

Mr. R. Palmer, Q.C., and Mr. Macnaghten, for the Appellant.—The evidence adduced established that the Appellant was the legitimate son and heir of the late Rajah Umur Purtab Syn; and as such he was entitled to inherit the Rajdom and Zemindary in dispute. Even if the evidence of the *factum* of the marriage be not as conclusive as it might have been, yet the fact of the recognition of the Appellant's legitimacy by his father, Rajah Umur Purtab Syn, is clear from the title he gave him of "Chuoturya;" a title which, according to the custom of the family, can only be assumed by the heir apparent. The fact that the Appellant was so designated is not disputed. Again, the evidence [33] of the witnesses as to the treatment of the Appellant by his father, the uniform affection shown him, his living and eating in common, his investiture with the sacerdotal cord, and his marriage into a Rajpoot family, all establish his acknowledged legitimacy. No credit can be given to the Respondent's witnesses that no marriage took place. They are the very witnesses who spoke to the fabricated Ijazut Puttur. The decree appealed from cannot be supported. It is founded in a great measure on evidence taken in suits between other parties, and not between the Appellant and Respondent. We conceive that by the presentation of the petition in November, 1842, by the Respondent, an entirely new litigation was commenced, and a fresh issue joined between the Appellant and Respondent, and that for the purposes of his defence against the Respondent's claim, the Appellant was not limited to the precise manner in which his defence had been stated upon the pleadings in the original suits. Supposing, however, that it should be held that it was competent for the Respondents, after the Order of the Sudder Dewanny Court, of the 23rd of May, 1842, to assert his own title as heir of the late Rajah Umur Purtab Syn, and as such to claim the Rajdom and Zemindary against the Appellant, then we insist that the suit must from that time be considered as having been constituted between new parties without written pleadings, and the Appellant ought not, as between himself and the Respondent, to be limited by pleadings in a suit between himself and the Respondent's infant son, or by the form of any proceedings which had been taken, or orders which had been made, in that or any other suit before the final and sub-[34]-stantial issue was joined between himself and the Respondent. Indeed, the decree of the Sudder Dewanny Court proceeded upon an assumption altogether erroneous; namely, that the only question at issue in the case, so far as the Appellant was concerned, rested upon the legitimacy of birth and not upon the title of the Appellant generally as heir, and the Courts have not taken that point into consideration. The cause, therefore, ought to be remitted to the Court below with special directions on this point. Another objection to the decrees of the Zillah and Sudder Dewanny Courts is, that those decisions were founded upon an opinion of the Pundit of the Patna Court, on

an assumed state of facts neither admitted nor proved; namely, that the Appellant's mother was a Soodra, and a different class from that of the late Rajah Umur Purtab Syn. This opinion was, however, contrary to the Hindoo law, for even if she was a Soodra, and he of the regenerate class, such marriage is good, and the issue legitimate. The *Mitacshara*, ch. i. sec. xi. p. 302, note.

Assuming, however, the Appellant to have failed in substantiating by evidence the marriage between the late Rajah and his mother, or his own legitimacy, the fact of his being the only son, though illegitimate, of the late Rajah, is sufficient by the Hindoo law to entitle him to succeed to the whole of the deceased father's estate. That was the opinion of the Pundit consulted by the Sudder Court in this case. His paternity is not in dispute. Rajah Umar Purtab Syn was a Rajpoot, and must be considered as one of the Soodra caste. All Rajpoots are Soodras. There are now only Brahmins and Soodras, the two intermediate regenerate classes having lost caste, and become [35] merged into the Soodra class. Ward's "Account of the Hindoos," vol. i. pp. 66, 91. Tod's "Annals and Antiquities of Rajasthani," vol. i. p. 53. Malcolm's "Memoir of Central India," vol. ii. p. 125. Steele's "Summary of the Law and Custom of Hindoo castes," pp. 95, 96. The "Vishnu Purana," ch. vii. and viii., by Wilson. The "Ayeen Akbery," vol. ii. p. 377. The Appellant, therefore, as the illegitimate son of a Soodra, was capable of inheriting the Rajdom and estates, and was entitled, in default of any legitimate son, to succeed in preference to any collateral relatives. The *Mitacshara*, ch. i. sec. xii. Daya Bhaga, ch. ix. sec. 31, p. 151. Inst. of Menu, ch. ix. p. 179. Strange's "Hindu Law," vol. i. pp. 69, 132, 173 (2nd. edit.). Colebrooke's Dig., vol. iii. ch. cxxiv. Macnaghten's "Principles of Hindu Law," vol. i. p. 18. *Chendrabham v. Changooran* (S.D. Decis. Mad. 50).

In any circumstances the decree of the Sudder Dewanny Court cannot be maintained. If the Appellant should be declared not to be entitled to the inheritance, he is, as the illegitimate son, at all events, entitled to maintenance out of his deceased father's estate, Macnaghten's "Principles of Hindu Law," vol. ii. p. 119, which the Sudder Court has wrongfully disallowed.

Mr. Rolt, Q.C., and Mr. Leith, for the Respondent.—The Appellant, notwithstanding that he had every opportunity afforded him, has signally failed in establishing the marriage and consequently his legitimacy; and his title, therefore, to succeed to the ancestral Raj and Zemindary, as the heir-at-law of the [36] late Rajah Umur Purtab Syn. It was satisfactorily proved that he was the illegitimate child of a Rajpoot by a slave-girl, and as such has no right of property. Steele's "Summary of the Law and Custom of Hindoo castes," p. 182. Macnaghten's "Principles of Hindu Law," vol. ii. p. 15, note. Such a marriage with a Soodra woman by a Khatri is prohibited by law. Macnaghten's "Principles of Hindu Law," vol. i. p. 59. His assumption of a title used by the heir apparent in the family, and the other acts relied upon by him, would, no doubt, be corroborative evidence entitled to some weight, if the *factum* of the marriage had been proved. The Appellant failed, however, to prove such marriage, although the *onus* lay on him to prove that fact. Now, the evidence of the Respondent's witnesses upon the new trial is positive and uncontradicted, that no marriage between the deceased Rajah and the Appellant's mother ever took place, either at the time or in the manner alleged by the Appellant. It was also proved that the Respondent was the nearest male relative of the late Rajah, and in that character he was the heir, according to the Hindoo law and custom, and entitled to succeed to the Raj and Zemindary. The argument of the Appellant, that Rajah Umur Purtab Syn, a Rajpoot, and as such one of the regenerate, or twice-born classes, was to be considered as a Soodra; and by that means to let in the Appellant to the succession, though illegitimate, is contrary to fact and utterly untenable. A Rajpoot is of the Khatri class, which still exists in its integrity. The "Ayeen Akbery," vol. ii. pp. 377, 481. Inst. of Menu, ch. i. p. 31. The "Vishnu Purana," ch. vii. and viii., by Wilson. Ward's "Account of the Hindoos," vol. i. p. 66. [37] "An Historical Sketch of Princes of India." As to the argument of the right of inheritance by an illegitimate son, we submit that, in the absence of any proof of a custom to that effect, he clearly has no title. *Mohun Sing v. Chumun Sing* (1 Ben. Sud. Dew. Rep. 28, and note to page 23).

Neither is the Appellant as an illegitimate son entitled to maintenance and to

have the same made a charge upon the Zemindary in dispute. We submit that as the Appellant's mother was a slave-girl, he may, as the son of a regenerate man, be entitled to simple maintenance, *Pershad Singh v. Rancee Mulesree* (3 Ben. Sud. Dew. Rep. 132); Macnaghten's "Principles of Hindu Law," vol. ii. p. 119; The *Mitaeshara*, ch. i. sec. xii.; Colebrooke's *Dig.*, vol. iii. secs. cexviii. and cexix.; but that only is allowed during youth, Steele's "Summary of the Law and Custom of Hindoo caste," p. 181.

Mr R. Palmer, Q.C., in reply, referred to The *Calcutta Review*, vol. xv. p. 62, upon the question of the caste of a Rajpoot.

Judgment was reserved, and now delivered by

The Right Hon. Sir Edward Ryan (Feb. 25., 1858).—In June, 1832, Rajah Tej Purtab Syn died, in undisputed possession of the Raj and Zemindary of Ramnuggur, in the Zillah of Sarun, the right to which Raj and Zemindary is the subject-matter of this appeal. He left surviving him three widows, and an only brother of the half-blood, Rajah Umur Purtab Syn. A dispute arose between Telotman Dabee, his eldest surviving widow, and his brother, as to who [38] should succeed to the Rajdom and estates; but this was ultimately compromised, and Telotman Dabee relinquished her claim in consideration of certain revenue secured to her for her life. Rajah Umur Purtab Syn continued in possession of the Raj and estates until his death, which took place in November, 1834. Upon his death, Lutchmee Dabee, his widow, obtained possession of the property, and a *Wirasutnamah* was filed in her name on the 5th of December following, stating that she was in possession, and claiming for her the Raj and Zemindary, as sole heir to the deceased. After the usual proclamations, the Government Collector entered her name in the books of record as the heir and sole proprietor of the Raj and Zemindary. Subsequently, claims were set up to the property by Telotman Dabee; by Oodey Purtab Syn; and by the Appellant; and also by the Respondent.

Two suits were commenced: one in August, 1835, by Oodey Purtab Syn, against the widows of Rajah Tej Purtab Syn, and Lutchmee Dabee, the widow of Rajah Umur Purtab Syn, in which he claimed as heir from a common ancestor of the deceased Rajah and himself— one Mukoond Syn. The plaint in this suit is not set out in the transcript, and it is not clear whether the Appellant was originally a party, or became so by a supplementary petition: but in the plaint he is stated to be the son of a slave-girl.

The other suit was commenced on the 5th of May, 1836, by the Respondent on behalf of his son, Futeh Bahadoor Syn, an infant, against the widows of Rajah Tej Purtab Syn: Lutchmee Dabee, and Oodey Purtab Syn; and by an Order of the Court, dated the 26th of March, 1838, the Appellant was also made a *Defen*-[39]-*dant*. This suit was founded on an *Ijazut Puttur*, alleged to have been executed by Rajah Umur Purtab Syn, empowering Lutchmee Dabee and his brother's widows, to bestow the *guddee* of the Rajdom on the Respondent's son.

These suits came on for hearing together before the Principal Sudder Ameen at Sarun, on the 7th of May, 1839, and were dismissed with costs. The grounds on which the first suit was dismissed are stated in these words, "that although Chuoturya Run Murdun Syn was the son of Umur Purtab Syn, yet whether he, not being born of a woman of equal caste, was entitled to the Rajdom during the life of Rancee Umur Raj Lutchmee Dabee, was a question, the investigation of which did not become necessary in this case, because there existed no dispute or disagreement between Rancee Umur Raj Lutchmee Dabee and Run Murdun Syn: but, whether Run Murdun Syn was entitled to the Rajdom, or not, while Umur Raj Lutchmee Dabee lived; Plaintiff had no right to the Rajdom whatever on the score of relationship, the Zemindary being a separate one altogether." In the suit of the Respondent it was held that, as the claim rested solely on the *Ijazut Puttur*, which was found not to be genuine instrument, it was not necessary to go into the matter of relationship.

From these decisions, Oodey Purtab Syn and the present Respondent, on behalf of his infant son, appealed to the Sudder Dewanny Adawlut, on the 24th of July, 1840. After the appeal, and before any further proceedings Rancee Umur Lutchmee Dabee died: upon which the present Appellant and the Respondent, as father and guardian of Futeh Bahadoor, presented to the Sudder Court separate pe-[40]-titions,

in which they set forth their respective claims to be considered as heirs to the deceased Rane. Mr. Reid, the Judge before whom these petitions came, directed the Principal Sudder Ameen of the Zillah of Sarun to receive proof of their claims as heirs to the deceased. In the meantime, the estate was attached by the Collector under order of the Judge, and placed under a manager, and a proclamation issued for the attendance of heirs. Oodey Purtab Syn, the Respondent, in his character of father and guardian; the surviving widow of Rajah Tej Purtab Syn; and the Appellants, attended to prove their respective claims. On the 7th of November, 1840, the papers relating to proof of succession were brought before Mr. Reid, and in an order made by him of that date, he states that as from the decision of the 7th of May, 1839, it appears that Run Murdun Syn is the son of Rajah Umur Purtab Syn, but by a woman of unequal rank, it has, therefore, become imperative on him, before going into the merits of the case, to require a Bywasta (law opinion) from the Pundit of the Court, on the point, whether among Hindoos a son by a woman of unequal rank, while lineal relations are forthcoming, will be entitled to inherit the estate of his deceased father, and the Pundit is accordingly ordered to give his opinion on the point. In January, 1841, the Bywasta of the Pundit is filed: it states, "that among Hindoos of the Rajpoot caste, a son who is not born from a woman of equal rank and caste can be reckoned as son, and will be entitled to the estate of his deceased father, a near relative of lineal descent living notwithstanding, because a Rajpoot is of the Soodra caste, and a son born to an individual of a Soodra caste, even from the womb of a [41] slave, etc., is reckoned his son by the Shaster laws, and is entitled to succeed to his father's estate, a near relation of lineal descent living notwithstanding"; and he also states that if there be no legitimate offspring, that is to say, no issue from a married woman, in such a case the illegitimate son of an unmarried Soodra woman will be entitled to the whole of his father's estate.

This Bywasta was brought before Mr. Reid on the 5th of February following, and he then proceeded with the further hearing of the cause, and he was of opinion that, although this Bywasta of the Pundit was in favour of Run Murdun Syn, yet that considering the claims of the parties, it was inexpedient to dispose of the case summarily without going into its full merits, and he ordered that both cases should be tried together, and that all the objecting parties and claimants should be at liberty to come forward, and that the name of the party whose claim should be found good, should be entered in lieu of the name of the deceased widow.

On the 23rd of May, 1842, the proceedings taken before Mr. Reid, and all the other papers in these suits, were, by an Order of the Court, brought before a full Bench, and the Judges, consisting of Mr. Lee Warner and Mr. James Shaw, recorded their opinion in these terms: "We perfectly agree in the opinion pronounced by the Principal Sudder Ameen in regard to the validity of the Ijazut Puttur. But as inquiry into the agnatic descent of the Appellants in both cases, and the objections made by Chuoturya Run Murdun Syn, and his marriage in a Rajpoot family, has been neglected by the Principal Sudder Ameen, we return the decisions of the Principal Sudder Ameen, [42] dated 7th of May, 1839, as incomplete; and, under cl. 2, sec. 2, of Reg. IX. of 1831, hereby order that the papers of this case and of case No. 50, of 1840, with a copy of this proceeding, be sent back to the Principal Sudder Ameen of Sarun, accompanied with a precept with this order: that he restore both the cases to their former number; and, as regards this case, he should inquire whether the marriage of Chuoturya Run Murdun Syn, who declares himself to be the son of Umur Purtab Syn, and whose marriage, by the papers, appears to have taken place in the village of Bel Ghat, in Zillah Ghomkhpoor, and in the family of Hindoo Sahee, of the Rajpoot caste, had actually taken place in a Rajpoot family, and whether he eats and drinks with them or not; and whether the marriage of Rajah Umur Purtab Syn with Lutchmee Dabee, the mother of Chuoturya Run Murdun Syn, was solemnized according to the custom and practice of the family or not; and after requiring and obtaining from Sahub Purhulad Syn, father and guardian of Futeh Bahadoor Syn, the Plaintiff in case No. 50 of 1840, a petition in regard to his agnatic descent, and a genealogical table and documentary proofs and witnesses from both parties, to try and decide the two cases as may be most consistent with justice and equity, as regards the heirship of Run Murdun Syn to the estate of his father, Rajah Umur Purtab Syn, and the relationships of the parties according to the genealogical tables given in by both."

In November, 1842, the Respondent filed a supplementary petition, setting forth his genealogy, and claiming in his own right as the next male heir of Rajah Umur Purtab Syn.

In February, 1845, the Principal Sudder Ameen gave [43] judgment on the re-trial of these causes, and held the Respondent to be the nearest next of kin to the deceased Rajah Umur Purtab Syn; that Oodey Purtab Syn being only remotely related, had not established his claim; that the marriage of Rajah Umur Purtab Syn with Lutchmee Dya Dabee was not proved; that the Appellant, as the illegitimate son of Rajah Umur Purtab Syn, was entitled to maintenance.

Against this decision, Chuoturya Run Murdun Syn, in April, 1845, appealed; and on the 9th of April, 1846, the Sudder Dewanny Court dismissed the appeal, affirming the decree of the Zillah Court in all respects, except as to the allowance of maintenance to Chuoturya Run Murdun Syn; which part of the decree was reversed.

From the decree of the Sudder Dewanny Court the present appeal comes before their Lordships, and the Appellant objects to that decree.

First. Because he claims to be entitled to the Raj and Zemindary, as the legitimate son of the late Rajah Umur Purtab Syn.

Secondly. Because, if the alleged marriage and legitimacy be not established, he claims to be entitled to the inheritance as the illegitimate son of the Rajah.

Thirdly. That if not entitled to the inheritance he is, as the illegitimate son, entitled to maintenance out of the estate, which the Court has disallowed.

In 1838, the Appellant endeavoured to establish by evidence, on the first question, that the late Rajah Umur Purtab Syn was married, according to the custom of the family, to Lutchmee Dya Dabee, and the Respondent endeavoured, by evidence, to show that the Appellant was the illegitimate son of a slave-girl; but it is alleged on behalf of the Appellant that [44] to this evidence of the Respondent little credit should be given, because the witnesses also attempted to prove the genuineness of the Ijazut Puttur, which proved to be forged and fabricated. Upon the re-trial of these cases before the Principal Sudder Ameen in 1845 no fresh witnesses were called by the Appellant to establish the marriage, although special directions were given as to the issues on this point; but many witnesses were called by the Respondent to show that no such marriage took place. The Counsel for the Appellant have abstained from entering into a review of the evidence given by the witnesses, on the *factum* of marriage; but have contended that the legitimacy of the son is recognized by the conduct of the father; by the title given him of "Chuoturya"—a title assumed, according to the custom of the family, by the heir apparent—and which it is admitted by the Respondent he was called; by his living and eating with the father; by the investiture of the sacerdotal cord; by what is urged to be a still more important mark of his condition, the admitted fact of his marriage into a Rajpoot family; and by the great kindness and affection with which he was treated by the late Rajah. No doubt evidence of this description is entitled to weight as confirmatory of testimony in support of the *factum* of the marriage: but it is not sufficient to outweigh the positive testimony of a great number of witnesses called on the re-trial, many of whom are native gentlemen of rank, some of them Rajahs in the immediate neighbourhood, and all of whom speak to the illegitimacy of the Appellant from their knowledge of the family, and from the marriage never having taken place at the time and in the manner alleged by the Appellant. Their evidence, it [45] must be recollected, was given before a native Judge understanding the language, usages, and customs of the people; nor is it easy, consistently, to explain why, upon this issue, the affirmative of which the Appellant was bound to prove, no further oral evidence was produced on his behalf. Their Lordships, therefore, are of opinion, that no satisfactory grounds have been alleged for disturbing the finding of the Court below on this matter of fact, confirmed by the judgment of the Sudder Dewanny Court, and are of opinion, that the Appellant has failed to establish the alleged marriage of his father with Lutchmee Dya Dabee, and that consequently his claim as the legitimate son of the late Rajah cannot be sustained.

Then arises the second question, whether the Appellant is entitled to the inheritance as the illegitimate son of the late Rajah?

There is no dispute as to the paternity of the Appellant, and the principal matter

for inquiry is the Hindoo law of inheritance, with regard to the right of succession of illegitimate children.

This law, it appears, varies according to the different classes of the Hindoos, and it is necessary, therefore, in the first instance, to consider what those classes are, and where they are to be found. It is undoubted that there were originally four classes: First, the Brahmins; second, the Khattris; third, the Vaisyas; fourth, the Soodras; the first three were the regenerate or twice-born classes, the latter the servile class. It was contended on the part of the Appellant, that the Khatri and Vaisyas classes have ceased to exist, and were sunk into the Soodra class, and that there are now two classes only, namely, the Brahmin and the Soodra. The Appellant, in order to show that the [46] proper genuine Khatri are extinct, cites as authorities in support of this position. The "Ayeen Akbery, or, the Institutes of the Emperor Akber," vol. ii. p. 377, in which there is this passage: "At present there are scarcely any true Kelterees to be found, excepting a few who do not follow the profession of arms."—"Those among them, who are soldiers, are called Rajpoots." Tod's "Annals and Antiquities of Rajast'han," vol. i. p. 53, where it is said, "Of the fifth dynasty of eight princes" "four were of pure blood, when Kistra, by a Soodra woman, succeeded." Ward's "Account of the Hindoos," vol. i. p. 66 (edit. 1815). Sec. 2, which treats of the Kshutryas caste, has this passage: "Some affirm, that there are now no Kshutryas in the Kulee yogu, that only two castes exist, Brahmins and Sudras and that the second and third orders having sunk in the fourth." Steele, "Summary of the Law and Customs of Hindoo castes," p. 95, says, "The Brahmuns assert that Purseram destroyed the whole of the Kshutryus;" and at p. 96: "The Rajpoots, Maratha chiefs of the Sattara or Blonsle, and Kolapoor families, etc., and other houses, lay claim to the title of Kshutryi, and wear the Jenwa. But they are considered Soodrus by the Brahmuns;" and there is an opinion to the like effect expressed by Mr. Sterling, in a paper on Orissa Proper, in vol. v. of the "Asiatic Researches," p. 195: "The proper genuine Khattris are, I believe, considered to be extinct, and those who represent them are, by the learned, held only to be Sudras."

Whatever weight may be due to these authorities in support of a speculative opinion, entertained, perhaps, by learned Brahmuns and others, their Lordships have, nevertheless, no doubt that the existence of the Khatri class, as one of the regenerate tribes, is [47] fully recognized throughout India, and also that Rajpoots in Central India, and in this District, are considered to be of that class. No doubt, as far as we are aware, has ever been raised in the Courts in India as to the existence of the Khatri class as one of the regenerate tribes. The Courts in all cases assume that the four great classes remain. Thus Sir W. Macnaghten, in his marginal note to *Pershad Singh v. Ranee Muhesree* (3 Sud. Dew. Rep. 132), says, "According to the Hindoo law, an illegitimate son of a Rajpoot or any of the three superior tribes, by a woman of the Sudra or other inferior class, is entitled to maintenance only." In the statement of the case, he takes it as an admitted fact that a Rajpoot is one of the three superior tribes; although it is true, as has been observed, that the point ultimately decided in this case, was only that the paternity was not established. In the second volume of Macnaghten's "Principles of Hindu Law," p. 119, the marginal note is, "The illegitimate son of a person belonging to one of the regenerate tribes (in this case a Rajpoot) is entitled to maintenance only." Accurate information as to the distinction of classes, especially in this part of India, is to be found in the statistical survey of Dr. Francis Buchanan, conducted under the direction of the Government of India. The second volume of M. Martin's "India" contains Dr. Buchanan's report on the district of Goruckpoor, and at p. 456 he says, "The Rajpoots are here, everywhere and by all ranks, admitted to be Khattris, although they claim all manner of descents, except from the persons who, according to the Vedas, sprang from the arms of Brahma." Other passages in the same report have been referred to by Mr. Leith to the same effect. [48] The Rajpoots are mentioned in Elphinstone's "History of India," vol. i. p. 607, as the military class in the original Hindoo system; so also in Cunningham's "History of the Sikhs," p. 202. Thornton, in his "Gazetteer," tit. "Rajpootana," says, "The widely-spread sect of Rajpoots are considered offsets of the Kshettriyas, one of the four great castes into which the Hindoos were originally divided." Sir John Malcolm, in his "Memoir of Central

India," vol. ii. p. 125, enters fully into the state and condition of the Rajpoot tribes. They are treated of throughout his history as belonging to the superior class; he mentions that although their intercourse with females of a lower tribe may have, in some instances, produced a mixed race, yet even in this class, which he terms the bastard Rajpoot tribes, the lowest of them who aspire to Rajpoot descent, consider themselves far above the Soodras.

In the report of Dr. Buchanan, mention is made of the existence of this mixed race in the District of Goruckpoor, and that there are several persons of the mountain tribe, called Khattris, who are a spurious race, but who claim all the dignities of the military order. One of the witnesses in this case, the Rajah of Gopalpore, a Khatri Kossuck, states that his family do not intermarry with the mountain Rajahs. It seems to us, therefore, not only that the Khatri class must be considered as subsisting, but that according to the Hindoo law generally prevailing in this part of India, and independently of exceptions arising out of any well established usage or custom to the contrary, as to particular places or families, Rajpoots are to be considered as of the Khatri class.

From these premises it seems to us to follow, that [49] (it being indisputable that Rajah Umur Purtab Syn was a Rajpoot) the true question to be decided in this case as to the Hindoo law of inheritance is—not whether the illegitimate son of a Soodra man by a Soodra woman can inherit but—whether the illegitimate son of a Khatri can in any event inherit, whether his mother be a Soodra or of any other caste.

The law relating to the right of succession of illegitimate children, is thus stated in the first volume of Sir W. Macnaghten's "Hindu Law," p. 18:—"Among the sons of the Sudra tribe, an illegitimate son by a slave-girl takes with his legitimate brothers a half-share; and where there are no sons (including son's sons and grandsons), but only the son of a daughter, he is considered as a co-heir, and takes an equal share." In the second volume of the same work, in a note, p. 15, he states: "According to the Hindoo law, the illegitimate son of a Sudra man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes;" and he adds, "If the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance." As an authority in support of the passage in his text, Sir W. Macnaghten refers to Colebrooke's translation of the *Mitacshara*, on Inheritance; which, as is well known, is the standard authority on this subject in all the schools of Hindoo law, from Benares to the southern extremity of the Peninsula of India. In chapter 1, section 12, of that work, on "The right of a son by a female slave, in the case of a Sudra's estate," it is thus stated: "The author next delivers a special rule concerning the partition of a Sudra's goods. 'Even a son begotten by a Sudra [50] on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brothers, may inherit the whole property, in default of a daughter's sons.' In clause 3, it is stated, that the rule does not apply to the three superior regenerate classes. 'From the mention of [a Sudra in this place it follows that] the son begotten by a man of a regenerate tribe, on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance.'"

In another treatise on the Hindoo law of inheritance, also translated by Colebrooke, and which is the great authority in Bengal, The "Daya Bhaga of Jimutavahana," p. 151, the same doctrine is to be found. Also in the "Treatises on Adoption," translated by Mr. Sutherland, The Dattaka Mimansa, sec. ii. cl. 26, p. 32, and The Dattaka Chandrika, sec. v. cl. 30, p. 205: the third volume of Colebrooke's Dig., clxxiv. p. 143. Strange's "Hindu Law," pp. 69-132 of vol. i.; and p. 68 of vol. ii.

A decision on the right, among Soodras, of illegitimate children to inherit, is reported in Sir Thomas Strange's Notes of Cases at Madras, *Vencataram v. Vencata Lutchemee Ummall* (vol. ii. p. 305). In his judgment he says, illegitimate children of Soodras inherit; but in the case of illegitimate children begotten by a regenerate man, the law is different; they are entitled to maintenance only.

It seems, therefore, to be established by an unusual concurrence of authority, that according to the law prevalent where this property is situated, the illegitimate son of one of the three regenerate or twice-born [51] races cannot succeed to the in-

heritance of his father. We think, therefore, that the Appellant's case fails on the second point no less than on the first.

In the course of the argument on this point, great reliance was placed, on the part of the Appellant, on the Bywasta of the Pundit of the Sudder Dewanny Court, but their Lordships are not disposed to attach much weight to this opinion, as it proceeds on the ground that Rajpoots are Soodras, and their Lordships are fully satisfied that this ground is wholly without foundation.

It was contended, however, on the part of the Appellant, that as this case has been presented to us, we ought not now to come to any conclusion affecting the Appellant's rights, but ought to remit the case to India, for the determination of those rights. It was urged that there has been a miscarriage in the Courts below; that both the Zillah and the Sudder Courts have proceeded on an erroneous assumption that the only question at issue, as regards the Appellant, was legitimacy of birth, and not the title of the Appellant generally as heir, and that the Courts have not considered or adjudicated upon either the law or the facts as respects the Appellant's right to succeed independently of the alleged marriage or of his own legitimacy.

It is true that the pleadings in this case are unusually—even for cases from the Mofussil Courts—loose and imperfect, and no distinct issues have been framed between the parties under the Regulations for that purpose: indeed, to the original suits of 1835 and 1836, the Appellant appears to have become a party only by an Order made after their commencement: and though we are disposed to think that the [52] Appellant's claims were distinctly before the Zillah Court in 1839, yet it must be admitted that neither the Principal Sudder Ameen nor the Judges of the Sudder Dewanny Court appear to have thought it necessary to adjudicate upon them. Still, however, the question for decision is one of Hindoo law, involving, in no inconsiderable degree, what is matter of history, and we do not think that it would be right for us to send back the case for the purpose of the Courts in India considering such a question; we are the less inclined, too, to adopt such a course because the particular inquiries directed by the Sudder Court's Order of 1839, as to the marriage of the Appellant's father and mother, and as to his own marriage, appear to us to have involved every element on which the Appellant's right to inherit could depend, and the Appellant, therefore, had every opportunity of adducing evidence to establish his claim.

The only remaining question is the reversal by the Sudder Dewanny Court of that part of the judgment of the Zillah Court which directed that an annual sum of Rs. 6000, should be set aside out of the estate, given by the decree to the Respondent, for the maintenance of the Appellant. The grounds upon which the Sudder Dewanny Court reversed this part of the judgment do not appear on these proceedings. The right of an illegitimate child of one of the three regenerate classes to maintenance out of the estate of his father, is recognized by all the authorities on Hindoo law relating to this subject; and as to this, there was no difference of opinion between the Pundit of the Sudder and the Pundit of the Zillah Court, although they differed on the right to the inheritance. It is not shown that the allowance is in excess of [53] what the Appellant is justly entitled to receive with reference to the value of the estate; and on this question, the Native Judge of the Court of the District in which the Zemindary is situated had the best means of forming a correct opinion. If the Court had thought the amount in excess, means might have been taken to ascertain what would be a proper allowance. In this part, therefore, of the decree of the Sudder Dewanny Court, their Lordships are unable to concur: they are of opinion that although the Appellant is shown to have no right to the inheritance, either as the legitimate or the illegitimate son, he is still entitled to maintenance out of the estate of his deceased father.

Their Lordships, therefore, will humbly recommend to Her Majesty to reverse the decision of the Sudder Dewanny Court, in so far as it reversed the decision of the Sudder Ameen, with respect to the maintenance, to declare that the Appellant, as the illegitimate son of the late Rajah Umur Purtab Syn, was, and is, entitled to maintenance out of his estate, at the rate fixed by the Sudder Ameen, and to remit the case to India for the purpose of effect being given to that declaration, but in other respects to dismiss this appeal, although without costs, the appeal having, in part, succeeded.

[Followed *Roshan Singh v. Balwant Singh*, 1899, L.R. 27 Ind. App. 51. See *Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Singh*, 1869, 12 Moo. Ind. App. 292.]

[54] SOONDUR KOOMAREE DEBBEEA,—*Appellant*: GUDADHUR PERSHAD TEWARREE,—*Respondent*; and GUDADHUR PERSHAD TEWARREE,—*Appellant*: SOONDUR KOOMAREE DEBBEEA,—*Respondent* * [Feb. 8, 9, and 11, 1858].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A childless Hindoo, a member of a divided Hindoo family in Bengal, by an Unomuttee Pottah authorised his widow to adopt a son for him after his death, and by that instrument made her his heir. His widow exercised the power, and adopted a son for her deceased husband; who died before attaining his majority. The deed was impeached as a forgery. Upon appeal reversing the decrees of the Sudder Ameen and Sudder Dewanny Court, such deed was upheld.

Held also, that the widow was entitled to a life estate in her husband's estate after the adopted son's death, either under the deed or as heir of the adopted son.

A verbal power to adopt is good by the Hindoo law.

In a suit in which the only points in issue were the validity of a deed of adoption and a charge of misconduct to deprive a Hindoo widow of her marital rights, the Courts in India decided that the deed was forged, and that the widow had committed no act to forfeit her rights, and further declared that the Plaintiff was entitled to succeed at her death to the estate as heir. Such decree reversed, as the declaration as to heirship was *ultra vires*, the proper parties not being before the Court, and the suit not raising that question.

These appeals were heard together. The first appeal was from a decree of the Sudder Dewanny [55] Court, dated the 23rd of July, 1845, in a suit instituted in the Zillah Court of Burdwan, Gudadhur Pershad Tewarree against the Appellant, for possession of real estate, which he claimed to be entitled to as heir of Hurree Pershad Tewarree, his nephew, who had died without leaving issue, on the grounds, first, that the Appellant, Hurree Pershad Tewarree's widow, had forfeited her right as widow and heir by misconduct; and secondly, that an adoption made by the Appellant under an Unomuttee Pottah, or deed authorizing her to adopt, after Hurree Pershad Tewarree's death, and constituting her heir, which power of adoption she had exercised, but which adopted son had, however, died before attaining majority, was altogether void and invalid, the Unomuttee Pottah being a fabricated instrument. The Sudder Dewanny Court's decree appealed from, declared that this instrument was a forgery, and decreed the Respondent to be the heir, and entitled to Hurree Pershad Tewarree's estate, after the life estate of the Appellant, the deceased's widow, whom the Court held had not forfeited her rights as widow.

The other appeal was brought from a decree of the Sudder Dewanny Court, dated the 30th of August, 1848, which confirmed the final judgment of the Zillah Court of Burdwan in a suit brought by the Respondent in the second appeal, against the Appellant in that appeal, to recover a large sum of money, the alleged value of moieties of certain real estates, cash, and jewels; the profits and interest of the Zemindary, which had been withheld from her and her deceased husband by that Appellant.

The facts common to both cases and the nature of the pleadings appear fully in the judgment.

[56] Mr. Forsyth, Q.C., and Mr. Leith, for the Appellant in the first, and

* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

Respondent in the second, appeal; and Mr. R. Palmer, Q.C., and Mr. W. Field, for the Respondent in the first, and Appellant in the second, appeal.

The principal arguments were:

First. Upon the evidence, whether it established the genuineness of the deed of Unomuttee Pottah and the validity of the act of adoption by the Appellant, Soondur Koomaree Debbeea. The case of *Purmannund Bhattachary v. Oomakant Lahoree* (4 Ben. Sud. Dew. Reps. 318) was referred to.

Secondly. As to the Appellant's right to inherit by the Hindoo law, under the Unomuttee Pottah, in her character of widow, the estate of her deceased husband, Hurree Pershad Tewarree, after the death of the adopted son, or as the adopted son's heir.

Thirdly. It was insisted that the declaration in the decree that the Respondent, Gudadhur Pershad Tewarree, was entitled to the estate and property of Hurree Pershad Tewarree, after the death of the Appellant, was unauthorized and erroneous, prejudicing the future rights of parties not before the Court and *ultra vires*, in suit so framed.

Their Lordships' judgment was delivered by

The Right Hon. The Lord Justice Turner (Feb. 15, 1858). These cases came before us upon two appeals, in the nature of appeal and cross-appeal. The appeals arise out of two suits in the Zillah Court of Burdwan, in the nature also of suit and cross-suit. The first of [57] these suits was instituted on the 9th of May, 1834, by Soondur Koomaree Debbeea against Gudadhur Pershad Tewarree, for the purpose of recovering from him some property of Hurree Pershad Tewarree, the late husband of Soondur Koomaree Debbeea.

In this suit Soondur Koomaree Debbeea claimed as the widow of Hurree Pershad Tewarree, and as the mother of Rada Pershad, a minor whom she had adopted, as she alleged, by the permission of her late husband.

It appears that she was non-suited by the Sudder Ameen, in the first instance, on the ground that Rada Pershad, the adopted son, had died, and that a second adoption which she had made was not valid; but that, on appeal, the Sudder Dewanny Court set aside the non-suit, and directed that on her proving her title, as heir of Rada Pershad, the first adopted son, the case should proceed. It further appears that Soondur Koomaree Debbeea accordingly proved her heirship; and that she then also put in a claim to be entitled in her own right, under a deed of Unomuttee Pottah, alleged to have been executed by Hurree Pershad Tewarree, and which had been produced on the first hearing before the Sudder Ameen in support of the authority to adopt, and that the case was then again heard before the Sudder Ameen, and she was again non-suited upon the ground that the Unomuttee Pottah was invalid, and that her suit having been instituted on behalf of Rada Pershad, as heir, she was not entitled to recover in her own right as widow and heir, but that she again appealed to the Sudder Dewanny Court, and that that Court then pronounced the following decision:—"As the Appellant sued in the first instance as widow of Hurree Pershad Tewarree, and as mother [58] of her adopted son, a minor, and when she appealed from the non-suit, claimed to be heard as widow, according to the Shasters, as devisee under the twofold deed called Unomuttee Pottah, and as heir of her adopted son, it is clear she never gave up her claim as widow, though she was preferring a claim to be heard as mother also of Rada Pershad. Her right as widow has been decided by the Principal Sudder Ameen himself in his decision, confirmed on appeal by the Sudder Court; therefore, it is indisputable. As she never gave up this right, though she brought more prominently forward her right by adoption, equity requires that she should be allowed to prosecute her claim on the former, notwithstanding the latter had been adjudged invalid. Ordered,—That the case be returned to the Zillah, to be restored to the file, and retried on its merits."

It appears that the case was accordingly retried upon its merits, and the following decree pronounced by the Sudder Ameen, and subsequently upon appeal, affirmed by the Sudder Dewanny Court:—"On a consideration of the foregoing circumstances, Ordered, that this case be decreed. The Plaintiff is to get from the Defendant the sum of Rs. 54,914. 12a. 7g. 2c. 2k., being a moiety of the ready cash in the Malikanah and profits of the Zemindary, etc., and the amount of fine

remitted, and Rs. 3660. 15a. 15g. 2k., the amount of exchange for Sicca rupees into that of the Company's, making a total of Company's Rs. 58,575. 12a. 2g. 3c., and interest thereon from date of suit to this day; and the Plaintiff to get possession by demarcation and partition, a moiety of the remaining lands, tanks, and gardens, with trees and places as specified in the plaint, the partition to [59] be made by deputation of an Ameen, save and except the lands, tanks, gardens, and places, etc., and the house of Shoodhakrishn Ghose and the Asareeah mangoe-trees specified in the first paragraph, and denied by the pleader of the Defendant. Let the worship of the idol, with Lot Raylah appertaining thereto, the Asareeah mangoe-trees and other goods of the Debshowah, be performed and continued in the custody of both the parties. The Plaintiff is to get a moiety of the rent of the house of Shoodhakrishn. The costs of Court proportionate to the claim established is to be borne by the Defendant, and the Plaintiff is to get interest on the amount decreed from to-morrow's date.

The second of the appeals before us, that of Gudadhur Pershad Tewarree, is from these decrees of the Sudder Ameen and of the Sudder Dewanny Court.

It may be as well, at this point of the case, to state that there is no appeal before us from the Order of the Sudder Court of the 29th of July, 1845; and that we feel bound, therefore, to regard Soondur Koomaree Debbeea as suing, and of course as defending, also, in all the characters referred to by that Order. We agree with the Sudder Dewanny Court, that she ought to be so regarded.

The other suit in the Zillah Court of Burdwan, to which we have referred, was instituted on the 9th of August, 1834, by Gudadhur Pershad Tewarree against Soondur Koomaree Debbeea, for the purpose of recovering the whole estate of Hurree Pershad Tewarree, upon the ground that Soondur Koomaree Debbeea had forfeited her rights as widow and heir by unchaste and un-widow-like conduct, and that the Unomuttee Pottah was fabricated, and the adoption under it invalid.

[60] In this suit Gudadhur Pershad Tewarree was non-suited by the Sudder Ameen, upon the ground, that Soondur Koomaree Debbeea had not forfeited her rights as widow and heir; but the Sudder Ameen, in the judgment pronounced by him, declared his opinion that the Unomuttee Pottah was a fabricated instrument, and that Soondur Koomaree Debbeea was only entitled to Hurree Pershad Tewarree's property for her life, and that upon her death, Gudadhur Pershad Tewarree would be entitled to it.

From this decree of the Sudder Ameen, Soondur Koomaree Debbeea appealed to the Sudder Dewanny Court, but the Sudder Dewanny Court was also of opinion that the Unomuttee Pottah was fabricated, and dismissed the appeal.

The first of the appeals before us, that of Soondur Koomaree Debbeea, is from these two latter decrees.

It was objected to this first appeal, that it is merely an appeal from the reasons from which the decree is founded, and is, therefore, incompetent; but their Lordships are of opinion that the decree cannot be regarded otherwise than as establishing the invalidity of the Unomuttee Pottah as between Soondur Koomaree Debbeea and Gudadhur Pershad Tewarree, and all parties claiming under them, and they are of opinion, therefore, that this objection cannot be maintained.

They have felt it their duty, therefore, to examine these cases upon their merits. Upon proceeding to examine them, the first question plainly is, the validity of the instruments on which the right to adopt is claimed, and more especially of the Unomuttee Pottah, on which the claim to the property is founded, failing the adoption.

[61] In examining this question, the facts of the case require particular attention. Some of them are common to both parties. Byjnath Tewarree died, leaving two sons, Ram Pershad Tewarree, and Gudadhur Pershad Tewarree, the party to these proceedings. Ram Pershad Tewarree afterwards died, leaving one son, Hurree Pershad Tewarree. He married Soondur Koomaree Debbeea, the other party to these proceedings. Hurree Pershad Tewarree was a minor at the time of the death of Ram Pershad Tewarree, his father, and Gudadhur Pershad Tewarree was appointed to be his guardian. After Hurree Pershad Tewarree had attained his majority, and in the year 1842, a separation took place between him, and his uncle, Gudadhur Pershad Tewarree, and the joint property was divided between

them. Thus far both parties are agreed. The question we are now considering depends upon what took place after this partition. It is alleged by Soondur Koomaree Debbeca, that in the month of August, 1831, Hurree Pershad Tewarree, being in a state of approaching dissolution, determined to empower her to adopt a son, and to constitute her sole heiress and proprietor and owner of his property; and that he accordingly, on the 15th of August, 1831, lodged with the Judge and the Collector two petitions, each of which was in these terms:—"As I have no son or daughter, I wish to adopt a son agreeably to Shaster, and I wish to arrange about it; but lest death should prevent my taking this course I have empowered my wife, Soondur Koomaree Debbeca, to adopt a son, and my wife will, in furtherance of my command, adopt a son according to Shaster; and whatever gifts, etc., she makes, I acknowledge and confirm the same as my own doing. As you, my Lord, are master, I have, agreeably to [62] Shaster, made my wishes known to you through this petition. I am ill. Not being able immediately to meet with a child that would suit me, I have empowered my wife to adopt a son. As soon, therefore, as she fixes upon a suitable child she will adopt him, and now my wife is the heir of all my property and Zemindary, and will hereafter continue to be the sole heir and proprietress and owner. For your Lordship's information I have stated this fact." And, that he also, on the same 15th of August, 1831, executed an Unomuttee Pottah, in the name of the Appellant, in these terms: "As I have neither a son nor a daughter, and I am ill, and as you are my wife, and in consequence the heir and proprietress of my property, and as from our having no son our funeral obsequies cannot be performed, it is, therefore, very desirable to adopt a son according to Shaster, and I have been on the look-out for a suitable child for that purpose, and not being able to get one to please me, I have not been able to adopt one to this day. Now, I am ill, and if by God's will I should not live to adopt a son, in such an event after my death you are to adopt a son according to Shaster on getting a fit child, and I hereby give you power to adopt a son with my free will and consent, and if you should expend any thing in charity, and also if you give away the immovable property, etc., to any one, all this you have full power to do. I give you power to do so. In witness whereof I give this writing as a deed of power." This instrument was signed and sealed by Hurree Pershad Tewarree, and it was urged that under the authority given to her by these instruments, she, on the 15th of January, 1832, adopted Rada Pershad, the son of her sister. On the other hand, Gudadhur Pershad Tewarree [63] wholly denies the validity of these instruments, and alleges that they were fabricated: that Hurree Pershad Tewarree's signature to them was forged, and his seal affixed to them at a time when he was wholly insensible; and he relies upon the contents of the instruments, and upon some erasures which appear upon the Unomuttee Pottah, as conclusive in his favour upon the question.

It was much pressed upon us in the argument on his part, that the Judge of the Zillah Court, by whom these questions were first decided, had the opportunity of seeing the original Unomuttee Pottah and petitions, and the witnesses on whose testimony the case was said to depend; and that both the Courts in India had better means than we have, of knowing the customs and habits of the people, and of judging whether such instruments as those which are in question were likely to have had existence. Their Lordships are fully sensible of the weight which is due to these considerations, and they would not lightly differ from the Courts in India upon questions of evidence or of custom; but it is their duty carefully to examine the cases which are brought before them, giving, of course, full weight to the decisions which have been pronounced upon them; and, if upon the result of that examination they are satisfied that those decisions are not well-founded, it is not less their duty to declare that opinion.

In this case their Lordships have the misfortune to differ from the Courts in India; and they have less difficulty in doing so, as the question to be decided depends much more upon the documentary than upon the parol evidence. Both, however, must, of course, be regarded; and it is scarcely necessary to say, that [64] from the very nature and constitution of these suits, the evidence taken in each of them must be looked at in determining the other.

In considering the validity of instruments of this description, it is of great im-

portance, in the first place, to ascertain the position of the parties at the time when the instruments are alleged to have come into existence, and the motives which may have led to the execution of them. This case presents no difficulty in that point of view; for the evidence on the part of Gudadhur Pershad Tewarree abundantly proves that at the time when these documents are alleged to have come into existence, there could be no other state of feeling between Hurree Pershad Tewarree and Gudadhur Pershad Tewarree, than the most determined enmity. Nearly every witness examined on the part of Gudadhur Pershad Tewarree proves that they were continually quarrelling. Neither can any one doubt of the great importance attached by the Hindoos to the existence of a son—their salvation depending upon it. We start, therefore, with every probability in favour of these documents.

It is not, however, upon probabilities that this case can be decided. We must look to the facts. The first and most important fact to be attended to, is that of the petitions to which we have referred, having been lodged in Court, and before the Collector, on the 15th of August, 1831. Nothing can be more strong than the language of these petitions, if they are authentic. They purport not merely that there was to be power to adopt, but that the property was to be the wife's. A power to adopt may, as we understand the Hindoo law, be given even verbally. Surely, then, these documents, if authentic, must be taken to have given it, [65] or, at all events, to prove that it had been given. Is there, then, any sufficient reason to doubt their authenticity? They bear not merely the seal, but the signature, of Hurree Pershad Tewarree. The Respondent has given no proof that the signature is not genuine. His witnesses are silent upon the subject. He has not even attempted to prove the forgery he alleges. The absence of any such evidence, under such circumstances, furnishes, as their Lordships think, strong ground for assuming the authenticity of these petitions; and if authentic, they would alone, as it appears to their Lordships, be sufficient to dispose of Gudadhur Pershad Tewarree's case; for it has not been disputed at the bar, though it was disputed in the pleadings, that if there was power to adopt, there was a valid adoption of Rada Pershad, and Soondur Koomaree Debbeea is the heir of Rada Pershad. It was said, however, that the Unomuttee Pottah was, at all events, fraudulent, and it was sought to affect the authority of these petitions by the fraud in fabricating the Unomuttee Pottah. The case was presented to us, in this respect, as if the petitions and the Unomuttee Pottah depended wholly upon the same evidence; but this is not so. The petitions, having been lodged in Court, have the stamp of authority, which is wanting in the case of the Unomuttee Pottah. As to the Unomuttee Pottah itself, however, how does the case stand? This instrument purports also to be signed and sealed by Hurree Pershad Tewarree; and there is the same absence of evidence to prove that the signature to it was forged, as there is with respect to the signature of the petitions.

The Sudder Ameen, in his judgment, places reliance upon the date of the instrument having been erased, [66] and some other date having been substituted; but whatever alteration may have been made in the date, it is plain that the deed was executed in the lifetime of Hurree Pershad Tewarree. Not only does this appear by the answer of Gudadhur Pershad Tewarree, but the very date of the alleged fabrication of the deed is mentioned in the petition presented by him on the 9th of August, 1838, and is fixed as being the day before the death of Hurree Pershad Tewarree; unless, therefore, there was an alteration in the state of mind of Hurree Pershad Tewarree, between the 15th of August, 1831, and the time of his death, the alteration in the date cannot, as it seems to their Lordships, have been material; and as to the other alleged erasures in the names of the witnesses to the deed, it is to be observed, that the Sudder Ameen does not at all refer to them. He appears, in his judgment, to have relied upon the circumstance of Hurree Pershad Tewarree not having himself adopted Rada Pershad; but their Lordships do not consider that the mere fact of non-adoption by Hurree Pershad Tewarree himself, weighs much against the validity of the deed. Many circumstances may have induced Hurree Pershad Tewarree rather to trust the adoption to his widow, than to make it himself; and no instrument, giving a power to adopt, could be held valid, if the non-adoption by the party making the instrument, be held to prevail against it. Reliance was also placed on Soondur Koomaree Debbeea having, soon

after the death of Hurree Pershad Tewarree, claimed as heir in the suit No. 6996; but it is to be observed that at this time, the adoption had not been made: and besides, from what has been already stated, it appears clear that the Unomuttee Pottah was in existence in the lifetime of Hurree Pershad Tewarree. [67] Some reliance appears also to have been placed upon some slight discrepancies appearing in the evidence of the witnesses examined on the part of Soondur Koomaree Debbee; but, in their Lordships' judgment, such discrepancies tend rather to support, than to discredit, the testimony of those witnesses. There are also other slight circumstances on which the Sudder Ameen has relied, which do not appear to their Lordships to require any comment: but the Sudder Ameen, in some degree, relied upon, and the Sudder Dewanny Court almost wholly relied upon, the inconsistency of this deed—that the gift of the property to Soondur Koomaree Debbee was at variance with the power of adoption given to her. This, no doubt, is a circumstance to which, if unexplained, great weight would be due, but the circumstances of this case appear to their Lordships to explain it. It is obvious that in the state of the relations existing between Hurree Pershad Tewarree and Gudadhur Pershad Tewarree, the natural desire of Hurree Pershad Tewarree would be to prevent his property from falling into the hands of Gudadhur Pershad Tewarree, into whose hands it would have gone if he had not otherwise disposed of it. That this was the feeling of Hurree Pershad Tewarree appears from the evidence of Gudadhur Pershad Tewarree's own witness, Bheekum Sing, who, upon his examination, states:—"Formerly, when the Defendant and Hurree Pershad Tewarree were joint in mess, I was in their employ. On the death of the Defendant in the year 1230, there was a partition made of the Zemindary, etc., in the year 1231. After that both the parties were in possession of their shares. In the year 1238, Hurree Pershad Tewarree became very weak from illness. I [68] had left the service then, and was not in employ, but frequented him still; when I used, Hurree Pershad Tewarree was indeed very weak. One or two days before his death I, and many others, had gone to see him, and at the same time Gudadhur Pershad Tewarree had also come to see him, when he said to Hurree Pershad Tewarree, 'You are very weak; what are you doing with the Zemindary?' On this Hurree Pershad Tewarree said, 'I have a wife; she will sustain my honour. I have transferred the whole to her by writing.' On hearing this the Defendant went away in a rage. I also went away. The other people also left the place."

The evidence of this witness is the more material as it shows that Gudadhur Pershad Tewarree was aware of the execution of this deed even in the lifetime of Hurree Pershad Tewarree; and this leads us to the consideration of his conduct. Knowing of the existence of this deed, as appears by the evidence of this witness: by his answer; and by the petitions already referred to, he instituted no proceedings until the 9th of August, 1834, and then only when he had been sued by Soondur Koomaree Tewarree, and was called upon to put in his answer in the suit instituted by her. The question, therefore, as to the validity of the deed of Unomuttee Pottah, appears to their Lordships to be reduced to the question of the alleged insensibility of Hurree Pershad Tewarree; and on this point their Lordships fully concur in the opinion of the Sudder Ameen, that no credit whatever can be given to the testimony of the witnesses examined on the part of Gudadhur Pershad Tewarree upon this point. Their Lordships have thought it right to examine this case with reference to the evidence on [69] the part of Gudadhur Pershad Tewarree; but, having done so, they think it right to add, that they are disposed to attach more weight to the evidence on the part of Soondur Koomaree Tewarree, than the Sudder Ameen appears to have done; and they see nothing to impeach the evidence of Ram Mohun Surkar, upon whom the Sudder Ameen, in his judgment on the first appeal, casts no imputation whatever. It is true, indeed, that in the copy of the same judgment, to the other appeal, he is made to speak of him in these terms:—"Witness, Ram Mohun Surkar, is one of those attached to the Court for the purpose of giving evidence, and is not worthy of reliance. Without even looking to the conflicting nature of the testimony of each of these witnesses, their evidence in my opinion has no weight in this case."

Their Lordships, however, are not disposed to place reliance upon this latter copy of the judgment, for they find that in the reasons of appeal presented by Soondur

Koomaree Debbeea against the judgment of the Sudder Ameen there is the following passage:—"The Principal Sudder Ameen, after his deep research, could state nothing against Ram Mohun Surkar, my witness, and a Vakeel of the Court, in his decision, except that nothing could be carried by the evidence of a single witness." And, in the answer to these reasons, there is no mention made of any such observation having been made by the Sudder Ameen, as appears in the second copy of the judgment.

Upon the whole, therefore, their Lordships are of opinion that upon the first appeal the decisions of the Sudder Dewanny Court and of the Sudder Ameen ought to be reversed.

The case, however, between these parties does not [70] require that any decision should now be given as to the rights of parties who may become entitled after the decease of Soondur Koomaree Debbeea: and feeling, for the reasons which have been already assigned, that these rights (if any) will be better investigated in India, their Lordships are not disposed to go further than the necessity of the case requires. They intend, therefore, upon the first appeal, humbly to recommend to Her Majesty that the decrees of the Sudder Dewanny Adawlut and of the Principal Sudder Ameen be reversed, and that in lieu thereof the decree stand and be as follows:—

"It appearing to their Lordships that Gudadhur Pershad Tewarree cannot, under any circumstances, have any right to the property in question in this suit during the life of Soondur Koomaree Tewarree, it is ordered that the suit be dismissed without prejudice to any question as to the rights of Gudadhur Pershad Tewarree (if any) after the death of Soondur Koomaree Tewarree, and without prejudice, also, to the rights (if any) of any person not before the Court in this cause, either in the lifetime or after the death of Soondur Koomaree Tewarree; and their Lordships will order Gudadhur Pershad Tewarree to pay the costs both in the Zillah and Sudder Courts."

Upon the second appeal, that of Gudadhur Pershad Tewarree, three points were raised:—

First. That all the accounts had been settled up to the time of the partition, and that the Appellant, Gudadhur Pershad Tewarree, had been improperly charged in respect of his receipts before that time: and, further, that he had been improperly charged with rents which he had not received.

Second. That he had been improperly charged with [71] a moiety of a fine which had been paid to Government, and afterwards repaid to him; and,

Third. That he had been improperly charged with the amount and value of property which had been abstracted from the Treasury in the year 1830.

The second point was abandoned at the hearing: upon the other two points it is unnecessary to say more than a few words. It appears to their Lordships from the partition papers, to be clear that accounts were to be afterwards rendered, and their Lordships see no evidence to show that any such accounts ever were rendered, and certainly none to show that any such accounts were settled: nor do their Lordships find that it is alleged by the answer, that there ever was any settled account; and with respect to the rents, the Appellant being in possession, was bound to keep the accounts of his receipts, and not having produced any such accounts, is properly chargeable with the full rents. There remains then only the third point, as to which, upon carefully looking into the evidence which was referred to on the part of the Appellant, their Lordships are fully satisfied that the property abstracted from the Treasury was not stolen, as the Appellant has alleged, but was possessed by the Appellant himself. Their Lordships are, therefore, of opinion, and will humbly recommend to Her Majesty, that Gudadhur Pershad Tewarree's appeal be dismissed, with costs.

[72] NGA HOONG and Others,—*Appellants*; THE QUEEN. — *Respondent*

[Dec. 5, 1857].

On appeal from the Supreme Court at Calcutta.

Appeal to the Queen in Council allowed from a judgment on a conviction of the Supreme Court at Calcutta, in a case of murder.

Statute, 9th Geo. IV., c. 74, sec. 56, extends to the British territories in India, the provisions of the Statute, 9th Geo. IV., c. 31, sec. 8, with respect to offences committed in two different places, or partially committed in one place and completed in another, but such Statute does not render a person liable to punishment for the commission of a complete offence, who was not liable before the passing of that Statute.

The words "within the limits of the charter of the said United Company," in the 56th section of the 9th Geo. IV., c. 74, held to mean, within the limits of the trading charter of the East India Company [7 Moo. Ind. App. 101].

The Supreme Court at Calcutta has no jurisdiction under the 9th Geo. IV., c. 74, sec. 56, to try an indictment for murder committed and wholly completed at a place within the trading limits of the East India Company's charter, by native subjects of Burmah under the government of the East India Company, representing the Crown, who would not under former Statutes regulating the jurisdiction of the Supreme Court, have been amenable to its criminal jurisdiction [7 Moo. Ind. App. 100-102].

In this case the appeal was allowed by the Supreme Court at Calcutta (*a*), from a sentence on the criminal side of that Court in a case of murder.

In the month of June, 1856, the Appellants, natives of Burmah, and native subjects of the East India Company, representing the Crown, were apprehended [73] on the charge of murdering a boat's crew of natives of Tavoy, in certain uninhabited Islands called the Coco Islands, in the Bay of Bengal: and were subsequently sent to Calcutta, to be tried in the Supreme Court there.

By the charter establishing the Supreme Court at Calcutta, the criminal jurisdiction of that Court extends to all murders and other crimes committed within the town of Calcutta and factory of Fort William, and the limits thereof, and the factories subordinate thereto: and also extends to all murders and crimes committed in Bengal, Bahar, and Orissa, by any British subject, or any other person in the service of the East India Company or of any British subject. By the Act, 39th and 40th Geo. III., c. 79, sec. 20, the limit of Bengal, Bahar, and Orissa was extended to Benares, and to all such Districts as should thereafter be made subject to the Presidency of Fort William. By the Act, 26th Geo. III., c. 57, sec. 29, all the servants of the East India Company, and all other British subjects resident in India, were made subject to the jurisdiction of the Supreme Court for all murders and other crimes committed in any parts of Asia, Africa, or America, beyond the Cape of Good Hope to the Straits of Magellan, within the limits of the exclusive trade of the East India Company.

By the 56th section of the Act, 9th Geo. IV., c. 74, it was enacted, "That where any person, being feloniously stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon land or at sea, within the limits of the Charter of the said United Company, shall die of such stroke, poisoning, or hurt, at any place without those limits: or, being feloniously stricken, poisoned, or otherwise hurt, at any [74] place whatsoever without those limits, either upon land or at sea, shall die of such stroke, poisoning, or hurt, at any place within the limits aforesaid, every

* Present: The Right Hon. Lord Wensleydale, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir William H. Maule.

(a) By the Charter of Justice, dated the 26th of March, 1774, sec. xxxiii., creating the Supreme Court at Calcutta, that Court, in criminal suits, has sole power and authority to allow or deny appeals to the Queen in Council. See *The Queen v. Eduljee Byramjee* (3 Moore's Ind. App. Cases, 468); *The Queen v. Alloo Paroo* (ib. 488).

offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished, by any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the Court within the jurisdiction of which such offender shall be apprehended or be in custody" (a).

At the Criminal Sessions holden before the Supreme Court on the 4th of February, 1857, an indictment against the Appellants was presented to the grand jury, the seventh count of which was as follows:—"The jurors of our Lady the Queen, upon their oath, further [75] present, that Nga Hoong, Nga Dzeen, Nga Thoon, Nga Tzeen, and Nga Than Keh, on the first day of November, in the year of Our Lord, 1855, being natives and inhabitants of the parts of India within the dominions of our Lady the Queen, and as such being persons owing allegiance to and under the peace and subjects of our Lady the Queen, and who now are in custody in Calcutta, within the local jurisdiction of this Honourable Court, did within the limits of the charter of the East India Company (to wit, at a certain Island in the Bay of Bengal, in Asia, called Wah (Gyoon), feloniously, wilfully, and of their malice aforethought, kill and murder a male native of the parts of India within the dominions of our said Lady the Queen, whose name is to the jurors unknown."

A true Bill was found by the grand jury against all the Appellants; and on the 7th of February, 1857, they were brought to trial in the Supreme Court, before the Chief Justice, Sir James William Colvile. At the trial the Appellants pleaded "Not guilty"; and the Counsel for the Appellants objected and contended that the Court had no jurisdiction to try the case, and that the Appellants were not subject to the criminal jurisdiction of the Court.

The question as to the jurisdiction was reserved by the Chief Justice for the decision of the full Court upon further argument. The jury found a verdict, as to all the Appellants, of "Guilty" upon the seventh, and three other counts not material to the question at issue.

The question of jurisdiction was argued, on the 12th of February, 1857, before the full Court consisting of the Chief Justice and Mr. Justice Buller, and Mr. [76] Justice Jackson, and the judgment of the Court was pronounced on the 17th of the same month. The Chief Justice delivered the opinion of himself and Mr. Justice Buller, that the Court had jurisdiction. Mr. Justice Jackson was of opinion that the Court had no jurisdiction.

The judgment of the Chief Justice and Mr. Justice Buller was in these terms:—"The following are the considerations upon which we think that the Court has jurisdiction to try and determine this case: The 56th section of the 9th Geo. IV., c. 74, is unlimited as to persons. It must necessarily receive that reasonable limitation which applies to every penal enactment, namely, that it cannot be taken to affect any person who does not owe a permanent or temporary allegiance to the Crown. But there is nothing in its terms which restricts its operation, whether within or without the Queen's dominions, to one class of Her Majesty's subjects; it comprehends every case of criminal homicide in which the person killed dies within the

(a) Shortly before the passing of this Act, the 9th Geo. IV., cap. 31, consolidating and amending the Criminal law in England, was passed, the 8th section of which provided, "That where any person, being feloniously stricken, poisoned, or otherwise hurt, upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt, in England; or, being feloniously stricken, poisoned, or otherwise hurt, at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in the county or place in England in which such death, stroke, poisoning, or hurt, shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place."

wide limits of the Company's charter, and in which the offender is in custody within the jurisdiction which we understand to be the ordinary jurisdiction of the Court. It contemplates two classes of such cases, one in which the mortal injury is inflicted beyond the limits of the Company's charter, and the other in which the whole offence is completed within those limits. The words, therefore, of this enactment, if construed literally, unquestionably comprehend the present case. There is no general rule of law which militates against that construction. The jurisdiction over offences committed beyond the territories of the East India Company, and within these wide geographical limits, is undoubtedly of an exceptional character, but it is beyond dispute that Parliament has granted it over British subjects, and that in respect not only of these heinous offences against the person, but of many other offences, by the 26th Geo. III., c. 57, s. 29. There can be no doubt that the object of that enactment was to provide for the punishment in India, of offences committed by British subjects within those geographical limits, which, if not altogether punishable by any British Tribunal, could only be tried in England under such Statutes as the 33rd Hen. VIII., c. 23, the 57th Geo. III., c. 53, or now by the 9th Geo. IV., c. 31, s. 7. Even as regards offences which could be tried in England, it was obviously expedient to provide some Tribunal, with power to try such offenders in the country of their residence, and in one presumably less distant than England from the place in which the offence was committed. The same reasons would apply to those offences committed by native subjects of the Crown which by reason of their locality would not fall within the ordinary jurisdiction of either the Crown or the Company's Courts, and there is, therefore, no antecedent improbability in the hypothesis, that the section under consideration was designed to give to the Crown Courts such a jurisdiction over offences touching life (to which the extraordinary jurisdiction created by several of the English Statutes is limited), when committed by natives. But it has been contended that other parts of the Statute in question, as well as particular expressions in the section itself, afford strong arguments against the construction which the Counsel for the Crown would put upon it. It is said that the preamble tends to show that there was no intention to confer upon any [78] of the Crown Courts in India a new jurisdiction, or to do more than introduce here some of those amendments in the administration of the criminal law which had been effected at home by the 9th Geo. IV., c. 31, and other Statutes. It is said, in particular, that the real object and intention of the 56th section of the Indian Statute, were to do no more than was done by the 8th section of the English Statute, and a further objection to the construction contended for by the Counsel for the Crown, which, when I first considered the subject, struck me as plausible, is drawn from the provision in the first section, which says, that the Act shall extend to all persons over whom the criminal jurisdiction of the Crown Courts does or shall hereafter extend, whence it is argued that the general provisions of the Act are not to be taken to apply to natives, who are not subject to the ordinary criminal jurisdiction of the Court. The answer to the first objection seems to be that, in whatever degree the passing of the Indian Statute was prompted by the contemporaneous amendments in the criminal law of England, that Statute does unquestionably in several instances give to the Crown Courts a new and extended jurisdiction, and confer upon them the power of trying natives, who would not otherwise be triable there. The 7th and 8th sections relating to accessaries, the 70th section relating to the offence of bigamy, the 109th section relating to receivers of stolen property, afford instances of this. Nor can it be said that the jurisdiction supposed to be given, was wholly unconnected with the recent amendments of the criminal law of England; on the contrary, the argument of the Crown Counsel assumes, that the intention was to make some kind of provision in India [79] for the trial of that kind of offence, which was the subject of the 7th section of the 9th Geo. IV., c. 31. That enactment consolidated and amended the English law relating to the trial of murder and manslaughter committed out of England, and if a similar jurisdiction was to be given to the Courts here, their circumstances required some modification of the machinery by means of which it was to be exercised. Again, it is clear that whatever the 56th section of the Indian Statute means, it means something different from, if not something more than, the introduction into India of the 8th section of the English Statute. The latter section seeks merely

to provide for the cases in which the deceased being stricken in England dies abroad, or, being stricken abroad, dies in England; and it does so by enacting, that in either case the trial may be had in that country in which either the death or stroke happened, as if the offence had been wholly committed in that place. But the 56th section of the Indian Statute does not merely contemplate a stroke without, and a death within, certain limits, or *vice versa*; it seems to contemplate also offences wholly committed within the limits defined (the words are, 'or being feloniously stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon land, or at sea, shall die of such stroke, poisoning, or hurt, at any place within the limits aforesaid'), and it provides for the trial of the offenders, not by any Court within the limits of whose ordinary jurisdiction either the stroke or the death has happened, but by any of the Crown Courts within whose ordinary jurisdiction the offender may be apprehended or be in custody. And as Mr. Advocate-General has shown by several of the cases put by him, it is quite consistent with this [80] section, that the offender should be tried by a Court within whose jurisdiction neither stroke nor death has happened; or by one within whose jurisdiction both or either of those events has happened. The word 'wholly' which has been contrasted with the word 'actually' in the 70th section, is not inappropriate, because the section does embrace some cases in which the stroke may have been given beyond, and the death may have taken place within, certain limits. In some of the other cases which are embraced by this section, it would not be strictly appropriate; but we cannot, from the use of it, infer that the object of the section was merely to incorporate into the Indian Act a provision analogous to those of the 8th section of the English Statute. On the contrary, we think that it was intended to answer the double purpose of introducing provisions analogous to those of the 7th as well as to those of the 8th section of the English Act; and to provide the means of trying, by any of the Crown Courts within whose ordinary jurisdiction he might be found, a person guilty of murder or manslaughter, whether his offence had been wholly or only partially committed within the limits of the Company's charter. It may possibly be argued that in that member of the section which contemplates a crime completed within the limits of the Company's charter, the Legislature may have had in view cases in which the stroke might be given at sea, and the death happen on the land, or *vice versa*, within these limits; but surely, if that were the intention, it would have been easy to express it by words importing either contingency; the words used are applicable to either case, but they equally include every case of murder or manslaughter, in which the party [81] injured dies within the limits of the charter. Nor do we think that the first section of the Statute really affords any intrinsic reason for excluding from the operation of this section the native subjects of the Crown. That clause at most declared that the operation of the Statute should be confined to the places and persons over whom or which the criminal jurisdiction of the Crown Courts did or should thereafter extend. This would of course exclude those who owed neither permanent nor temporary allegiance to the Crown; it would also exclude such native subjects as might commit offences beyond the local and ordinary limits of the jurisdiction of those Courts; but it would include British subjects committing offences within the limits of the Company's charter or any of the narrower limits within which, by Statutes, other than the 26th Geo. III., c. 57, jurisdiction has been given over that class of persons, and it would also include natives who either by reason of the commission of the offence within the Presidency towns or upon any special ground might be amenable to the jurisdiction of the Court, and such a special jurisdiction over natives might, notwithstanding that clause, be given by the subsequent provisions of the Statute itself. We find it unquestionably given by the 70th section, given also as they are generally understood, by the 7th, 8th and 109th sections, why then should it not be given by the 56th section? Again, this section either applies to the native and East Indian subjects of the Crown or it does not. If it does not, what becomes of the assumption that the intention was to introduce a provision analogous to that of the 8th section of the English Statute? Why should such a provision be confined to British subjects? We [82] learn from the comments on this Statute contained in the charge of Mr. Justice Ryan to the grand jury, that in a case tried not long before in this Court, one Anthony had escaped from justice, because the murdered man having been stricken in the town of Calcutta had died in the Twenty-four Pergunnahs; that

that case had been brought to the knowledge of the advisers of the Crown, and that in the opinion of the learned Judge that defect in the law was remedied by this very clause of the Act. It is quite clear that had Anthony been proved to be a British subject, the difficulty in that case could not have arisen. Therefore, it cannot but be supposed that in so far as this section was designed to remedy that defect in the law, it was intended to apply to natives, as well as to British subjects. And, if it were intended to apply to the former, we cannot see by what rule of construction the words of the enactment are to be expanded or narrowed according to the character or *status* of the person to whom they are applied. It cannot be said that the first section or any other part of the Statute makes the applicability of the 56th section depend upon the circumstance of the person being subject to the general jurisdiction of the Court; for the criminal jurisdiction of the Court is never exclusively determined by the charter or *status* of the person. The local limits of that jurisdiction may be wider in the case of British subjects, and narrower in the case of natives; but in either case its existence is determined by the locality of the offence. A native who has never slept a night in Calcutta, who commits an offence in Calcutta, can only be tried here. If one whose domicile is unquestionably in Calcutta, who has never slept a night out of Calcutta, walks beyond the ditch and [83] commits a larceny in the Twenty-four Pergunnahs, he cannot be tried here. Therefore, to make this section applicable to natives in those cases only in which the offence has been partially committed in Calcutta, you must re-write every clause, I had almost said every word of it. If the intention had been merely to provide for the trial by the Court, of cases of murder and manslaughter when the offence was partly but not wholly committed within its jurisdiction, it would have been easy to express by apt words such an intention with reference to both natives and British subjects. It is more reasonable to suppose that the Legislature omitted to do so, because, by this section it had provided generally for the trial and punishment of every case of murder and manslaughter, committed wholly or partially within the broad limits of the Company's charter, either by native or British subjects in the Crown Court within whose jurisdiction the offender should be in custody. It did not express the smaller because it was included in the larger proposition: in fine, we think that the clause must apply to natives to some extent, since otherwise there would be no law for such cases as that of Anthony. We think it cannot, as against natives, be limited to cases in which some part of the offence has been committed within the local limits of the jurisdiction of the Court, both because the Court is empowered to try in any of the Crown Courts within whose jurisdiction the prisoners may have been apprehended or be in custody; and also, because the application of the clause cannot be so narrowed without doing great violence to its language; and lastly, we think that a construction which makes it a necessary condition to the application of the clause, that the stroke should be given in [84] one place, and the death happen in another, is neither necessary nor reasonable. In such a case as this it would have given the Court jurisdiction over these prisoners, if the man killed had been wounded on the smaller and had died on the larger Island, whilst it denies the jurisdiction of the Court over them, because the man killed died on the spot on which he was wounded. Another argument against the jurisdiction that has been suggested is, that any construction of the 56th section which supports it against these prisoners, must also give to this Court, in every case of murder, or manslaughter, committed in the Mofussil, a jurisdiction concurrent with that of the Company's Courts. The word used is, however, 'may,' not 'shall,' the jurisdiction is at most concurrent with that of the local Courts, and though this consequence may not have been foreseen by the framers of the Statute, and might lead to practical inconvenience, it cannot control the construction of the enactment. It is further to be observed that the existence of the jurisdiction depends upon a further circumstance which can rarely happen, and can never be created in order to oust the jurisdiction of a Company's Court, namely, that the prisoner must be apprehended or be in custody within the local limits of the Crown Court's jurisdiction. Upon the whole, then, we are of opinion that this Court, as a Court of oyer and terminer and general gaol delivery, had power to try the prisoners for the felony of which they stand convicted on the seventh count of the second indictment. In coming to this conclusion we have not been influenced, and we ought not to be

influenced, by the consideration, that, if we decide otherwise, great crimes, and in this and perhaps in other [85] like instances, would either go unpunished, or be left to such uncertain remedy as proceedings in England might afford. But, if we ought not to be astute in seeking for jurisdiction, so neither ought we to be astute in evading a jurisdiction, which, upon the best consideration which we can give to this difficult and novel question, we think has been conferred upon us. We would not unduly strain the Statute, either to avoid or to cause a failure of justice; we have tried fairly to interpret it, and the result is, that we think this conviction can be supported. Having come to this conclusion, we have considered anxiously what course it is the duty of the Court to follow, and in this I believe we are all agreed. The crime of which these men have been convicted is of the deepest dye. It involves not merely the murder charged in the indictment, but nine others. In such a case, but for this question of jurisdiction, we should unquestionably have deemed it our duty, however painful, to let the law take its course against some, if not all, of the prisoners. But to inflict capital punishment, if there is the slightest doubt of our jurisdiction, is a serious responsibility. On the other hand it would be objectionable to allow great criminals to escape with inadequate punishment, because on the trial a question of this kind had been raised and determined against them; though with that uncertainty which necessarily attaches to the decision of any Court but one of ultimate resort. In the present case the Court is not unanimous, and that affords a strong additional reason for the course which we intend to pursue. But had we been unanimous, we should have felt that this is the first decision on the section in question; and that the practice of the Court, whenever it has [86] tried a case of homicide committed in the Mofussil, has been to require proof that the accused is a British subject in the strict sense of the term; and so far affords an argument against the construction which two of us have to-day adopted. If these unhappy men had the means of appearing by legal advisers regularly instructed, and had petitioned for leave to appeal against our judgment, we should not on these circumstances have refused to allow their appeal. It is in every way desirable, as regards the public, that this question of jurisdiction should be authoritatively settled. What we propose to do, therefore, is to pass sentence on them now upon the second indictment; but to suspend the execution of that sentence until the Queen's pleasure can be known. We shall, whether there is a regular appeal or not, send home the proceedings, and endeavour to obtain, in the manner which may be thought most satisfactory, an authoritative decision, which will both determine the propriety of this conviction, and set at rest the question on which its legality depends."

The other Judge, Sir Charles Jackson, delivered his judgment as follows:—"As I take a view somewhat different from the rest of the Court upon the question of jurisdiction under the Statute, 9th Geo. IV., c. 74, I think it as well to express that opinion shortly. It appears from the preamble of that Act, that it was passed with the view of introducing some of the alterations of the criminal law contained in the English Act, 9th Geo. IV., c. 31; and clause 56 of the 9th Geo. IV., c. 74, appears to be the one which was intended as an introduction, to some extent at least, of section 8 of the English Act into this country. This is admitted by the Counsel for the Crown, who contend, however, [87] that the 56th section was intended as an introduction of the 7th section of the English Act, as well as the 8th—an argument to which I shall hereafter advert. The general intention of section 8 of the English Act, was to provide for cases of murder or manslaughter where the blow was struck upon the sea, or at any place out of England, and the death occurred in England, or where the blow was struck at any place in England, and the death occurred out of England. The words of the 56th section of the Indian Act are certainly different. At first it provides for the case of a person struck at any place on land or sea within the limits of the Company's charter and dying without those limits. So far this section resembles the second state of circumstances referred to in section 8 of the English Act; but, instead of proceeding with a provision for the case of a person struck at any place without the limits, and dying within those limits, the phraseology is changed, and the section runs thus: 'or being feloniously stricken,' etc., 'at any place whatsoever either upon land or sea shall die of such stroke,' etc., 'at any place within the limits aforesaid.' The section then proceeds to give jurisdiction to

the Court to try and punish all such cases, 'as if such offence had been wholly committed within the jurisdiction of the Court within the jurisdiction of which such offender shall be apprehended or be in custody.' It is not difficult to account for the language being different in the English and Indian Acts. If the Indian Act had merely provided for cases where the blow was struck without the limits of the Company's charter, and the death occurred within, there would have been many cases of murder and manslaughter, in which the blow was struck in one [88] jurisdiction and the death ensued in another, which would be excluded from the operation of the section. The framer of the Act, if he glanced at the map, would see that he had not to deal with limits consisting of a compact territory under one jurisdiction like England, but with limits including a large portion of the surface of the globe, with many independent jurisdictions, native and foreign, within them, and he would be anxious to provide for cases where the offence was committed in one of these jurisdictions within the limits of the Company's charter, and consummated in another, also within the same limits, as well as for offences committed without the limits, and consummated within them. As instances, suppose two Lascars, natives of India, but not inhabitants of Calcutta, were on shore at Madagascar, or at the Isle of Bourbon, and one of them inflicted a mortal wound on the other; that both natives then embarked, and the wounded man died at sea, and the slayer was afterwards arrested in Calcutta; or suppose the case of two native subjects, quarrelling on the road from Lucknow (in the then Kingdom of Oude) to Cawnpore, and that one of them received a mortal wound from the other, and afterwards both crossed the river to Cawnpore, where the wounded man died. Numerous other cases might be put, in which the blow would be given within one jurisdiction and the death would take place in another, and yet both jurisdictions would be within the geographical limits of the Company's charter, and it is, I think, more probable that the phraseology was changed to meet such cases as these, which are similar in their nature to those provided for in section 8 of the English Act, than that it was altered with a view of giving this Court concurrent jurisdiction with [89] the Mofussil Courts in all cases of homicide committed in the Mofussil, when the prisoner is in custody in the Presidency town. I see no ground for supposing that the words were altered with the view of embodying into this section the 7th section of the English Act, as well as section 8; for section 7 of the English Act deals with an entirely different matter to that contemplated in section 56 of the Indian Act, inasmuch as section 7 applies exclusively to cases where the whole offence is committed out of England, whereas section 56 applies to cases committed partly within and partly without, or wholly within, the limits of the Company's charter, and does not in any aspect contemplate a case of murder wholly without those limits. We have next to consider the effect of the words as they stand in this section 56. It first provides for cases of murder, etc., where the blow is struck within the limits and the death occurs without, and it then proceeds—'or being feloniously stricken,' etc., 'at any place whatsoever, either upon land or at sea, shall die of such stroke,' etc., 'at any place within the limits aforesaid.' I concede at once that this language gives the Court jurisdiction when the blow is struck without the limits of the Company's charter, and death ensues within those limits, and also in cases where the blow is struck in one jurisdiction or place within the limits of the Company's charter, and death ensues in another jurisdiction or place within those limits. I think the clause was expressly framed to meet such cases, but I doubt whether the section was ever intended to apply to a case of murder or manslaughter where the offence was completed, that is, where the blow was struck and the death ensued at one and the same place within the [90] limits of the Company's charter. It is true that the words 'being stricken at any place whatsoever,' and the words 'shall die of such stroke at any place within the limits aforesaid,' if taken literally, admit of the construction that the blow may be struck and the death ensue in one place, if within the limits; but I nevertheless doubt the propriety of such a construction. The whole section must be taken together, and the general intent of the provision, and the other words contained in it, must also be considered. I think that the whole section is framed *diverso intuitu*, and solely with the view of providing for certain exceptional cases where the blow is struck in one jurisdiction and the death ensues in another; and, if I am right in my premises, that this section is merely an adaptation of the 8th section of the English Act, that section

supports my view, inasmuch as it does not contemplate the blow and the death occurring at the same place, but is expressly framed with the view of meeting the difficulty of cases where the blow is struck in one place, and the death ensues in another. I also think that the word 'wholly,' which is found towards the end of this section, is unnecessary and inappropriate to the case of a murder committed in one place, and that it, therefore, throws a doubt on construction insisted upon by the Crown. The passage in which it stands, runs thus: 'may be dealt with, inquired of, tried, determined, and punished by any of His Majesty's Courts,' etc., 'in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the Court within the jurisdiction of which such offender shall be apprehended or be in custody.' The section here again reverts to the language of section 8 of the [91] English Act, which also contains this word 'wholly,' 'wholly committed in that county,' and it seems clear that the jurisdiction here spoken of is that jurisdiction which we exercise within our local limits, and in which the prisoner is in custody. Bearing this in mind, the word 'wholly' would be most appropriately used if applied simply to the case of an offence commenced or consummated partly within the local jurisdiction. Still that expression would not be inappropriate, if applied to offences consisting of two parts, respectively committed in different jurisdictions without the local limits. But the word 'wholly' is both inappropriate and unnecessary if applied to the case of a murder committed in one place within the Company's charter, though without the local jurisdiction: for in such a case, there is no question whether it was committed wholly or in part in any particular place, and it would have been sufficient in such a case to say 'as if such offence had been committed within the jurisdiction of the Court,' omitting the word 'wholly' altogether. And if it were the intention of the draughtsman to include offences committed in one place, he might have added the words 'or actually,' words which he could appropriately use in the 70th section of this Act, in which case the words might be read distributively, and the word 'actually' applied to cases where the offence was committed in one place. If this 56th section was framed, as the Counsel for the Crown insist, with a view of giving this Court jurisdiction in all cases of murder and manslaughter occurring within the limits, one would not expect to find so important a jurisdiction, one that gives us concurrent jurisdiction with the Mofussil Courts in all cases of murder and manslaughter occurring in the Mofussil, when the offender is in custody in the Presidency town, to be thus incidentally and obscurely given in a section which has for its main object, at least, a provision for cases where the blow is given in one jurisdiction, and the death ensues in another. It is hardly possible to conceive, that, if it were the intention of the Legislature to give us so important a concurrent jurisdiction, it would have remained undiscovered and unknown until this argument: for if the argument for the crown be correct, this Court has been in error for the last twenty-eight years, inasmuch as it has always, during that period, required proof in all cases of murder and manslaughter committed in the Mofussil, that the offender was a British subject. On the whole, then, I have great doubts whether this section applies to a case where the murder was committed at one place within the limits of the Company's charter. I am inclined to think that the section was framed *diverso intuitu*, with the intention of giving this Court jurisdiction in a few exceptional cases, where the blow occurs in one place and the death in another, and the person is in custody at the Presidency town, and that it is very difficult to extract out of these obscure words, an entirely new range of jurisdiction, which no other Statute, authority, or practice, has ever treated as existing. I am glad, therefore, that the course about to be adopted by the Court will set at rest all doubts on this question before the execution of the sentence."

The majority of the Court being of opinion that the Court had jurisdiction, judgment of death was recorded against the Appellants on the seventh count: but execution of the sentence was respite.

The Appellants having obtained leave of the Su-[93]-preme Court to appeal from this judgment to Her Majesty in Council, the same now came on for hearing.

Mr. Wigram, Q.C., Mr. Forsyth, Q.C., and W. H. Melvill, for the Appellants.—The Supreme Court at Calcutta had no jurisdiction to try this indictment, as the Appellants were not subject to the criminal jurisdiction of that Court, or liable to

be tried before it for the offence with which they were charged. That Court was created by the Act, 13th Geo. III., c. 63, sec. 13, which enabled the Crown to erect a Supreme Court with civil and criminal jurisdiction; and by the Charter of Justice, dated 26th of March, 1774, founded upon this Statute, the Supreme Court at Calcutta was established, with a criminal jurisdiction extending to all murders and other crimes committed within the town of Calcutta, in Bengal, Bahar and Orissa, by any British subject, or any other person in the service of the East India Company. The term "British subject" did not include native subjects, but only Europeans, it being intended to exempt British subjects from the Mofussil jurisdiction. Statute, 39th and 40th Geo. III., c. 79, sec. 20, extended the limits to Benares. The Statute, 26th Geo. III., c. 57, sec. 20, made all the servants of the East India Company resident in India amenable to the jurisdiction of the Supreme Court for all murders or other crimes within the limits of the trade of the East India Company. The principles of these enactments were fully considered in their application to the Supreme Courts at Madras and Bombay in the cases of *Nagapan Chetty v. Rachummar* (1 Strange's Mad. Cases, 152), and *In re The Justices of the Supreme Court of Judicature* [94] at Bombay (1 Knapp's P.C. Cases, 1). Under the provisions of these Statutes the criminal jurisdiction of the Supreme Court has always practically been treated as applying only to crimes committed within the Presidency town of Calcutta, and its factories, and to crimes committed by the British subjects of the Crown within the mercantile limits of the Company's charter, or over natives, for crimes committed within the limits of the town of Calcutta. Here the Coco Islands are not within the town of Calcutta, and the Appellants are not British, but native subjects of the Crown. This was the position in which the law stood at the time of the passing of the Statute, 9th of Geo. IV., c. 74. Now, the object of that Statute, as it appears by the preamble, was to extend to India, and to those persons who were then subject to the jurisdiction of the Supreme Court before the alterations made in the criminal law of England, the benefit of the English Statute, 9th Geo. IV., c. 31, sec. 8; and section 56 of Statute, 9th Geo. IV., c. 74, was framed and intended to be an adaptation of section 8 of the Statute, 9th Geo. IV., c. 31, so as to make similar alterations in the criminal law administered in India, but was never intended to render any person subject to the criminal jurisdiction of the Supreme Court who was not previously subject to that jurisdiction. Certainly it was never intended to give the Supreme Court a general jurisdiction over all natives in cases of murder and manslaughter. Nor even over aliens in the service of the East India Company, *Re v. Francisco Jose* (Morton's Rep. 218), where that Court held, that a foreigner who had committed an offence beyond the province of Bengal was not subject to the jurisdiction of the Supreme Court, under the Statute, [95] 26th Geo. III., c. 57, sec. 29. If the offence was committed by a native subject in the town of Calcutta, the Court would have jurisdiction, *Jannokee Dass v. The King* (1 Moore's Ind. App. Cases, 67; S.C. Morton's Rep. 222). The language of the Statute in question clearly shows that it was to be solely applicable to English subjects. Sections 2, 59, 60, 67, 69 and 97, respectively contain the word "felony." This is a technical phrase of English law, and not in general use, like "misdemeanour," showing it was intended only to apply to British subjects. It is not to be found in the Bengal Regulations relating to the administration of the Foujdarry, or Criminal Courts, which are in force in the Mafussil. Ben. Regs. Dec. 3rd, 1790; IX. of 1793; XII. of 1825; and XII. of 1829. It follows, therefore, that the use of the word "feloniously" in the 56th section implies that the persons committing the offences to which that section refers were already under the English jurisdiction. Again, the word "person" in that section cannot apply to native subjects as contradistinguished from British subjects. If the Supreme Court at Calcutta had jurisdiction over natives before the passing of this Statute, then the word used in this section is superfluous. The first section should be incorporated with the other sections where that word occurs, and to the word "persons" should be added "subject to the jurisdiction of the criminal law." Such a construction would make all the sections intelligible. Courts in this country have done so, *Fallance v. Siddel* (6 Ad. and Ell. 932), *Lyde v. Barnard* (1 Mee. and Wels. 101). Again, the phrase "within the limits of the charter" must be taken to mean the judicial and administrative limits, not the trading limits. Section 56, under [96] which this conviction is founded, therefore, cannot apply: the murder took place

indeed within the trading limits of the charter, but not the judicial limits. Whenever the trading limits are intended, such intention is expressly mentioned in the Acts of Parliament; as in the 26th Geo. III., c. 57, sec. 29; 53rd Geo. III., c. 155, sec. 2; 7th Geo. IV., c. 56, sec. 3; 9th Geo. IV., c. 73, secs. 19, 21, 54; 3rd and 4th Will. IV., c. 52, sec. 119; 3rd and 4th Vict., c. 56, sec. 9.—[Mr. Pemberton Leigh: In this particular case would there be any other Tribunal, than the Supreme Court, to entertain the charge?—The native criminal Courts, the Foujdarry and the Nizamut Adawlut, had jurisdiction by Ben. Regs. V. of 1809, sec. 3; VIII. of 1813, sec. 2; I. of 1822, sec. 6; VIII. of 1829, sec. 3. These Regulations were repealed by Act of the Government of India, No. I. of 1849, and fresh enactments made for that purpose. Another fatal objection to the conviction under this 56th section of the 9th Geo. IV., c. 74, is, that the murders were “wholly” committed at one place. This section was intended to meet a case of difficulty, where the blow was struck in one place and death took place in another, and to that extent only has the English Act, 9th Geo. IV., c. 31, sec. 8, been introduced into India by the Act, 9th Geo. IV., c. 74. The judgment cannot be sustained.

The Solicitor-General (Sir Henry S. Keating), and Mr. Welsby, for the Crown.—The whole question turns upon the proper interpretation of the 56th section of the 9th Geo. IV., c. 74. Our contention is, that the Supreme Court had jurisdiction to try the Appellants by virtue of that section, which was passed to meet a case of this [97] kind. It is true that in former Statutes a distinction was made between English and native British subjects, but we submit that no such distinction is to be found in the Act, 9th Geo. IV., c. 74. The preamble fully bears this out. There the word “extend” is used, which clearly indicates that its operation is not to be confined to British subjects, but on the contrary to embrace native subjects, and to enlarge the jurisdiction of the Court. The first object of the 56th section is protection. There is, therefore, no reason why any class of natives should be excluded from the benefit of that protection. There is nothing which can justify the Court in construing this Statute so as to limit the word “person” to British subjects and not to native subjects. The words relied upon by the Appellant’s Counsel, “within the limits of the charter of the said United Company,” necessarily mean the geographical or trading limits, and such an interpretation must be so put on the Act, 9th Geo. IV., c. 74, as in the former Statute, 26th Geo. III., c. 57, sec. 29. The object of the charter was to give the East India Company a monopoly of trade, therefore the limits of the charter must mean the trading limits. Where those limits are intended they are expressly mentioned. Another ground taken by the Appellants, as an argument against the application of this Statute to native subjects, was the use of the word “feloniously,” and it was contended that it was a technical word which applied only to individuals liable to the English law: we submit, however, that the word “feloniously” refers only to the nature of the crime, and not to the person who commits it.

Mr. Wigram, Q.C., was heard in reply.

[98] The Right Hon Lord Wensleydale.—Their Lordships in this case have had an opportunity of consulting the judgments in the Court of Calcutta, which are ably and perspicuously stated by the Chief Justice and Mr. Justice Buller on one side, and by Mr. Justice Jackson on the other. They have heard as well every argument which could be advanced, either in favour of the conviction, or against it, at the Bar; and having formed their conclusion, and entertaining no doubt upon the question, they think it would be improper to create any further delay for the purpose of considering this case. They are all quite satisfied that the judgment cannot be supported, and that the conviction was wrong.

The question in this case depends entirely upon the construction of the Act, 9th Geo. IV., c. 74, and of the 56th section of that Act, taken in conjunction with the preamble. Now, there is nothing more clear than that, with respect to the criminal law, the construction is always to be strict; and putting a strict construction upon the 56th section of this Act, we have no doubt that it was not meant to apply to a case of this kind, but that in the first place it extends only to persons who were otherwise amenable to the criminal jurisdiction of the Court at Calcutta, who are the persons described in the first section, and that by the language of the section in question, it

applies only to cases in which the felony or crime has been committed, by persons who committed that crime, partly within the jurisdiction, and partly without.

The object of the Statute, as appears by the recital, was for the purpose of applying and extending to the British territories in India the same provision as had [99] been recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another, which provisions had been the subject of a recent enactment in the Statute, 26th of Geo. IV., c. 31. The preamble describes that to have been the object of the Statute; and there can be no doubt that we must consider the preamble as a key to the construction of the Statute, though it would not, of course, control every provision, for we very often find that the subsequent provisions of a Statute extend beyond the limits of the preamble.

The Statute goes on to say, that the object being that the "alteration should be extended to the British territories under the Government of the United Company of Merchants of England trading to the East Indies," it is, therefore, enacted that the Act "shall extend to all persons and all places, as well on land as on the high seas, over whom, or which, the criminal jurisdiction of any of His Majesty's Courts of Justice erected, or to be erected, within the British territories under the Government of the United Company does or shall hereafter extend." Now, that clause clearly shows that the object of the Statute was that it should apply to such persons. The Solicitor-General says that the word "extend" is not to be construed to confine it to such persons, and that it is not to limit the jurisdiction. But the word "extend" is to be explained by the preamble, which states the object of the Statute to be to extend the recent enactments of the Act which is in force, to the East Indies, and the word "extend" is to be read the same as if it were "apply."

Then we must consider whether the 56th section [100] applies merely to those persons, or whether, as the Chief Justice and Mr. Justice Buller have stated, it extends beyond the preamble, and applies to an offence completely committed within the limits of the Company's trading charter, but not within the limits of the town of Calcutta. Now, reading that clause, we think that there is really no difficulty in saying that the sole object of it was, that it should apply to offences partially committed in one district and completed in another. The words of the clause are, "That where any person being feloniously stricken, poisoned, or otherwise hurt,"—the word "feloniously" seems to show that it was meant that at the time when the person gave the original stroke, he was a person capable of committing felony—"at any place whatsoever, either upon the land or at sea, within the limits of the charter of the said United Company, shall die of such stroke, poisoning, or hurt, at any place without those limits; or being feloniously stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon land or at sea, shall die of such stroke, poisoning, or hurt, at any place within the limits aforesaid, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished by any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the Court within the jurisdiction of which such offender shall be apprehended or be in custody."

[101] One question raised before us by the learned Counsel for the Appellants, is as to the meaning of the term "within the limits of the charter of the said United Company." On that point I believe their Lordships have not the slightest difficulty. Those words are to be construed in the same way as they are used in the Statute, 26th Geo. III., c. 57, to which this Statute forms an addition. They are to be construed to mean "within the limits of the trading charter of the Company." So far, therefore, as regards the place of committing the offence, this was an offence committed within those limits, and the Court had in that respect jurisdiction. But the words of the section do not apply to entire offences, begun and completed within the jurisdiction, but to those partly committed within, and partly without, which are put on the same footing as if they had been "wholly committed within the jurisdiction." It is perfectly clear that the term "wholly" shows the intention of the Legislature to be, that the section shall apply only to that description of case: and it

cannot have the sense of "actually committed" put upon it, as is contended on the part of the Crown, without doing violence to the words. Therefore, it appears to us, proceeding upon the ordinary rules of the construction of penal enactments, that the object of this section was merely to apply the improvement of the law, which had lately taken place in England, to the case of persons amenable to the Court of Justice at Calcutta, who had partly committed an offence in one place, which was afterwards completed in another; that it does not apply at all to a case of this kind, where the persons committing the offence were not amenable to the Court of Calcutta, and where the [102] whole offence which has been committed was within one jurisdiction.

The Court are confirmed in their opinion as to the meaning of the Statute with respect to the persons to whom it is applicable, by the last section. It is introduced at the end of this Statute obviously with the purpose of showing what class of persons were liable to the provisions of this Statute; and it extends the liability of persons to the jurisdiction of the Courts beyond what it had been before. That section enacts, "That all persons, whether British subjects or others, employed by or in the service of His Majesty, shall be held subject and amenable to the criminal jurisdiction of His Majesty's Courts of Justice, erected or to be erected within the British territories under the Government of the said India Company, in the same manner as persons employed by or in the service of the said United Company are now by law subject and amenable to the said jurisdiction." Before the Statute, British subjects, properly designated as British subjects, that is, British-born subjects, and persons in the service of the East India Company, were liable to the jurisdiction of the Court of Calcutta; persons not in the employment of the East India Company, but in the employment of His Majesty, were not so liable. This Statute extends the liability to those who are servants of the Crown; and that provision, finding its place in this Act of Parliament, raises, in their Lordships' opinion, a strong inference that the Statute was meant to apply to no other persons than those who were liable to the jurisdiction of the Court of Calcutta, to which the last clause makes a considerable addition.

Therefore, looking at this Act of Parliament alto-gether, [103] their Lordships have not any doubt what the object of that Statute was: it was only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and completed in another, to the East Indies, and not to make a new enactment rendering persons liable to punishment for a complete offence, who would not have been liable before. If the result of our decision should be, that these Appellants are to escape from justice, we shall regret it; but that is a matter which cannot influence our judgment. If the Mofussil Court has no jurisdiction now, by virtue of the East India Company's Regulations, to dispose of this case, they must escape justice; but we are not, in any way, to alter or construe differently the rules of the criminal law in consequence of the supposed justice of a particular case. The rule is, that such law is to be strictly construed; and so construing it, or even without that strictness, the construction of this 56th section appears to us to be such as to require us to pronounce in favour of the Appellants.

[104] JOHN ROSE TROUP and MARY ANN his Wife, PETER PAUL MARIE SOLAROLI and GEORGIANA his Wife, and the Hon. MARY ANNE DYCE SOMBRE,—*Appellants*: THE EAST INDIA COMPANY, *Respondents*, and The Hon. MARY ANNE DYCE SOMBRE, Administratrix of David Ochterlony Dyce Sombre,—*Appellant*: THE EAST INDIA COMPANY, *Respondents* * [Dec. 9, 10, 1857].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra

Ben. Reg. II. of 1803, sec. 18, cl. 3, prohibits the Court from hearing, trying or determining the merits of any civil suit, if the cause of action arose twelve years antecedent to the institution of the suit, unless the Plaintiff prove "that either from minority or other good and sufficient cause he was precluded from obtaining redress."

A cause of action arose in 1836. In 1842, the party entitled to seek redress was found a lunatic by a *Commission de lunatico inquirendo* in England, and in 1844, a Committee to his estate was appointed, who in 1848, more than twelve years from the time when the cause of action arose, brought a suit in the Zillah Court of Delhi, in the North-Western Provinces, on behalf of the lunatic's estate. The Zillah Court at Delhi, and the Sudder Court at Agra, held that the Committee was barred by the Ben. Reg. II. of 1803, sec. 18, cl. 3, from filing his plaint.

Such judgments reversed upon appeal by the Judicial Committee, by reason:

First. That the words "other good and sufficient cause" in cl. 3, sec. 18, of Ben. Reg. II. of 1803, included "insanity" [7 Moo. Ind. App. 125].

Second. That it made no difference, so far as concerned the lunatic, that under the Commission of lunacy a Committee of the lunatic's estate had been appointed in 1844 [7 Moo. Ind. App. 125, 126].

Third. That in computing the limitation of twelve years mentioned in cl. 3, sec. 18, of this Regulation, there should not be reckoned any time elapsing, while the person for the time being entitled to seek redress was not free from disability [7 Moo. Ind. App. 126].

After an appeal to England, and before any petition of appeal was lodged, the appeal abated by the death of the Appellant. Appeal revived by the Appellant's special administratrix.

In these appeals, the points raised in the Courts in India and upon appeal in both suits, were substantially the same; the questions being, first, whether the limitation of twelve years prescribed by cl. 3, sec. 18, of Ben. Reg. II of 1803 (a), operated as a bar to the right of action by the Committee of the estate of a lunatic,

* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

(a) By Ben. Reg. II. of 1803, sec. 18, cl. 3, it is enacted as follows:—"After the period of twelve years shall have elapsed from the date of the cession of the Provinces ceded by the Nawab Vizier to the Honourable the English East India Company, the Courts of Adawlut are prohibited from hearing, trying or determining the merits of any civil suit whatever, if the cause of action shall have arisen at a period being twelve years antecedent to the date on which the petition for the institution of such suit shall be presented to the Court, unless the Complainant can show, by clear and positive proof, that he has demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money, or that he directly referred his claim, within that period, to the matter in dispute, to a Court of competent jurisdiction, or person having authority, whether local or otherwise, for the time being, to hear such complaint and to try the demand, and shall assign satisfactory reasons to the Court, why he did not proceed in the suit; or shall prove that, either from minority or other good and sufficient cause, he was precluded from obtaining redress."

the cause of action having accrued more than twelve years before the institution of the suit; secondly, whether the lunacy of Dyce Sombre, and [106] certain intermediate proceedings taken by him to obtain redress, brought the case within the exceptions in cl. 3, of the 18th section of that Regulation; and thirdly, whether the provisions of Ben. Reg. II. of 1805, sec. 3, applied to the case.

The first suit was brought to recover possession of the Altumgha Jaghire of Badshapore Jharsa near Delhi, on the North-Western Province, with mesne profits. The facts, as they appeared in the pleadings, were as follows:—

On the 17th of April, 1834, the late Begum Sumroo, of Sardanlia, conveyed and assigned, by a deed of gift, the Altumgha Jaghire of Budshapore Jharsa, to Dyce Sombre, who entered into possession, subject to certain bequests and trusts given and declared by her Will previously made. The execution of this instrument was formally communicated to the Secretary of the Government, who did not at that time advance any claim to the Jaghire. The Begum Sumroo died on the 27th of January, 1836, and on the 30th of that month the Government took possession and resumed the Jaghire, on the ground that her right to the Jaghire ceased at her death (*a*). On the 4th of July, 1836, Dyce Sombre presented a [107] memorial to Sir Charles Metcalf, the then Lieutenant-Governor of the North-Western Provinces, in which he complained of the illegal resumption of the Altumgha Jaghire, and urged his claim thereto as donee and devisee of the late Begum. The reply to that memorial was sent through the Secretary of the Lieutenant-General, and was unfavourable to the memorialist. Being dissatisfied with that reply, Dyce Sombre, on the 23rd of August, 1836, presented a memorial to the Governor-General of India in Council, again urging his right to the Altumgha Jaghire. That memorial was referred to the Lieutenant-Governor for his report thereon, which was subsequently sent to the Governor-General under date, the 19th of October, 1836, and on the 21st of November, 1836, the Secretary to the Supreme Government addressed a letter to Dyce Sombre, stating that the Governor-General in Council could discover no sufficient ground for questioning the propriety of the decision which had been given on the case by the Lieutenant-Governor of the North-Western Provinces. Subsequently Dyce Sombre, in prosecution of his claim to the Altumgha Jaghire, presented a memorial on the subject to the Court of Directors in England, and to the board of Commissioners for the affairs of India; but those applications were unsuccessful.

On the 31st of July, 1843, an inquisition was held to inquire into the state of mind of Dyce Sombre, in pursuance of a commission issued under the Great Seal of Great Britain, when he was duly found and declared to be a person of unsound mind and unable to manage himself or his property, and to have been in the same state of unsoundness of mind from the 27th of October, 1842. By an Order made by the [108] Lord Chancellor of England, on the 8th of February, 1844, John Pascal Larkins was appointed the Committee *ad interim* of the estate and effects of the lunatic; and by another Order of the Lord Chancellor, bearing date the 5th of August, 1847, such Committee was ordered to institute the suit out of which the first of the present appeals arose.

The plaint in the suit was filed in the Court of the Principal Sudder Ameen at Delhi, on the 17th of August, 1848, by Larkins, as such Committee, and on behalf of the lunatic, Dyce Sombre, against the East India Company, to recover possession of the Altumgha Jaghire, and prayed that the Plaintiff, Dyce Sombre, might be declared entitled in perpetuity to the Altumgha Jaghire of Badshapore Jharsa, and to the maal and sayer, and other privileges and profits appertaining thereto; and the mense profits and revenues arising from the Altumgha Jaghire, and the maal and sayer

(*a*) By an Act of the Indian Legislature, No. xvii. of 1836, passed on the 20th of June, 1836, it was enacted, that "whenever the Governor-General in Council should order that any of the territories which were lately held by the Begum Sumroo, and which elapsed to the East India Company on the 27th of January, 1836, should be annexed to any District under the government of the Company, all Laws and Regulations then in force within such District should be in force in the territories so annexed to such District;" and under the powers of this Act, Pergunnah Badshapore Jharsa was incorporated with Zillah Goorgaon, in which it now continues as a portion of the British territories.

and privileges aforesaid, which have accrued due and been received by them, from and after the date of the resumption thereof, together with interest.

The answer of the East India Company, among other pleas, set up as a plea in bar, that if the cognizance of the suit even appertained to the Civil Courts, it could not be entertained, as the period of limitation of twelve years had elapsed, the cause of action, the resumption of the Altumgha Jaghire, having arisen on the 30th of January, 1836; and that measure being afterwards approved and confirmed by the Lieutenant-Governor of the North-Western Provinces, who was invested with full powers for such purposes. That the Government had since then been in possession of the estates in question, and that as the Plaintiff's plaint was dated the 17th of August, 1848, seven months [109] in excess of twelve years since the resumption had elapsed.

The replication to this plea pleaded, that although the period of limitation, counting from the date on which the Plaintiff received notice of the resumption to the date of institution of suit, had not elapsed, yet, supposing that it had elapsed, even in such case the hearing of a suit of this nature was not barred by lapse of time for two reasons: First, that the Plaintiff became a lunatic before the period of limitation had expired, and a lunatic, like a minor, was disabled from suing; second, that the Government had in an illegal manner, amounting to violence, resumed the estate in dispute, and brought it by an act of power into their possession; that a suit against one who, in a mode contrary to that prescribed in the Regulations, does by force or violence, or an act of power, seize and possess any immoveable property, may be heard within a period of sixty years; and that, therefore, the exception taken fell to the ground.

The suit was afterwards transferred to the Civil Court of Zillah Delhi.

The suit was not heard upon the merits, but only upon the point of limitation raised by the Defendant.

On the 19th of July, 1849, the case was brought up for final hearing before Mr. John Panton Gubbins, who pronounced judgment in the following terms: "The particulars of the case are, that the Pergunnah Badshapore Jharsa was long held in Jaghire by the late Begum Sumroo, whose chief possession lay around the town of Sirdhana, in the Meerut District, where she also resided at her death, which happened [110] on the 27th of January, 1836; the whole Jaghire of the Begum, both on this and on the other side of the Jumna river, was resumed by the British Government without any opposition on the part of the Begum's heirs, and incorporated with the Zillah Goorgaon, in which it now continues, as a portion of the British territories. Matters continued in this state till Dyce Sombre, who succeeded by Will to the bulk of her personal and private property, was found and declared a lunatic, and in August, 1848, the person appointed by the Lord Chancellor to manage the lunatic's estate, preferred this suit, in the Court of the Principal Sudder Ameen, which was afterwards transferred to the Civil Court of Zillah Delhi, on the ground that as the Pergunnah Badshapore Jharsa was held by a special tenure, an Altumgha Jaghire quite different from that of Sirdhana, the Government had acted illegally in resuming it in the same manner as the rest of the Jaghire of Sirdhana. At the very outset of the case the following question suggested itself to me, whether under such circumstances the Lord Chancellor's order declaring Dyce Sombre a lunatic must of necessity be acted upon by the Indian Courts; this, I confess, appears to me to be very doubtful, but after carefully weighing the point, which I may observe is not noticed by the other party, I thought it best to admit the lunacy, and proceeded first to examine the Defendants' objection under the Regulation of Limitation, namely, that more than twelve years had elapsed from the date of resumption to the preferring of this suit; to this the Plaintiff replied in his replication, first, that the period of twelve years had not even yet elapsed, if reckoned from the date on which he received notice of [111] the resumption; secondly, that Dyce Sombre became a lunatic within the period of twelve years fixed by law, and was, therefore, unable to sue; and, thirdly, that as the Government had acquired possession by violence, the Plaintiff became entitled to the benefit of the full term of sixty years allowed in such cases by cl. 1, sec. 3, Ben. Reg. II. 1805, no one of which pleas were however advanced in the first instance, as the Plaintiff had not, to all appearance, anticipated the objection on the score of limitation, and it was only when pleaded by the Defendants

in bar of the suit that the Plaintiff took it on his replication. In my opinion these pleas are not sufficient to enable me to examine and dispose of this case on its merits, it being clearly barred by the Regulation of Limitation. My reasons are as follow:—In the first place it appears to me that the period of twelve years can only be reckoned from the actual date of resumption, the 30th of January, 1836, of which Dyce Sombre, from his peculiar relation with the Begum, could not but have been informed, as the terms on which the Jaghire was generally supposed to be held, and its consequent liability to resumption on the Begum's death, were well known all over the Upper Provinces. Besides, the officers of Government, immediately on the resumption taking place, took charge of the administration of the estate in question. Secondly, the Plaintiff has, neither in his Plaint nor replication, brought forward any proof of violence on the part of Government, nor from the circumstances of the case can any such be presumed. It is evident that on the death of the Begum, the Government, according to previous stipulation, resumed the Pergunnah. In his plaint and replication the Plaintiff explains the term [112] 'violence' as denoting illegal and forcible dispossession. It ought to be known, however, that omission to fulfil any condition prescribed in the Regulations, while carrying out the instructions of the Government, is a different matter from 'violence,' possession by which or in a fraudulent manner of anybody's land or property was alone intended by the law to be liable to question during the larger period allowed for admission of suits. No act of the Government can be construed as falling under the head of violence anticipated by that Regulation. The assertion, moreover, on the part of the Committee of the estate, of 'violence,' is directly opposed to the line of conduct pursued by Dyce Sombre himself, who, for the period of seven years from the date of resumption, while he had the management of his own affairs, never preferred any claim of this sort, which would scarcely have been the case had he really thought he possessed any such. As regards the question of lunacy, I can find no law whereby a Plaintiff is entitled as a matter of course to indulgence on that ground, even had it been applied for, which is not the case. The law on the contrary is clear; it makes no exception in favour of lunatics, and Dyce Sombre himself had ample time before his lunacy, and so had his agent during five years from the time when he was appointed to the charge of the estate, to bring forward a claim to the Pergunnah within the period of twelve years fixed by law; but neither of them did so. I, therefore, consider the plea of lunacy insufficient to protect the Plaintiff's claim from the operations of the Law of Limitations, and dismiss it accordingly with costs.

The Plaintiff appealed to the Sudder Dewanny Adawlut of the North-Western Provinces.

[113] The case was brought for hearing, before a full Bench of the Sudder Dewanny Court at Agra, and on the 9th of December, 1850, that Court pronounced the following judgment:—"To understand the principal plea of the Plaintiff, it is necessary to note the following dates: The Begum Sumroo died on the 27th of January, 1836. The Government authorities assumed management of the territory on the 30th of January, 1836. Notice of the intentions of Government was received by the Plaintiff on the 18th of August, 1836. The commencement of lunacy, as declared by the Commission, was on the 27th of October, 1842. The Committee of the lunatic's estate was appointed on the 8th of February, 1844. The present suit was instituted on the 17th of August, 1848. As more than twelve years had elapsed since the 30th of January, 1836, previous to the institution of the present suit, the claim was dismissed. The pleas in appeal are those which were brought forward in the Zillah Court. In regard to the first, namely, that the limitation began to run on the 18th of August, 1836, and not on the 30th of January preceding, the Court are of opinion, that such plea cannot be sustained. The actual dispossession of the Plaintiff, and the assumption of management by the Commissioner of Delhi, are the acts which constituted the cause of action: and it has ever been the practice of the Courts to hold that the proceeding of the officer of the Government by which an injury was actually inflicted, and not the sanction of that act by the Government, indicated the commencement of the period within which remedy might be sought in the civil Courts. This has been repeatedly ruled in the numerous suits which arose out of the late Settlement proceedings, and is a point not open to discussion. In regard to the second plea, namely, that the Plaintiff is entitled to the

benefit of cl. 1, sec. 3, Ben. Reg. II. of 1805, the Court is of the same opinion, that it cannot be admitted. The allegations of the Plaintiff are set forth in a very vague manner, whereas clause 2 of that section requires that the alleged violence shall be 'distinctly' pleaded, and subsequent decisions have enforced this provision of the law (*Mussunaut Ommut-o-Zuhra Begum v. Lootpollah Khan*, Select Reports, volume vii. p. 399). Neither do the proceedings of the Government officers, however distinctly they might have been pleaded, constitute, in the judgment of the Court, that 'violence, fraud, or unjust means' contemplated by the law; the Government acquired possession of the disputed Pergunnah as they acquired possession of the rest of the Territory, by a fair title, believed to have conveyed a right of possession and property (clause 1). It has been urged that evidence should have been taken of the fact of violence, but the Court hold such evidence to be superfluous; the facts themselves are not disputed, and it remains only for the Court to determine whether those facts bring the case within the meaning of the Regulation or not. In regard to the third plea, namely, that the Plaintiff is entitled to a deduction from the twelve years of the period which elapsed between the 27th of October, 1842, and the 8th of February, 1844, the Law of limitation does not continue to run under all circumstances, as it does in England, but may be suspended in its operation by a variety of causes, as has been urged on the part of the Plaintiff. It does not, however, follow, that the whole period during which a cause of suspicion has been [115] in operation shall always be deducted from the twelve years. The amount of indulgence to be granted to the party who has failed to bring his suit within the time appointed depends upon the circumstances of each case, and is not determinable by any general rule. The law (sec. 18, Reg. II. of 1803) upon this head is the same for the Upper as the Lower Provinces, but the construction which has been put upon that law by the Sudder Dewanny Courts is different. The practice of the civil Courts is consequently different also. The Plaintiff has referred to precedents of the Presidency Court, and of the Agra Court, which are unquestionably in his favour; but, according to the latest decisions in the North-Western Provinces those precedents are not agreeable to law, and are, therefore, of no avail. The case in which this doctrine was first held is that of *Rajah Chetpal Singh v. Sheo Gholam Singh*, decided by the Sudder Dewanny Adawlut at Agra, on the 30th of August, 1848, an account of which is to be found in the printed decisions (3 Dec. N.W.P., 306). The point there ruled was, that a minor (and this Court admit generally the analogy between minority and lunacy) must sue as soon as he can after coming of age, if the period allowed by law has elapsed during his minority; and that opinion was founded on the words of the Regulation, which declares that Courts are prohibited from hearing civil suits, unless the Complainant shall prove that, 'either from minority or other good and sufficient cause he was precluded from obtaining redress.' If a Plaintiff, on attaining his majority after the lapse of the period, unnecessarily delayed to bring his suit, he could not prove that he had been precluded from obtaining redress, [116] and accordingly the prohibition would remain in force. He could not be heard. The principle of the decision in *Rajah Chetpal Singh v. Sheo Gholam Singh* was again recognized and upheld by a full Bench in the case of *Ramchul Singh v. Koonwar Sarrubdawan Singh*, decided at Agra, on the 2nd of September, 1850. It has, therefore, become law in the North-Western Provinces. In the case before the Court, the period which the Plaintiff claims to deduct is that which passed between the 27th of October, 1842, the date of the commencement of lunacy, and the 8th of February, 1844, the date of appointment of the Committee of the estate; and the plea is to be disposed of on the same principles as if minority had intervened. The case of *Rajah Chetpal Singh v. Sheo Gholam Singh* is directly in point. In both cases, disability occurred after the time had begun to run; in both, many years of the legal term had yet to run when the disability ceased. The only question that could be raised was, whether there were any other circumstances peculiar to the condition of the Plaintiff, by which he was precluded from bringing his suit before the expiration of the legal period, and this is not even asserted. The Court, therefore, dismiss the appeal, and confirm the decision of the Zillah Judge, with costs."

The Plaintiff appealed from this judgment to Her Majesty in Council.

The other suit was instituted on the 18th of August, 1848, by Dyce Sombre and Larkins, the Committee of the lunatic's estate, against the Government, in the same

Court, to recover the value of certain arms, guns, military stores, equipments and cattle, which it was alleged the Begum Sunroo had bequeathed [117] by her Will to Dyce Sombre, and which had been taken possession of by the Government. The question of limitation in this suit, as raised by the pleadings, slightly differed from the other case in this respect. The Begum Sunroo died on the 19th of January, 1836, and at her death the Government took possession, but, as contended by the Plaintiffs, not adversely, but only for safe custody until the claim of Dyce Sombre was investigated by the Government; that it was until the 18th of August, in that year, that he received intimation by a letter from the Government, dated the 13th of that month, which distinctly notified to him the intention of the Government to appropriate to their own use the arms, etc., as belonging to the Government, and not to the estate of the deceased Begum; and it was insisted by the Plaintiffs, that the cause of action then took place, and that from that period the limitation of twelve years prescribed by cl. 3, sec. 18, of Ben. Reg. II. of 1803, was to be calculated. In the view their Lordships took of the effect of the lunacy during the running of the twelve years, this point was not decided by them, and, therefore, it is immaterial further to notice it. The same defence was pleaded by the Government to this suit, and the determination of the Courts in India was confined to the question of limitation, the merits, as in the former suit, not having been entered into. The Zillah Court at Delhi and the Sudder Dewanny Court at Agra held that the hearing of the suit was barred by Ben. Reg. II. of 1803. Hence this appeal, as in the former suit, to the Queen in Council.

Before any steps were taken in the appeals or petition of appeal lodged, and on the 1st of July, [118] 1851, Dyce Sombre died intestate, still continuing up to that time a lunatic. Special administration of the estate and effects of Dyce Sombre was granted to Mary Anne Dyce Sombre, his widow. Larkins, the Committee of the lunatic's estate, also died on the 14th of September, 1856.

In these circumstances a petition was presented (Feb. 17, 1857*) to revive, in which it was submitted, that the Petitioners, Ann May Troup and Georgiana Solaroli, by reason of Dyce Sombre dying intestate, as his sisters and only coheirresses, were entitled to the Altumgha as an inheritable Jaghire; and that the other Petitioner, Mrs. Dyce Sombre, as such administratrix, was entitled to the mesne profits which accrued in respect of the Jaghire during the lifetime and up to the death of her husband, and it was further submitted, that under the circumstances the appeal was abated, and that the Petitioners were entitled to have the same revived; and the petition concluded by praying that the appeal might stand revived, and that the Petitioners might be allowed to come in and prosecute the appeal in the place of Larkins, as such Committee. Another petition to revive and prosecute the appeal in the arms suit in the place of Dyce Sombre and Larkins, was also presented by Mrs. Dyce Sombre, as the administratrix and sole legal personal representative of her husband's estate.

Mr. Leith, for the Petitioners, moved in both appeals to revive.

By Orders in Council, it was directed that the ap-[119]-peals should be revived, and that leave be granted to the Appellants to prosecute the same.

Mr. R. Palmer, Q.C., and Mr. Ayrton, for the Appellants, in the first appeal.

The Attorney-General (Sir R. Bethell), Mr. Leith, and Mr. Wm. Jervis, for the Appellant, in the second appeal.

Mr. Wigram, Q.C., and Mr. W. H. Melvill, for the East India Company, in both appeals.

The arguments turned upon the following points:—

As to the operation of the Ben. Reg. II. of 1803, sec. 18, cl. 3, as a bar to the suits. Upon the facts admitted by the pleadings—First, the lunacy of Dyce Sombre, whether that fact brought the case within the exception contained in that Regulation as a "good and sufficient cause" to take it out of operation of the limitation of twelve years; and, secondly, whether the period of limitation applicable to the case was twelve years, or the more extended period of sixty years provided by Ben. Reg. II. of 1805, sec. 3, cl. 3. The authorities relied upon were—upon the construction of Ben. Reg. II. of 1803, sec. 18, cl. 3, by the Courts in the North-Western Provinces,

* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

in the cases of *Rajah Chetpal Singh v. Sheo Gholam Singh* (3 Dec. N.W.P. 206), *Ramtchul Singh v. Koonwur Surruddowun Singh* (5 Dec. N.W.P. 280), and *Dharmee Dhur v. Sookhee Chund* (11 Dec. N.W.P. 280), being contrary to the decisions of the Bengal Courts, upon that Regulation and upon the Ben. Regs. of 1793, sec. 14, 11 of 1819, and XIV. of 1825, the cases *Sheikh Imdad Ali v. Mussumat Kauthy Begum* (3 Moore's Ind. App. Cases, 1), *The Collector of Rung-pee v. Gudadhur Chatterjee* (7 Ben. Sud. Dew. Rep. 443), *Rancee Bhooabun Maya v. Bhgrub Indernarain Rancee* (S.D.A. Decis. Ben. 513), *Bhgrub Indernarain Rancee v. Rancee Bhooabun Maya Deba* (S.D.A. Decis. Ben. 676), *Imaun Buskh Khan v. Nanab Dehaur Jung* (1 Ben. Sud. Dew. Rep. 190), *Syed Hussein Reza v. Ameroonissa* (7 Ben. Sud. Dew. Rep. 124, 316), were referred to, and also by the Madras Courts, upon the Madras Regulation of Limitation II. of 1803, sec. 18, cl. 11, which followed the construction put by the Bengal Courts, *Madras Civil Proc.*, pp. 236-7-8. As to the time occupied in applying to the Government, *Oma Dial Singh v. Mussumat Tej Rancee* (S.D.A. Decis. Ben. 378), *Rup Chand Sahu v. Jivan Lal Ray* (5 Ben. Sud. Dew. Rep. 168). So with respect to the operation of the English Statute of Limitations, 21 Jac. I. ch. 16, sec. 2, *Her Highness Ruckmabhoy v. Lulloobhoy Mottichund* (5 Moore's Ind. App. Cases, 234), *Douglas v. Forrest* (4 Bingh. 686).

That laches would not be imputed by the English law to a lunatic, *Burcher's case* (Hobart's Rep. 137). Or to a lunatic, or an infant whose guardian had neglected to sue, Macpherson "On Civil Procedure," p. 70 (Edit. 1850). They also referred, by way of analogy, to the Law of Scotland, where in cases of prescription, disability has been held to operate as a suspension, Erskine's "Principles of the Law of Scotland," pp. 384-9, Burton's "Manual of the Law of Scotland," p. 446.

And, in the second suit, upon the question when the conversion took place, and the cause of action arose, the cases of *Smith v. Young* (1 Camb. 411), *Phillpott v. Kelley* (3 Ad. and El. 106), *Montague v. Lord Sandrich* (7 Mod. 99), were referred to.

[121] Their Lordships' judgment in both appeals was delivered by

The Lord Justice Knight Bruce (Feb. 2, 1858).—The main question raised by these appeals is the true construction of a passage contained in the third clause of the eighteenth section of the Bengal Regulation II. of 1803, with reference to the undisputed facts, affecting or not affecting the suits brought by the appeals before us. I say the "undisputed facts," for the facts disputed are, in the view taken by their Lordships, not, for the present purpose, material. The clause is thus worded—[His Lordship here read the clause, *ante* [7 Moo. Ind. App.], p. 105].

The appeals are against judgments of the Sudder Dewanny Court of Agra, affirming judgments of the Zillah Court of Delhi, which, in two civil suits instituted against the Respondents in the Court of the Principal Sudder Ameen at Delhi, and transferred afterwards to the Zillah Court of Delhi, gave effect to so much of their defence in each case as, founded on the clause before referred to of the Regulation, was analogous to what in England is called a plea of the Statute of Limitations. The residue of their defence, therefore, did not—the merits did not—in either Court receive any determination.

The suits were instituted in the year 1848; the original Plaintiffs having been Dyce Sombre, a person of mixed European and Asiatic descent, who had become insane some years before, and the Committee of his estate, under a Commission of lunacy issued against him in England, where Dyce Sombre passed some portion of his life after the year 1836, the year in which the alleged causes of action in the [122] suits took place. He was living when each of the judgments were pronounced, but died in the year 1851, and some time after that event, the suits having been commenced in respect of property, movable and immovable, in the North Western Provinces of India, which he, before his lunacy, and the Committee for him after the Commission, claimed against the Respondents, the proceedings were revived by the present Appellants, the representatives respectively of the lunatic after his death, as to the lands and goods in litigation—an amount of property, together, of considerable extent and value; all which had been in the possession of a wealthy Begum called "Sumroo," who resided, and was, nominally at least, a kind of small Sovereign, at Sirdhana in those Provinces, and died there at an advanced age in the year 1836.

Dyce Sombre seems to have stood towards her in the relation of an adopted son, or in an analogous position, and succeeded to the bulk, at least, of her riches: which included, as he said and insisted, the lands and movables in dispute, of which, indeed, or some at least of which, she appears to have, so far as was within her power, made to him a donation, in her lifetime; and he seems to have had them, or some part of them at least, in his possession, accordingly, before and at the time of her decease. Soon after that event, and in the same year, 1836, the Respondents claiming the property in controversy seized it—we do not say with violence, but seized it: asserting and acting upon their alleged right in the most practical manner. They have never relinquished the property thus rightfully resumed (as the Respondents say), or, as the Appellants contend, wrongfully taken.

[123] Dyce Sombre never submitted to this, except that he instituted no suit. He objected, remonstrated, memorialized, represented himself as unjustly treated; but, whether wisely or otherwise, did not resort to a Court of Justice. It was the Committee of his estate, that, in the year 1848, did so, using both their names.

Dyce Sombre was at Sirdhana, we believe, when the Begum died; he was then, we also believe, upwards of twenty-one years of age; and (as for every present purpose it must be taken) was, at that time, neither insane nor under any other disability, a state of things which must be deemed to have continued uninterruptedly for several years next after her death, except as to his residence. He probably remained at Sirdhana for some weeks at least next following her decease, and in Asia during the whole of the year 1836, and part, at least, of the year 1837. He came to Europe about the end of the year 1838, and never was again in the East Indies. The Commission of lunacy issued in the year 1843. He was found under it to have been a lunatic from some time in the year 1842. The Commission of lunacy was never superseded, and we must, for the purpose of these appeals, consider it as clear and admitted, that from a time previous to the end of the year 1842, and thenceforth continually to his death, he was an insane person (see the case of *Prinsep and The East India Company v. Dyce Sombre and others*, 10 Moore's P.C. Cases, 232, upon the question of the sanity of Dyce Sombre's mind at this period). The acts of which the suits complained, were done in the year 1836. It was in that year that the Respondents took possession of the disputed property of each kind, which, alleged by those proceedings to be wrongful, was the groundwork of the suits.

[124] And, we assume that possession to have been taken and those acts to have been done before August, 1836, while it was in August, 1848, and not before, that the complaints were filed. The Respondents, on this ground, by their answers to the complaints, set up the 3rd clause of the 18th section of the Bengal Regulation II. of 1803 (already mentioned), as barring the suits. They set up also other defences, valid or invalid, just or unjust, with which we are not at present concerned. The Zillah Judge, considering the limiting Regulation to apply to the cases, dismissed the complaints for that reason in the year 1849, and his opinion was affirmed on appeal in the year 1850, by the Sudder Dewanny Court at Agra. From which judgment, in each instance, the appeals now before us have been brought.

The representatives of Dyce Sombre, being by revivor the present Appellants, allege with truth, that the acts of which the complaints complained, and for which they sought redress, having been done in the year 1836, were, therefore, done less than eight years before the time of issuing the Commission of lunacy, and less than seven years before the commencement of the state of insanity in which Dyce Sombre, as I have also said, was continually from some time in the year 1842 until his death. And the only question that we can, or at least need, now decide is, whether, in that condition of circumstances, the alleged bar is effectual: whether indeed such a bar has taken place. Their Lordships think not.

The words of the clause of the Regulation upon which the controversy mainly or altogether turns, are, "shall prove that, either from minority or other good and sufficient cause, he was precluded from obtaining redress;" words the last four of which are [125] especially remarkable, and which, of course, to be construed without reference to the context, seem to their Lordships of difficult interpretation, nor are they surprised that the meaning should have been viewed differently by different minds.

But we conceive, that "other good and sufficient cause" must include insanity

(whether there has been a Commission of lunacy or Committee of the estate appointed, or any analogous measure, or not); and that the word "precluded," which must necessarily be understood as referring to some time or period, does not mean "precluded" during the whole of the term of twelve years, or at its commencement, but means, in effect, "precluded" during any part of it. The conclusion at which we have arrived on the subject is rather, therefore, that reached by the Sudder Courts of Bengal in analogous cases, than that of the Zillah Court of Delhi and the Sudder Court of Agra, in the present. Those two Courts, it is right to add, having acted, or intended to act, conformably to the spirit of former decisions of Courts within the North-Western Provinces, in holding, as they did, on the hypothesis of twelve years and more, from the time of the accruing of the cause of action, in each case, having elapsed before either plaint was filed, and Dyce Sombre having been in the North-Western Provinces, and under no disability when such cause of action accrued, and for a considerable period afterwards, and having been a free man, of sound mind, until some time in the year 1842, and the Committee of his estate in the lunacy having been appointed to that office in the year 1844, that the question, under the Regulation, was substantially whether the lunatic and his estate (so to speak) had been guilty of negligence; [126] and had not exhibited reasonable and due diligence in prosecuting the claims; and the Delhi and Agra Judges, being of opinion that that question ought to be answered against Dyce Sombre and the Committee of his estate, decided accordingly. Their Lordships are of opinion, with the Bengal Sudder Courts, that the meaning and intention of the framers of the Regulation are shown by it to have been that, in computing the twelve years mentioned in it, there should not be reckoned any time elapsing while the person, for the time being entitled to seek redress, was not free from disability. Here, if we are right, the Appellants are certainly clear of the Regulation, the time between the commencement of Dyce Sombre's lunacy, in the year 1842, and his death, being not to be counted against him. The suits having been instituted in the year 1848, were, therefore, in their Lordships' judgment, as effectually instituted as if they had been so in the year 1844; their Lordships considering themselves bound to give effect to the language of the Regulation as they interpret it: language very different from that of the English Statute law on such subject. They deem it right to say, in addition, that had they, with the Courts at Delhi and Agra, considered it to be properly, under the Regulation, a question of judicial discretion, whether in the circumstances of the particular cases, or either of them to hold the actions, or either of them, barred, their Lordships would have been disposed to think the Respondents wrong on that point also.

Their Lordships do not consider it necessary to intimate an opinion as to any other point raised in the argument of either appeal, nor do they wish to be understood as suggesting, that if Dyce Sombre had [127] in the year 1844 recovered from his insanity, and without any relapse or interruption continued a sane man from that time until his death, and lived, in fact, until some time in the year 1852, and had in that year instituted against the Respondents suits such as those instituted in 1848, *mutatis mutandis*, and the suits of 1848 had not existed, the suits of 1852 would not have been effectually barred by the Regulation. As matters, however, are, their Lordships, on the grounds that have been stated, hold, that the judgments under appeal should be reversed, and, with that reversal, the whole matter remitted; the Respondents paying the Indian costs so far as occasioned by the defence on the ground of lapse of time founded on the Regulation, and the cost of the appeals to Her Majesty, to whom their Lordships will report accordingly.

[See *Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Sing*, 1869, 12 Moo. Ind. App. 342.]

[128] UNIDE RAJAH RAJE BOMMARAUZE BAHADUR, -Appellant; PEMMASAMY VENKATADRY NAIDOO and Others.—Respondents * [Dec. 12, 13, 1858].

On appeal from the Sudder Dewanny Adawlut at Madras.

Amaram, or service tenure, in Madras, is resumable at the will of the Zemindar for the time being in possession, where the lands held under an amaram grant form part of his Zemindary [7 Moo. Ind. App. 132, 133].

A grant in Enam, is in perpetuity, and not resumable [7 Moo. Ind. App. 132, 133]. Lands held under an amaram grant from a former Zemindar, at a fixed rent, resumed by the Zemindar in possession, for the purpose of full assessment of the lands, upon extinction of the services.

The rules with regard to the admissibility of evidence are not to be observed with the same strictness in proceedings in the native Courts in India as in the Courts in England.

Copy of a document coming out of a public office, and certified by the proper officer of that department as a copy of a copy deposited there, admitted as evidence [7 Moo. Ind. App. 139].

In this case the appeal was brought from a decree of the Sudder Dewanny Court at Madras, by which the claim of the Plaintiff (the Appellant's father), the then Zemindar of Karvetinugger, to resume a village named Veraraghavapuram, forming part of his Zemindary, was dismissed, on the ground that the Respondents and their ancestors had been in uninterrupted possession of the village for fifty years, and that the Zemindar had failed to establish that the village was [129] held by the Respondents on Amaram, or service tenure, so as to justify the resumption for assessment.

The question was one of tenure and of the right of resumption. The main issues between the parties being these:—

First. What was the nature of the tenure under which the Respondents held the village in question. The Appellant contended that it was held by the Respondents under a grant by his great-grandfather in favour of an ancestor of the Respondents on his joining the military adherents of the Zemindary, and that it was subsequently, down to the year 1840, granted to such of the members of the Respondents' family as were employed in the service of the Zemindar for the time being, by way of remuneration for such services; that in 1840, the Zemindar dismissed his servants and resumed, among others, this village, it being from the nature of the tenure liable to be resumed at the will of the Zemindar. The case of the Respondents, on the contray, was, that they and their ancestors had, since the year 1798, held the proprietary right of soil in the village as an Enam, or gift in perpetuity, from the Appellant's ancestor; that they never paid rent for the same either in money or services, and, consequently, that the village was not liable to be resumed at the will of the Zemindar for the time being. Secondly; assuming that the village was held by the Respondents only upon an Amaram tenure, they denied that the tenure was determined, and the village resumed by the Appellants' father in the year 1840.

The principal facts of the case, as they appeared from the pleadings, are sufficiently stated in their Lordships' judgment. The documentary and oral [130] evidence bearing on the points at issue is also fully set forth therein.

The appeal was argued by Mr. Rolt, Q.C., and Mr. Blaine, for the Appellant; and Mr. R. Palmer, Q.C., and Mr. Mackeson, for the Respondents.

Upon the question of tenure in Madras, of lands held under an Amaram grant being vested in the Zemindar, and his right to resume them for the purpose of assessment, Mad. Reg. XXV. of 1802 was referred to.

And as to the admissibility as evidence of a copy of a Kaifiynamah, out of the

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Collector's Office, *Syud Abbas Ali Khan v. Faderm Ramy Reddy* (3 Moore's Ind. App. Cases, 156) was cited.

Their Lordships, without calling for a reply, delivered judgment by

The Right Hon. Dr. Lushington.—Considering that the decision in this case may affect a very considerable amount of property, besides that which is the proper subject of this suit; and seeing that the two Courts in India have pronounced conflicting judgments, we should, had we entertained any doubt whatever as to the advice which we should tender to her Majesty, have been anxious to have heard a reply, and to have taken time for consideration; but the case is, in our judgment, so clear, that only one result can possibly be come to, and, there[131]-fore, we proceed at once to declare the opinion we have formed upon the questions before us.

The parties to this appeal are, the Zemindar of one of the four western Zemindaries of Arcot, the original Plaintiff, and now Appellant; and certain persons occupying lands within the Zemindary, who were the Defendants, and are now the Respondents.

The suit commenced in 1848, in the Zillah Court of Chittore. The plaint stated that the Zemindary was originally granted by the Rajah of Arcot to the ancestors of the Plaintiff; and that on the accession of the British Government, that grant was confirmed under certain conditions. It then sets forth that certain grants were made to the ancestors of the Respondents, in the nature of "Amaram" grants; that these grants were resumable; and that, in the year 1811, the Plaintiff resumed those grants, and required the Respondent to pay the full assessment on their lands; and it concluded by stating that the demand was for Rs. 13,597, being the amount due on such assessment, including interest.

The answer of the Respondents was to the following effect: that their ancestors rendered great services to the ancestors of the Plaintiff; that, in requital for these services, a grant was made to them of several Districts, then a jungle, amongst which lands was the village in question; but they denied that they held it on condition of rendering any service, or that they rendered any; and alleged that they held it under a Sunud from the Appellant's ancestors. They then stated that this action ought not to have been brought for the recovery of the arrears, but ought to have been brought for the village itself. They did not deny that a Jodi or quit-rent was paid for the village, but [132] alleged that that Jodi was fixed, and permanent, and never was, or could lawfully be, increased. They distinctly denied the power of the Zemindar to resume or alter the grant enjoyed by them.

The reply called upon the Court to ask for the document under which the Respondents alleged they held the village, and referred to various facts and circumstances as tending to establish the Appellant's right, as set forth in the plaint. There was a rejoinder on behalf of the Respondents, which was, as the other pleadings are, in great part, an argument on the evidence to be produced.

It seemed prudent to the advisers of the Appellant to file a supplemental plaint for the recovery of the village.

The real question between the parties is; under what tenure the Respondents held the village? On the part of the Respondents they say it was of Enam tenure. The Appellant contends that it was an Amaram tenure.

Before proceeding further, it may be expedient to consider the nature of these tenures, and the incidents consequent thereon.

There has been much controversy, in argument at least, as to the meaning of these words, though we find no such doubt in either the Zillah or Sudder Dewanny Courts. We apprehend that the word "Enam" originally meant a grant generally; that such grants were of various descriptions—as an Altumgha Enam, which meant a grant in perpetuity, not resumable by the Zemindar. That there were various other grants, as set forth in the statement of Mr. Stratton, hereafter referred to, as grants for religious or charitable purposes; and also two other descriptions of grants, [133] called "Amaram," and "Kattubady," and that the latter grants were grants resumable. Probably, in process of time, when the word "Enam" alone was used, it meant a grant in perpetuity, not resumable. But there is not the least reason to suppose that when the term "Amaram" was applied, it did not mean a grant resumable at the pleasure of the Zemindar. We think that this explanation will, in very great measure at least, be confirmed by the reference we

shall presently make to the evidence in the cause. For instance, in the judgment of the Zillah Court, the Judge states that the Defendants contend that the grant was not a service Enam, evidently showing that "Enam" was a word to be qualified according to its own conditions. That an Amaram grant was resumable, is assumed throughout the judgment.

The title of the Appellant to the Zemindary is not a matter in dispute; but we will refer to the documents upon which that title is founded, in order to ascertain the powers which he was authorized to exercise under that title.

What were the powers of a Zemindar, of one of these Zemindaries, prior to the year 1802, it might be difficult to define with perfect accuracy; but we may presume, as we think we are fairly entitled to do, and with no disadvantage to the Respondents, that they were at least commensurate with the powers stated to belong to a Zemindar in 1802. The most important documents on this subject are, first, a letter of Mr. Stratton, the Collector of the Northern division of Arcot, to the Board of Revenue, which is dated the 14th of July, 1801, put in evidence by the Plaintiff; in the fourteenth paragraph of that letter, he [134] states that the Poligars, that is, the Zemindars, are at liberty to resume the Amaram Enams, without assigning any reasons to the respective occupants; the word "Amaram" being used by him as an adjective. The next document, and a most important one it is, is dated the 24th of August, 1802, and is produced by the Respondents; and it may be remarked, by the way, that it is verified as a true copy by Mr. Bourdillon, the Collector. It is a letter from Lord Clive, then Governor of Madras, to the then Zemindar of this Zemindary. That document states that, from 1792, the Zemindary was subjected exclusively to the British Government, that the established Peish Cush alone was paid, and that the Zemindary was free from all other charge except the military establishments; it proceeds to relieve the Zemindar from all military services, and to fix a payment instead: and this letter further states that a Sunud, fixing the sum of star pagodas to be paid, is transmitted. In the seventh paragraph of this letter, Lord Clive refers to the revenue which will revert to the Zemindar from the Amaram Peons; or, in other words, he points out that the military service on which such Amarams were held, being discontinued, the revenue would revert to the Zemindar. The eleventh paragraph is to the same effect.

The Sunud mentioned in that letter sets forth the facts already stated, provides for a transfer by a sale or gift, commits the police to the Zemindar, requires engagements with the Ryots to be in writing, and confirms to the Zemindar in perpetuity the Zemindary.

The next document is a letter from Mr. Stratton to [135] the Judge at Chittore, dated the 17th of January, 1807, and in that letter he expressly declares that Amaram grants were resumable.

Now, without going further, the following facts appear to be established:—

First. That the Appellant is the Zemindar of the Zemindary, with the authority, and under the obligation, already stated.

Secondly. That the lands in question are within the Zemindary.

Thirdly. That the Respondents hold under a grant either in perpetuity or resumable.

Fourthly. That Amaram grants are resumable at pleasure.

It may not be necessary in this case to consider minutely upon whom the *onus probandi* is—under the circumstances stated—thrown: it is more convenient to look at the evidence in the case, and to see what the result is, when all the facts proved in evidence are taken into consideration. We will proceed then to the Respondents' evidence as to their title to a grant in perpetuity, or what is called, in these proceedings, an Enam grant.

It must be recollected that in the defence of the Respondents, they state that they and their ancestors enjoyed this property under the Sunud granted by the Appellant's ancestors, and that they paid the prescribed Roosums. Now, the only document upon which any reliance can be placed in support of this avowal, is a statement of the boundaries of the village Kaverirajpuram, and is dated the 24th of July, 1798. It is difficult to say from whom this document comes, or to whom it is addressed. The Zillah Court apprehended it to be an order from the chief officer of the [136] then Zemindar to the Respondents' ancestor. Now this document has neither the

name of the grantor nor grantee, nor are there any words of grant in it, nor any conditions of any kind: it is simply a statement of certain limits to certain villages, concluding with an order that they should be reclaimed through Vellore Vama Naidoo.

Giving the utmost latitude of construction to this instrument, it appears to us wholly impossible to contend that it is a grant of any description whatever, though it may be a direction that the ancestors of the Respondents should be permitted to reclaim the lands in question. There is no other documentary evidence whatever to establish the Respondents' title, and, therefore, we must presume that this document is the Sunud, or grant, upon which they rely, as mentioned in their answer to the plaint.

The claim of the Respondents, therefore, is founded upon an existing grant, and the case is not, and cannot be, assimilated to a claim founded upon a long continuous possession, where the title-deed is alleged to have been lost, and, therefore, that its existence and contents might be presumed. There is no such averment in this case, neither is there any other documentary evidence whatever tending to prove any grant. We must now turn our attention to the documents brought forward by the Appellant.

In considering the further evidence produced, the document entitled to the greatest weight, provided it be clearly admissible in evidence, is a copy of a Kaiifynamah. That document purports to be addressed to the East India Company, and to have been given by the third Defendant in this suit; it is dated the 19th of July, 1842, and is certified to be a true copy, [137] by J. D. Bourdillon, the Collector; and it is an admitted fact that Mr. Bourdillon was appointed Collector in 1848, about the time when this suit commenced. Objections have been taken to the admissibility of this document as evidence, and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think, that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own Tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and, more especially, where we find that it has been the practice of the Court to receive documentary evidence, without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence, not only in this case, but almost in every other. Looking through the whole of these papers, we see that both on the side of the Appellant and Respondents, copies of documents coming out of a public office have been received upon the certificate that [138] they were true copies, signed by the officer in the charge of that department, and that whether produced by the Plaintiff or the Defendants in the cause.

We entertain no doubt, therefore, that this document must be received in evidence, but what weight is to be ascribed to it still remains to be considered; all we know of it at present from the certificate of the Collector is, that it is a copy of a document remaining in his office, whether the copy of an original, or of the copy of an original, at present *non constat*. It has been contended on the part of the Respondents, that it is a document of no authority, being merely the copy of a copy; but they have not in their pleadings denied its authenticity, nor have they produced any evidence to prove that it is undeserving of credit, nor is it impeached in either of the judgments. Now, whether this Kaiifynamah was given by one of the Defendants or not, is a fact within his own knowledge. This document, however, is attempted to be impeached through the medium of the evidence of one of the Appellant's witnesses, and to that evidence we shall now direct our attention. That witness was Balagurunada Pillay, a Sampratee, or accountant under the Zemindar,

and he was cross examined on behalf of the present Respondents, and the commencement of that cross examination relates to certain Sunuds. After that cross-examination, he is questioned as to this Kaiifynamah. He states the contents of that Kaiifynamah, that it was given to the Seristadar, and forwarded by him to the Collector, and that he has a copy of it. He is asked when he got the copy. He says it is in a book which was returned to the Zemindar by the Collector, [139] and he says he has brought that book. He says the copies of the Sunuds were taken when the Defendant gave the Kypheyut, and were there in the book, and that no copies were kept in the Collector's office, either of the Sunuds or other vouchers. He is asked whether the copies of the Kypheyut and Sunuds entered in the book bear the signatures of the Seristadar, or of one of the Defendants; and he says, "No." He is asked whether they bear the signature of the Collector to prove that the book was returned from the Collector's office. He says they do not.

Now, it is perfectly manifest, upon consideration of this evidence, that it in no degree whatever proves that the document, called a Kaiifynamah, was the copy inquired of by the question; but, on the contrary, that the question put to this witness related to the book by him produced, and the copies therein contained, and not to that document; and this is more especially evinced by his deposing, that the copies of which he was speaking did not bear the signature of the Collector; whereas upon the face of this document, it does bear that signature.

This evidence, however, is of importance, and great importance too, to show that the original Kypheyut was deposited in the Collector's office, and that this document is a copy of that original. The witness swears that the original was forwarded to the Collector.

We entertain no doubt whatever that this document is entitled to be received as evidence in this case, and we proceed to consider its contents, and the inferences to be drawn from them.

It is not denied that this Kaiifynamah was given by one of the Respondents, and he describes himself as an Amardar. This Kaiifynamah states the history of [140] the family and of the grants made to them, and it especially refers in the third paragraph to a Sunud dated the 31st of July, 1798, to a grant under Amaram tenure, stating it to be Doomballa, or rent-free Kandighy; and in the sixth paragraph, which more especially relates to this property, the grant is stated of this village to be under Amaram tenure, with a Jodi of fifty star pagodas, under a Sunud, dated the 1st of April, 1818. The eleventh paragraph refers to a Sunud, dated the 31st of July, 1835, relating to another grant of this village.

This is a very brief summary of the contents of this document. It is a possible case looking at the extensive powers with which the Zemindar is invested, that the grant being originally "Amaram," and resumable, might, when the military service was dispensed with, and circumstances had changed, been converted into a perpetual grant upon a fixed payment. Had this been the case, it ought to have been distinctly pleaded, and the grants themselves, if produced, would have shown whether such defence could be supported.

Now, bearing in mind that this is a document coming from the Respondents themselves, and setting forth the Sunuds under which they hold the village, and claiming in 1812, rights in respect thereof, we necessarily ask why the Respondents have not produced those documents? In every view of the case it was incumbent upon them so to do: first, as tenants of the Zemindar, holding property under him; secondly, as being in possession of the titles upon which they held their property, and on which in this document they found their claims.

In the argument which was addressed to us from [141] the bar, we have not been able to discover any reason whatever why this obligation has not been fulfilled. Much time has been occupied in endeavouring to prove that the copies of these Sunuds produced by the Appellant ought not to be received in evidence; whereas it had been much more beneficially employed in showing, if it had been practicable, why the Respondents had not produced in evidence the very documents which they vouched as their titles.

As to the parol evidence of the Respondents, it is clearly entitled to no weight whatever; indeed, it is wholly inadmissible. How can we receive parol evidence of the contents of documents from those who have the custody of those very docu-

ments? We need not add that such parol evidence is in direct contradiction of the Respondents' own statement in the *Kaifiynamah*.

Now, if the case rested here, to what conclusion must we necessarily come? Why, that the Respondents held under Amaram tenure; and if they held under Amaram tenure, it is equally clear that such grants were resumable at pleasure; if this be not the true construction to be put upon their own representation, it is the fault of the Respondents themselves that they did not produce those very documents, which, upon a perusal of their contents, would have set the question entirely at rest.

Such being the necessary inference to be drawn from the case, so far as we have considered it, we deem it wholly unnecessary to enter into an investigation of the subsidiary evidence, not that we mean thereby to say that any part thereof ought to be rejected, but that it is not necessary to take it into our consideration.

[142] We shall not, therefore, expend time in considering the admissibility or weight of the copies of the Sunuds produced, nor of the Jumabundy accounts, or the muster-rolls, and much less is it necessary to look to the parol evidence of the Appellant. We have the admission of the Respondents themselves that they hold under Amaram grants, which, in the absence of all evidence to the contrary, are resumable grants; the grants, or Sunuds, themselves are their own proper evidence to clear up any difficulty; and those they have not produced. We have no hesitation, therefore, in coming to the conclusion, that the Respondents held under grants which were resumable at the pleasure of the Zemindar.

The question of resumption remains to be disposed of. The contest in this case is, whether what is called an "attachment" took place or not: the precise meaning of this word "attachment" is not explained. We apprehend the fact to be, that so long as the lands remain in the actual possession of the Respondents, upon payment of a certain Kist, and the rendering certain services, the Zemindar, though entitled to resume, was of course bound to give notice, and that in some public form. The resumption consists in putting an end to the grant under which the Respondents held, remitting the services, and requiring them to pay the full assessment. It does not appear that an absolute dispossession was either attempted or intended, though means were taken to prevent the Respondents reaping the crops.

In the account for 1831, there is an entry of a Jodi paid by the Respondent, Pemmasamy Venkatadry Naidoo, of fifty pagodas, and increased thirty pagodas. In the accounts for 1841, there is no entry of pay-[143]-ment of Jodi at all. This is the year in which it is alleged the resumption took place. In this account is found a statement that the village having been taken under attachment, certain accounts were not furnished. Now, this entry is strong evidence to show that an attachment did take place in 1841. We see not the least reason to suppose that this document is not genuine and trustworthy, nor the slightest cause to suspect that such an entry as this could be forged for the purposes of this suit. Whether it be the attachment of the Zemindar, or of the Sircar, is not so certain.

There is a document relative to this question on which the Respondents have greatly relied, and which, therefore, it may be desirable to notice. It is an extract from the proceedings of the Session Court of Chittore, dated the 19th of July, 1849, and produced by the Respondents, though erroneously classed with the Appellant's evidence. It appears from that document, that certain Enamdars of the village in question had been filed by the Magistrate for a riot; one of them is a Respondent in this case; the alleged riot was in September, 1848, the charge being that the Respondents molested the Appellant's servants when they went to make the account of the lands. The Head Assistant Magistrate was of opinion that the Zemindar was justified in pursuing this course under an order of the Collector, and fined the tenants, and the Magistrate confirmed this order. The case appears to have been appealed to the Session Court, and that Court was of opinion that the order of the Collector was simply to attach the property of Ryots, or others in arrear, as prescribed by the Regulation. The Court thought the Zemindar was the first trespasser-[144]-passer, that there had been no regular attachment of the village, and set aside the fine. The importance of this document is the denial of an attachment; but be it remembered that the plaint was filed on the 21st of October following.

It is remarkable that the Judge of the Sessions Court was Mr. Lovell, and that this same gentleman was, in 1850, the Judge of the civil Court of the Zillah of Chittore; that he had to decide upon this very question, attachment or no attach-

ment, that being the first issue before him. He held that the attachment was proved, and he relies upon the evidence, documentary and parol, therein cited. The first document is an order in writing from the Zemindar to the Amildar to resume the lands. This order is dated the 9th of June, 1840, and is proved by the eighth witness. This document proves the intention of the Zemindar to resume.

The parol evidence is to the following effect:—The third witness for the Plaintiff, Jampuram Tirupatirauze, deposes to the fact of the village being sequestered about 1842, and from a subsequent question it is apparent that the sequestration and attachment mean the same thing. This witness was present when the Zemindar ordered the resumption of the village, though not at the actual resumption. It is proper to observe that prior to the resumption of these grants, various services fully set forth were remitted to the Respondents. The fourth witness, Ramaya, saw the order of resumption written, though not present at the resumption. Many witnesses depose that from the time of the resumption the personal services ceased. Amongst other duties were those of attacking tigers. The eighth witness, Balagurumada Pillay, gives [145] very important testimony: but after the decision we have already come to as to the description of the tenure under which the Respondents held the village, it is not necessary to refer to that evidence save as it bears on the question of resumption or attachment. This witness gives a detail of the various Sunuds under which this village was held from 1798; but we need not travel through this evidence. It appears that in 1831, when the village was under the management of the Court of Wards, the former Jodi of 50 pagodas was raised to 80 pagodas; that the Respondents, or their ancestors, continued to hold the village on service tenure, at a Jodi of 80 pagodas, till the 13th of May, 1840, when, according to the evidence of this witness, a resumption took place and has ever since continued. He annexes an account showing what is demanded. One of the Respondents was from 1839-40, Moniegar of the village till 1846-7, and it was his duty to collect the revenue. Part of the time, namely, in 1842, the Zemindary was under Sircar attachment. In 1845-6, in consequence of the alleged resumption, demand of the arrears was made from the Respondents. In answer to the 79th question, he states that he was not present at the resumption: that the village has been in the Respondent's possession since Keelaka (January); and prior to that year in that of the Zemindar.

Several of the witnesses speak in general terms to the resumption of the village. The thirteenth witness, Shashirekha Peroomal, a Moniegar, proclaimed the resumption, and carried out the order. The deposition of the fourteenth witness, Verasawmy Pillay, explains the whole transaction in answer to the fourteenth question. The village was attached, and the Respondents directed to collect the revenue according to the rules observable when a village is under attachment, and this accounts for the Respondents remaining in possession. The seventeenth witness, Streenevassiengar, saw the attachment published. A letter from the Acting Collector, dated the 24th of June, 1843, tends to establish the truth of these statements; for it proves that in 1843, a representation was made to the Collector by the officers of the Zemindar, that though the former Jodi was paid, the remainder, that is, the assessment, was withheld.

The only contradiction to this is, that the two first of the Respondents' witnesses say that they never saw the village resumed. The third witness knew nothing about it, nor does the fourth.

Then what is the result of our examination into this question of resumption or attachment? We do not find in any of these papers, that the law has prescribed any particular form in which such resumption shall take place; nor, if there was such form prescribed by law, that it has in any specified particular not been complied with. Of course justice requires that a resumption should take place with due publicity and upon reasonable notice. We have abundance of evidence that a formal instrument of resumption was executed by the Zemindar, that such resumption was publicly proclaimed, that the Respondents were allowed to retain possession, but required to pay the full assessment; but, when they were in default, complaint was made to the Collector that the Zemindar took forcible measures, perhaps erroneously, to obtain his claim. All the accounts correspond with the evidence of the witnesses; and against this, is only the isolated fact, that Mr. Lovell, upon one occasion, with imperfect information (for [147] the case was one of a riot),

thought that no regular attachment had issued—an opinion which he altered when the case came regularly before him, and he was supplied with that evidence which before had been deficient. It is true that the Collector, when the Zemindar complained that he could not pay the pesh cush by reason that the Respondents withheld their payments, expressed an opinion that the grants could not be resumed, and that an attempt to do so would lead to litigation; but this was merely the opinion of the Collector, manifestly ignorant of the true state of the case.

In the judgment pronounced by the Sudder Dewanny Court, they say that the probability is, that the attachment never actually took place, although no doubt there was an attempt made to effect it. At all events, they say the village appears never to have been taken out of the possession of the Respondents; we cannot think that this reasoning ought to prevail against the evidence in the case. The Respondents, if left in possession at all, were in possession as the servants of the Zemindar, and on condition of collecting the revenue.

The short history of the case is this:—The Respondents were grantees under resumable grants; that those grants were resumed by the Zemindar; and they remained in possession without payment of that assessment which they were lawfully bound to discharge, and for such arrears of assessment this suit is brought. We are of opinion, that the decree of the Zillah Court of Chittore was well founded in all respects, and, therefore, we must humbly advise Her Majesty to reverse the decree of the Sudder Dewanny Adawlut, and with costs. The decree of the Zillah Court will be affirmed.

[See *Forbes v. Meer Mahomed Tuquee*, 1870, 13 Moo. Ind. App. 461; *Baboo Bodhnarain Singh v. Baboo Omrao Singh*, 1870, 13 Moo. Ind. App. 529.]

[148] BUNWAREE LAL, — Appellant; MAHARAJAH HETNARAIN SING and Others,—Respondents * [Feb. 20, 22, 1858].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A letter in the nature of a guarantee, wholly in the handwriting of A., written upon stamped paper, sealed, but not signed or attested by witnesses, or registered, to B., a co-Plaintiff with A., undertaking to indemnify B. from costs, if he would join as a co-Appellant with A. in an appeal to England, established, and held to operate as a release in an action brought by A.'s heirs against B. to recover his *pro rata* share of the costs of the appeal.

The latitude with which documentary evidence is received in the Native Courts in India observed upon, and such practice condemned, as involving unnecessary costs, the administration of justice requiring that the admission of documents should be strictly conducted with reference to the principles regulating the admission of evidence [7 Moo. Ind. App. 168].

This was an action brought by the Respondents, the heirs of Maharajah Mitterjeet Sing, to recover from the Appellant and others, their respective shares of the costs of an appeal to England realized from Maharajah Hetnarain Sing, in execution of the decree of the Privy Council. The appeal was confined to the claim against the Appellant for his share of the costs.

The question in the case depended on the single issue raised; whether a document dated the 15th of May, 1832, produced and alleged by the Appellant to have been written by Maharajah Mitterjeet Sing, the deceased father of the Respondents, was a genuine instrument.

In the year 1817, Maharajah Mitterjeet Sing and [149] two others, named Meer Abdoollah and Gokhul Dass, purchased at an auction sale Talook Belkharah, in

* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell.

shares: Maharajah Mitterjeet Sing had an 8 anna share, and the other two 4 anna shares each. This sale was afterwards reversed in a suit instituted for that purpose by the Ranee, widow of Rajah Jeswunt Sing, the former owner. Pending this suit the now Appellant purchased the 4 anna share of Gokhul Dass in the Talook, and with the object of asserting his title to maintain the sale, he intervened in the appeal then pending to the Sudder Dewanny Adawlut. That appeal was unsuccessful, and thereupon a further appeal was carried to England, but with the like result; and by an Order of Her Majesty in Council, dated the 11th of August, 1842, the then Appellants, Maharajah Mitterjeet Sing, Meer Abdoollah, and Bunwaree Lal, were ordered to pay the costs of such appeal (see case reported, "*Maharajah Mitterjeet Sing v. The Heirs of the Ranee, widow of Rajah Jeswunt Sing*," 3 Moore's Ind. App. Cases, 42; S.C. 5 Ben. Sud. Dew. Rep. 192). The Maharajah not having taken the necessary steps to bring the appeal to a hearing, the East India Company prosecuted the same under the provisions of the Statute, 3rd and 4th Will. IV., secs. 22 and 23. The costs of the appeal were ascertained by a proceeding of the Sudder Dewanny Adawlut at Calcutta, dated the 30th of March, 1843, at the sum of Rs. 70,926. 9. 6., and the necessary papers were transmitted to the Zillah Court of Behar, with directions to realize this amount from the then Appellants in the appeal to England, or their heirs. The Zillah Court, on the 29th of July, 1843, passed an order directing the payment of such costs by the then Appellants in proportion to their shares.

[150] Maharajah Mitterjeet Sing had died pending the appeal to England, and his 8 anna share of liability was represented by the Respondents, Maharajah Hetnarain Sing and Modnarain Sing, two of his sons, in the proportion of 9 annas to the former and 7 to the latter; so that in this state of things one-half of the costs was payable by them in those proportions, and the remaining half by Meer Abdoollah and Bunwaree Lal, the present Appellant, in equal moieties. For the purpose of compelling the payment of the costs, the properties of the various parties were put under attachment, and a sale of Maharajah Hetnarain Sing's having been directed, he paid into Court Rs. 43,910. 15. 11., on account of the costs ordered to be realized. As his nine-sixteenths of the moiety payable by him and his brother only amounted to Rs. 20,588. 10. 5., he contended that he had paid in excess Rs. 23,322. 5. 3.; and he accordingly, on the 27th of August, 1847, instituted the suit now under appeal in the Zillah Court of Behar, to recover this excess, with interest, from the present Appellant and the other co-sharers in the appeal, in proportion to their respective shares. These shares having been ascertained and liquidated, there was no question in this appeal in respect of them.

Bunwaree Lal by his answer admitted that he was a purchaser from Gokhul Dass of the 4 anna share, and that he had appealed on his own account to the Sudder Dewanny Court; but he set up as a defence that he only became a party to the appeal to England at the request of the deceased Maharajah, and that the latter had, in order to induce him so to do, on the 15th of May, 1832, with his own hand written him a letter in lieu of an Ikrarnamah, requesting him [151] to join in the petition of appeal to England, engaging that if, on the appeal, an adverse decision should be passed, the Maharajah would pay the costs of the Appellant.

The genuineness of this instrument having been denied in the replication, the Appellant produced the alleged document, and put it in evidence. It was in these terms:—Lala Mahadeo Dutt, of good caste, having returned from you, stated that you are not willing to become a co-sharer in the appeal to England, in the case of Talook Belkhourah, on the ground of your having had nothing to do with the auction-purchase. This is a great impediment, because by an appeal not being preferred for the whole Talook, there will be a defect in the appeal. Under these circumstances it is incumbent on you, hoping in the blessing of God, you will conjoin in the petition of appeal to England. If (God forbid) in the appeal to England an adverse decision be passed, I will, without any objection, pay the costs charged to you from my own funds; for the present I accordingly also get Rajah Khan Beliadoor Khan, Behadoor, to execute a Zaminee (security bond) for costs of the appeal for your satisfaction. I have written this letter with my own hands for your greater satisfaction. You will retain it as a document. The 15th of the

month of May, 1832 A.D., corresponding with the 1st of the month of Jyē, 1239 Fuslee."

This document was proved to be in the deceased Maharajah's own handwriting, but it was neither attested by subscribing witnesses nor registered. It was written upon a stamp of Rs. 8, which was alleged to have been done at the instance of the Maharajah himself. Eight witnesses were examined: three of [152] them, named Nath Buksh, Kedaree Singh, and Dial Singh, spoke to the fact of the writing by the Maharajah, and the seal; and of other persons being present when it was written, but who were not called to prove that fact; and of Lala Mahadeo Dutt, being son of the Dewan of the Maharajah. Besides them there was no direct evidence upon this head; for although copies of depositions of other witnesses in a former matter to which the Respondents were not parties, and which were in no way admissible in evidence against them, were filed, the latter were not produced for examination in this suit. The other witnesses spoke to their belief as to the handwriting and seal of the Maharajah; but although it was alleged upon the Appellant's evidence that the Maharajah wrote several letters about the same time, and in reference to the same matter, no document was produced except the one relied upon. The Appellant also put in evidence a great many documents, consisting of copies of decrees in other suits, and copies of depositions of witnesses examined therein, and of proceedings in the Foujdarry Courts relating to the parties but not affecting the question at issue.

On the 21st of May, 1849, the Principal Sudder Ameen pronounced judgment in favour of the Appellant, establishing the validity of the letter or instrument of guarantee, and exonerating him thereunder from payment of the portion of the costs of the appeal to England; but upon appeal to the Sudder Dewanny Adawlut at Calcutta, this judgment was, on the 19th of August, 1851, reversed by Sir Robert Barlow and Mr. John Robert Colvin, two Judges of that Court, Mr. Abercrombie Dick, the other Judge, dissenting. The material portion of this decree was [153] as follows:—"Is it in any way probable that a deed of such importance, if intended to be used as a public instrument, should have at its execution been unattested by subscribing witnesses, and remained unregistered by the Maharajah, or at least by the Defendant, Bunwaree Lal, whose exemption from all responsibility in a heavy appeal to England would have been thus publicly recorded and secured? If again it is to be looked upon in the light of a private and friendly communication to the Defendant, in order to satisfy him that he was to be held irresponsible by the Maharajah for the results of the appeal to England, what was the use of a stamp, and by whom was the necessity of a stamp suggested? All that we learn from the Defendant's witnesses is, that Mahadeo Dutt, the Maharajah's Dewan, produced stamp paper for the intended letter. Now, it cannot be supposed that the Dewan would, as a safeguard to be used against his own master, and in anticipation of ulterior proceedings, prescribe the necessity of a stamp in order only to prepare the document for admission to Court, should occasion require it, on behalf of the adverse party. Again, it is hardly necessary to advert to the well-known fact, that men of the rank which the late Maharajah held, are not in the habit of writing such letters of business in their own hand. It is alleged by the Defendant's witnesses that they had received themselves many letters of business from the Maharajah, yet not one have they produced, though said by one witness, Nath Buksh, to be at hand. The same witness also deposes that he himself despatched two or three letters from the Maharajah on this very business to Bunwaree Lal: not one of these letters have been laid before the Court. In short, nothing is [154] produced but the one deed, or letter, by which the Defendant desires to evade his responsibility. The writing of the paper must be noticed as remarkably clear and firm, and very unlike that of a person far advanced in years, as it is notorious that Maharajah Mitterjeet Sing was in the year 1832. The deed, as now before us, is in a most suspicious state. It bears on the face of it the manifest proof of having been cut or punched in a uniform manner by some sharp instrument, a circumstance not noticed by the Principal Sudder Ameen; but as our decision will be irrespective of the condition of the deed, and would be the same if the paper had been in no way tampered with, we do not dwell further on this point. We think that the direct evidence to the execution of the deed is very unsatisfactory, and that all the presumptions of the case are

strongly against its genuineness; we, therefore, reverse the decision of the Principal Sudder Ameen," and the Appellant was ordered to pay the Respondent, Maharajah Hetnarain Sing, one-fourth of the whole sum realized for the costs.

Against this decree, Bunwarree Lal brought the present appeal.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Wigram, Q.C., and Mr. W. Field, for the Respondents.

The argument was exclusively confined to the credibility of the evidence of the witnesses speaking to the genuineness of the document of the 15th of May, 1832, and to the fact whether it was written by Maharajah Mitterjeet Sing. In support of the position that [155] the *onus probandi* was upon the Appellant to establish such fact, the case of *Bahoo Kasi Persad Narain v. Mussumat Kawalbasi Kooer* (5 Moore's Ind. App. Cases, 146) was relied upon.

Their Lordships without calling for a reply, delivered judgment by

The Right Hon. Dr. Lushington.—The sole question in this case is, whether the Appellant has produced adequate proof that a document upon which he relies, is a true and genuine instrument. It is not denied on the part of the Respondents that if that document be genuine, the effect of it will be to exonerate the Appellant from the demand made against him, nor is it said on the part of the Appellant that he would not be liable, if not protected by the document in question.

It has, we think, been truly urged on behalf of the Respondents that the *onus probandi* lies upon the Appellant: it is not necessary for the Respondents to contend that the instrument is forged; it is sufficient to say that there is a *deficit probatio*.

Amongst other arguments urged for the Respondent it was said that, with regard to instruments of this kind, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, that the probability or improbability of the transaction formed a most important consideration in ascertaining the truth of any transaction relied upon. With this argument we agree; and, therefore, it will [156] become our duty to examine with care how far the defence relied upon is consistent with all the probabilities of the case.

It has been also said that this defence stands exclusively upon oral evidence, and though to a considerable degree that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon the proof of a given instrument; but, there is a very clear distinction, and not an unimportant one, between pleading a written instrument, as an answer to a demand, and the setting up a defence founded exclusively upon oral evidence: for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it; but, where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence; and, moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence.

There are more means of trying the genuineness of a written instrument than there can be in disproving purely oral evidence. This is quite manifest, even upon the present occasion: for the truth of the transaction may, as it has been, be investigated by reference to the handwriting, to the seal, to the stamp, [157] the description of the paper, and the alleged habits of him who is said to have written it.

It is now expedient to investigate the facts of this case, with the view of discovering what is probable, and what is not. It appears that Maharajah Mitterjeet Sing, before the year 1825, had purchased a certain Talook. Maharajah Mitterjeet Sing was the father of the present Respondent, Maharajah Hetnarain Sing. In this property other persons were interested. Gokhul Dass was the proprietor of a fourth share under an asserted auction-sale, and the present Appellant purchased that share of him. A suit had been instituted against Maharajah Mitterjeet Sing

and the other asserted proprietor before this last purchase. The Provincial Court of Patna set aside the auction-sale, and the present Appellant intervened in that suit after that decree, and filed a petition of appeal to the Sudder Dewanny Adawlut, as did Maharajah Mitterjeet Sing and the other asserted proprietor. On the 21th of April, 1832, the Sudder Court affirmed the judgment of the Court below.

Maharajah Mitterjeet Sing appears to have been a person of high rank and great wealth, and also to have enjoyed a high character for his integrity. In the suit to which we have adverted, some serious imputations were made against him. Maharajah Mitterjeet Sing was very deeply interested in this suit, both as concerned the property at stake and the exoneration of his character from the charges preferred against him. He had, therefore, the strongest motives for the most effectual prosecution of an appeal to the ultimate Tribunal. The present Appellant was in a very different position. His share of the property was but small, and, if evicted from it, he [158] had his remedy over against the vendor. He had already experienced the evils of a suit in two Courts, and it appears to be quite consistent with prudence and the ordinary motives by which men are actuated, that he should not have embarked afresh in a long and renewed litigation.

The Appellant alleges that, under these circumstances, Maharajah Mitterjeet Sing urged him to become a co-Appellant, so that the appeal might be prosecuted in the names of all aggrieved by the decrees in the Courts below; and that to induce him so to do, Maharajah Mitterjeet Sing offered to indemnify him from all costs. The Respondents contend that such alleged transaction was improbable, because Maharajah Mitterjeet Sing might have effectually prosecuted his appeal without the Appellant being joined in it; and that, therefore, Maharajah Mitterjeet Sing had no adequate motive for indemnifying the Appellant. Now, it is true, Maharajah Mitterjeet Sing might have prosecuted the appeal solely and without the name of the Appellant; but, we are of opinion that, though this position is legally true, yet that there was an adequate motive, under the circumstances, for the anxiety of Maharajah Mitterjeet Sing to retain the Appellant as party to that appeal. We think that it was by no means contrary to probability that Maharajah Mitterjeet Sing would conceive that his case would be dammified, if the Appellant withdrew from the suit; he might well suppose that his own case would be injuriously affected by the secession of a party standing, in some respects, in a similar predicament. It may be true, legally speaking, that he would not be so, but, we think, that he had rational grounds for believing that such would be the case: in-[159]-deed, we doubt whether, even in this country, such an opinion may not have been entertained. We, therefore, think that the wish of Maharajah Mitterjeet Sing to retain the Appellant in the suit was rational, and his proposal to indemnify him probable; and we might further observe that Maharajah Mitterjeet Sing must, in any case, have incurred the main expense of the proceedings in the appeal; and he might well consider the additional costs of the present Appellant worth the countenance and support which he might derive from the countenance of his name in the appeal. We have, therefore, upon a review of all these circumstances, come to the conclusion—and a most important one it is in the view of the Respondents themselves—that the alleged conduct of Maharajah Mitterjeet Sing was entirely consistent with probability.

The document purports to be a letter in the handwriting of Maharajah Mitterjeet Sing, to be sealed with his seal, though not signed. It is dated the 15th of May, 1832, and the summary of its contents is to desire the Appellant to join in the appeal, undertaking to indemnify him from the costs, and stating that he had got a person to execute the security bond. That person is said to have been a son, or a natural son, of Maharajah Mitterjeet Sing.

The next important question is the time and circumstances of its production.

In the year 1842, the decree was pronounced by Her Majesty in Council with respect to the appeal which had been so brought. The decree of the Sudder Adawlut, setting aside the auction sale, was affirmed; but, from the peculiar circumstances of the case, each party was left to bear his own costs. This [160] appeal had been conducted under the provisions of an Act of Parliament, the 3rd and 4th Will. IV., c. 41, secs. 22 and 23, now repealed. In virtue of that Statute, the East India Company conducted the case, both on behalf of the Appellants and Respondents, and were authorized to recover the costs from the parties in India.

Maharajah Mitterjeet Sing died pending the appeal; and in March, 1843, the East India Company proceeded against all the Appellants and their representatives for the amount of costs they were liable to pay to the East India Company: further proceedings were had, and in the course of them, in June, 1843, the document in question was produced.

It has been contended on behalf of the Respondents that the production of the letter at that time cannot be considered as a circumstance favourable to the Appellant, nor assisting the probability of his case; because, as against the claim of the East India Company, it would not have any operation or effect. Now, this again is legally true—that the guarantee of Maharajah Mitterjeet Sing could not be a defence to the demand of the East India Company; but that the present Respondent, Maharajah Hetnarain Sing, being one of the parties on whom the demand for costs was made, and which Respondent the Appellant contended must, by virtue of this instrument, ultimately defray his, the Appellant's, share of the costs; that the Appellant should on that occasion produce this document, and expect some benefit from so doing, appears to us the most natural and probable line of conduct, considering the loose notions prevailing in India as to the form in which justice is administered. It is by no means incredible that the Appellant should believe that the [161] East India Company would recover directly from the Respondents those costs which he might be compelled ultimately to pay.

We think, then, that the production of this instrument came at a very natural time, and so strongly are we of that opinion, that had it been altogether kept back at that period, we should have thought that the non-production militated against the Appellant's case. It was produced at the natural time, because it was the first occasion when there was any reason for its production, namely, when the demand for costs was first made.

Then as to the circumstances attending the production, it is not worth while to consider whether the evidence taken to handwriting is, or is not, admissible. To the benefit of the fact that the Appellant then offered to prove the document to be genuine, and of the handwriting of Maharajah Mitterjeet Sing, the Appellant is clearly entitled. We do not take into consideration the opinion formed, or said to be formed, by the Zillah Court, that the document was proved.

In August, 1847, the present suit was commenced, being a proceeding by the Respondent, Maharajah Hetnarain Sing, the son and heir of Maharajah Mitterjeet Sing, to recover from the Appellant a certain amount of costs already paid by the Respondent, and which he would have been entitled to recover, if Maharajah Mitterjeet Sing had not indemnified the Appellant.

The Appellant pleaded in defence the document in question, and we will now look to the evidence produced; we leave out of our consideration all that has previously passed, excepting so far as relates to the production of the instrument upon a previous occa-[162]-sion, and we proceed to look at the testimony of Nath Buksh, and others, the witnesses produced in the suit instituted in 1847. We need not minutely detail the testimony given by them; but, the short history of it is this: Maharajah Mitterjeet Sing having been informed that the Appellant would not join in the appeal, sent Mahadeo Dutt (a son of the Dewain of Maharajah Mitterjeet Sing) to the Appellant to induce him to consent to be an Appellant in the appeal to England; the Appellant declined to give his consent without a document written by Maharajah Mitterjeet Sing; accordingly the document in question was written by Maharajah Mitterjeet Sing and sent to the Appellant. Speaking now of the evidence of the four witnesses produced to establish this statement, it has been strongly contended that, besides the general objection to oral evidence, the witnesses, considering the length of time which has elapsed since the transaction in question, and the period when they gave their testimony, have deposed, with a minuteness of facts and circumstances which could not, probably, have been so deeply impressed upon their memories. It is true that they have given a very detailed description of the transaction in question; but were not the circumstances which then existed calculated to make a deep impression on their memories? Maharajah Mitterjeet Sing, in whose service they were, and with whom they were connected, had been engaged in an important lawsuit: he had been ultimately defeated in that suit, and that under circumstances which were very likely to excite strong feeling on behalf of Maharajah

Mitterjeet Sing and all his dependents. We think, therefore, that though sixteen or seventeen years may have elapsed, the impression made of what occurred immediately afterwards, may have been so lasting as to leave a lively recollection of the transaction; and we must further remark that in evidence so taken, we must allow some degree of latitude for the question put to the witnesses, and their answers. We do not deem it necessary minutely to go through that evidence; if it be deserving of credit at all, it satisfactorily establishes that the document in question was written by Maharajah Mitterjeet Sing. There are various reasons which induce us to think that it was credible; we see no reason to suppose, looking at the whole history of the transaction, that it was improbable that Mahadeo Dutt should have been sent to the Appellant, for the purpose of obtaining his consent to join in the appeal, nor that the Appellant should decline unless he was indemnified from the costs. The witnesses further deposed to the persons who were present at the writing of this document; not one of them has been produced to contradict any part of their statement, either as to the interview with the Appellant, or with respect to the making of the document itself: their testimony is wholly and altogether uncontradicted; and yet, if untrue, there seems to be a fair opportunity of proving the falsehood of their evidence.

Some discussion has arisen with respect to the non-production of Mahadeo Dutt, and it has been said, perhaps not untruly, that Mahadeo Dutt was more properly the witness of the Appellant. Now, conceding all possible weight to that argument, and presuming, which we must say is contrary to all experience in Indian cases, that suitors in those Courts had any knowledge who was the proper witness of Plaintiff or Defendant, yet what does it come to? If there was insufficient evidence on the part of the Appellant to establish a *prima facie* case, that argument might be used with advantage; but if their evidence was sufficient for such a purpose, then it cannot be said that it was indispensably necessary for them to produce further testimony; and this is perfectly clear, that if Mahadeo Dutt were alive and capable of being produced, and would have contradicted the evidence of the Appellant's witnesses, he might, as far as appears, have been produced on behalf of the Respondents.

Other attempts have been made, and very properly made, to discredit the testimony of the Appellant's witnesses. It has been said, and it appears to have been the opinion of persons conversant with the usages and habits of individuals in the high rank of Maharajah Mitterjeet Sing, that they would not write with their own hand any document of this description. We give due weight to the strength of this objection, confirmed as it is by the opinion of two of the Judges of the Sudder Adawlut; but we feel ourselves also bound to look to the evidence in the cause, and the probability of deviation from this rule under the particular circumstances of the case. We have distinct and uncontroverted evidence that Maharajah Mitterjeet Sing was in the habit of writing with his own hand: it may be true that there is no accurate description of the species of documents he so wrote, but one of the witnesses brought with him a bundle of papers said to be in his handwriting, and no demand was made for their production; and further, we think, that the nature of the transaction itself, especially if the evidence as to what passed with the Appellant be true, renders it extremely probable, that in order to comply with the requisition of the Appellant, Maharajah Mitterjeet [165] Sing would, according to that requisition, have given him a letter in his own handwriting, and that, even though it might not be his usual habit so to do.

With respect to the letter having been written upon stamped paper, it seems to us extremely difficult to attribute any great importance to this fact either the one way or the other; it depends so much upon what we cannot by possibility ascertain, namely, what passed in the mind of Maharajah Mitterjeet Sing upon that occasion. It is very reasonable to suppose that he wished the document to be effectual, and that he conceived, in order to render it so, that it must be written upon stamped paper. We cannot attribute to him, or to any persons in his situation, any very precise knowledge of the stamp laws of India: assuming him to be an honest man—and such was his character—he would seek to render the document effectual.

With respect to the stamp itself, it appears to have been the proper stamp which would have been affixed in the year 1832, the date of the letter. It is said

that such a stamp even in 1843 might have been fraudulently affixed: it is unnecessary to deny the truth of that proposition: but we cannot presume fraud. All that is necessary to be said upon this point is, that however little weight may be attributed to the stamp in favour of the Appellant, it is perfectly clear that the impression of the proper stamp does not tend in the slightest degree to impair the validity of the instrument.

We do not think it necessary to enter into any disquisition as to the seal, for nothing important arises thereon: and as to the absence of a signature, it is abundantly clear, that a signature might have been [166] forged with as much ease, or even more easily, than the document itself.

The case came on for hearing before the civil Court of Behar, in May, 1849; and the Judge of that Court, being a native, and the Principal Sudder Ameen, pronounced a decree in favour of the Appellant, thereby declaring that the document was a genuine instrument. Upon appeal to the Sudder Dewanny Adawlut, the Judges of that Court differed in opinion; the cause was heard on the 19th of August, 1851, and two of those Judges, Sir Robert Barlow and Mr. John Russell Colvin, were of opinion that the decree of the Inferior Court ought to be reversed; the other Judge, Mr. Abercrombie Dick, expressed a different opinion, and in affirmance of the decree of the Court below.

In the preceding observations we have discussed, as we believe, all the important reasons assigned by the majority of Judges in support of their decree. We are very sensible how great a weight ought justly to be attributed to the opinion of persons so much more conversant with the habits and usages of natives than ourselves; but we are not, upon the present occasion, placed in the painful predicament of opposing our own opinion solely, against the judgment of those who are conversant with India, for we have to pay due deference also to the judgment of the Zillah Court, and the opinion of the dissentient Judge: however this may be, we are bound to look, with due allowance to the practical knowledge of the Courts in India, to the merits of the case, and to the evidence produced. Then how does this case stand? We have already expressed our opinion that the whole of the transaction is perfectly consistent with probability, [167] and in support of the genuineness of the document relied on, is the evidence of witnesses against whose veracity no solid objection has been raised, beyond the general observation that oral evidence in India is untrustworthy. This evidence is wholly uncontradicted, and yet, surely, if capable of contradiction, some evidence might have been adduced to impeach its credibility—some evidence either to show that the facts did not take place as stated, or to throw a doubt upon the testimony as to the handwriting. We have no such evidence; we must, therefore, necessarily come to the conclusion that the genuineness of the document is established. It would, indeed, be most dangerous to say that where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence: such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes, without recourse to it. We shall, therefore, feel it our duty humbly to advise Her Majesty to reverse the decree of the Sudder Court, and affirm that of the Zillah Court.

Mr. Wigram, in anticipation of the probability of such advice proceeding from us, has urged that the Respondents ought not to be rendered liable to the costs of many documents, which he alleges have been improperly introduced on the part of the Appellant. Those documents, however, formed part of the proceedings in the Court below, and however [168] unnecessary they may now appear to the just decision of this cause, we cannot undertake to say that they were wantonly or unjustifiably introduced into the Courts below. It is unfortunately too much the habit of those Courts to receive documents, without that just discrimination which would prevail were the rules of evidence known and established: but their Lordships are of opinion that they cannot, in these cases, take upon themselves to determine what ought, or ought not, to have been received in the Courts in India; they may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal con-

sequences because the administration of justice was not more strictly conducted with reference to the admission of evidence; and grievous, indeed, will be the task, and vain will be the attempt, of endeavouring to discriminate in these cases what was the precise course the Courts of primary jurisdiction ought to have pursued. For these reasons we are of opinion that the ordinary rule must be adhered to, and that we must humbly advise Her Majesty to reverse the decree of the Sudder Dewanny Adawlut, with costs.

[169] BAMUNDOSS MOOKERJEA and MUSSAMUT RAJ LUKHEE, *Appellants*.
MUSSAMUT TARINEE, *Respondent* * [Feb. 22, 23, 1858].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Authority was given by deed, by a childless Hindoo in Bengal, to his widow, to adopt a son at his decease. The widow did not exercise that power, and many years after her husband's death brought a suit in her character as widow, claiming his succession in the family estates. Held, that the mere fact of there being authority given her by her husband to adopt a son did not, before an adoption had actually taken place, supersede and destroy her personal right as widow to sue.

This suit was instituted by the Respondent, the widow of Chunder Bosun Mookerjea, in the Zillah Court of Nuddea, to set aside a Will alleged to have been made by her deceased husband, whereby the Appellant was appointed manager of his property, and which Will declared that Chunder Bosun had adopted the Appellant's Bamundoss Mookerjea's, third son, Muthooranauth, and also to recover possession of her husband's property in the Appellant's possession, with wasilat profits and interest. The Respondent claimed in her own right as widow, her husband having died childless. Previous to his death, however, he had by deed authorized her to adopt a son for him, but that power she had not exercised. The Appellant's case was, that the Respondent's husband had by the Will acknowledged the adoption of his son, Muthooranauth.

[170] The circumstances which gave rise to the suit were these:—

In the year 1814, Mohadeb Mookerjea, who was Chunder Bosun's grandfather, and was possessed of very considerable self-acquired property, divided it amongst his family by a deed of partition, whereby he gave a 4 anna share to his brother, Radhanath, an 8 anna share to his elder son, Doorga Pershad, and a 4 anna share to a younger son, Kishen Pershad, and directed that the property should be held jointly, and Doorga Pershad should be the manager. Doorga Pershad and Kishen Pershad died during Mohadeb's lifetime. Doorga Pershad left three sons, of whom the Appellant, Bamundoss Mookerjea, was the eldest, and Gouree Pershad and Unnode Pershad the other two. Kishen Pershad left one son, Chunder Bosun, the alleged Testator.

In 1823, Mohadeb Mookerjea died; and upon his death, Bamundoss Mookerjea, under a deed of guardianship and management, executed by Mohadeb just before his death, entered into the receipt of the rents and managment of the joint property. The genuineness of this deed was contested by Indermoney, the mother of Chunder Bosun, he being then only seven years of age; but the only mode of effectually contesting it being a civil suit, which Indermoney was unable to undertake, the matter dropped, and Bamundoss Mookerjea continued in the management of the joint property and affairs; and received the rents of the real estate; and the profits of a trade carried on with the joint funds, without rendering any account, and merely giving such money, from time to time, to Chunder Bosun as he thought proper. Chunder Bosun complained of this treatment, and disputes arose be-

[171] tween them; in consequence of this and of other ill treatment, and in the

* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell.

month of August, 1832, only a few weeks before his death, he presented a petition to the magistrate, praying for inquiry and protection, in which he complained of the ill treatment and injury by Bamundoss Mookerjea. Chunder Bosun had proceeded to Calcutta to obtain redress, but he shortly afterwards, in September, 1832, returned to his mother's house at Beernugger dangerously ill, and died there on the 21st of September, 1832, having, on the morning of the day of his death, executed a deed of permission (Onoomuttee Puttur) to his wife to adopt a son, and this deed he sent to her at her father's house at Santipore, where she was staying. At the time of his death he was under eighteen years of age. His sudden death, connected with the known enmity existing between him and Bamundoss Mookerjea, excited the attention of the authorities; but upon an inquiry into the circumstances before the Darogah, his death appeared to have ensued from natural causes. Upon this inquiry, however, Gouree Pershad Mookerjea and Unnode Pershad Mookerjea, the two younger brothers of Bamundoss Mookerjea, and Indermoney, Chunder Bosun's mother, and the guardian and devisee under the alleged Will, were examined, with other relations and friends who were present during Chunder Bosun's last illness. They stated the circumstances attending his illness and death, but none of them deposed to anything regarding the adoption of Bamundoss Mookerjea's son, or concerning any Will being made in his favour, and no mention of the alleged adoption, or Will, until nearly twelve months after Chunder Bosun's death, when an investigation in the Collectorate, under an old petition of inquiry as to the heirs of Mohadeb, [172] was taken advantage of by Bamundoss Mookerjea. Upon this inquiry the Respondent presented a petition, praying for the insertion of her name in the Register as representing her deceased husband; and evidence was given by numerous members of the family before the Nazir that she was Chunder Bosun's heir. The alleged Will was not produced or adverted to before the Nazir who conducted the inquiry, but six days after the examination of the witnesses a copy of the alleged Will was filed in the Collectorate, as if by Indermoney; and a few days afterwards, Bamundoss Mookerjea, in her name, but, as she afterwards declared, without her consent or knowledge, presented a petition, alleging that Chunder Bosun had, on the day before his death, executed a Will in her favour as guardian, in which it was stated that he had adopted Bamundoss Mookerjea's third son, Muthooranauth, and had appointed Bamundoss Mookerjea manager. Upon examining the original depositions of the witnesses it was insisted that they had been tampered with in Bamundoss Mookerjea's interest, and the native word for "writings" had been altered into that for "Will"; and that at the end of the depositions were found additions, written with a different pen and ink, relating to the alleged Will. The Nazir, in his report, referred to the alleged Will, but the matter appeared so full of suspicion to the Collector that he, by an order dated the 7th of August, 1833, directed further inquiries, and the attendance of Gouree Pershad and the other witnesses who had been examined on the previous inquiry; and, as they did not attend, he ultimately directed the institution of a regular suit.

Under these circumstances, the Respondent, who was then under age, on the 14th of September, 1844, [173] instituted the present suit, claiming, as heir of her husband, and also on behalf of any son whom she might adopt, possession of Zemin-dary, houses, indigo-factories, profits of trade, cash belonging to her husband, etc., and also praying to have the alleged Will set aside.

Bamundoss Mookerjea, by his answer, alleged that when he heard of Chunder Bosun's illness he left Calcutta and went home, and that, on the 7th Assim, Chunder Bosun, after adopting Muthooranauth, and appointing his own mother as guardian, and Bamundoss Mookerjea manager, lost his senses, and the next day died; adding, that in obedience to the injunctions of the Will, the rites and ceremonies of adoption, etc., according to the Shasters, had been performed, and denying the genuineness of the deed of Onoomuttee Puttur sent to the Respondent. He also objected that she ought to have instituted a suit to establish the Onoomuttee Puttur before seeking to recover possession in this suit.

Indermoney filed a separate answer, denying all knowledge of the adoption and Will, and praying to be dismissed as not being in any way responsible for the detention of the Respondent's property.

Gouree Pershad and Unnode Pershad also answered separately, but raised the

same defence as Bamundoss Mookerjea, and the replication having put the answer in issue, a proceeding took place on the 10th of November, 1845, in which, amongst other things, the Appellant's Vakeels were asked when and by whom the ceremonies of adoption were performed; and the Respondent was required to produce an authority establishing her competency to sue before making an adoption under the deed of permission. On the [174] 19th of December, the Appellant's Vakeels answered that the ceremonies of adoption were performed on the 19th of June, 1834, by the Respondent's substitute, she being present at the place of the ceremonies, with the child in her arms. The Respondent produced a case as an authority in which a final decree was made in a suit under similar circumstances (*Bhoobuniswaree Dibbeah v. Kucul Dibbeah*); and the Court held, that as, according to the Shasters, the Respondent as the widow had a right to the possession of the property of her deceased husband, it was unnecessary for her to prove the execution of the deed of permission to her to adopt, and that there were, therefore, only two points for determination: First, whether Chunder Bosun adopted Muthooranauth, and made the alleged Will, and whether the rites and ceremonies prescribed had been duly performed; and secondly, what was the amount which Respondent was entitled to recover?

The case came on before the Court on several occasions in 1846 and 1847. The Appellants produced the alleged Will, which had not been registered at the time. The deed of permission, by Chunder Bosun, to adopt, was not produced, nor was any evidence given of its existence or of its ever having been seen by any one, with the exception that one of the witnesses, called and examined on behalf of the Respondent, stated that he had heard that Chunder Bosun had executed a deed of adoption and sent it to Santipore, but the witness stated also that he was not present at the alleged execution of the deed. By far the greater portion of the evidence of the witnesses called on behalf of this Respondent, related to the value of the property in dispute, and to the question whether the [175] property was ancestral or purchased by the first Appellant. Several witnesses were called on her behalf to show that large sums of ready money had been left by Mohadeb, in which she was entitled to share. On behalf of the Appellant, witnesses were examined, and numerous documents relating to the property in dispute and to earlier proceedings in the Courts of Justice were put in evidence to show the manner in which he had acted as guardian of Muthooranauth, and that several of the factories and gardens included in the claim of the Respondent were not ancestral property, but had been purchased by Bamundoss. Other witnesses were also called on behalf of this Appellant, who said they were present at the making of the alleged Will of Chunder Bosun, and also to prove the adoption of Muthooranauth. Two of the four subscribing witnesses to the last-mentioned instrument were called and examined on behalf of this Appellant. Of the other two witnesses, one was dead, and the other, although summoned on behalf of the Appellant, did not appear.

On the 20th of September, 1847, the Principal Sudder Ameen of the Court of Nuddea delivered judgment in the case. This judgment decided, in substance, first, that the evidence did not establish that Chunder Bosun had executed the alleged Will or had adopted Muthooranauth, and, as to the two attesting witnesses to the alleged Will, the Court disbelieved their testimony and described them as "professional witnesses" attending the Nuddea Court. Secondly, the Court held that there was no sufficient proof that the property alleged by Bamundoss Mookerjea to be self-acquired was not so, and that the Respondent was only entitled to her husband's share in the property acknow-[176]-ledged to be ancestral. Thirdly, that the witnesses called on behalf of the Respondent, to prove that she was entitled to share in a sum of Rs. 300,000 of ready money, alleged by her to have been left by Mohadeb were not entitled to credit. Fourthly, that the witnesses called on behalf of the Respondent, to prove that she was entitled to the gold and silver plate claimed by her, were not entitled to credit. Fifthly, that some of the witnesses called on behalf of the Respondent had given false evidence with respect to the annual profits of the lands; that with respect to a large portion of the claim, the annual value of the lands had not been proved; but that with respect to the Talook Shoulmaree, the Respondent was entitled to recover Rs. 35,055 for mesne profits. The Principal Sudder Ameen then went on to declare that the claim in the suit should be amended

according to the above finding, and decreed in favour of the Respondent, that the Respondent should obtain from Bambundoss Mookerjea, and from Gourree Pershad, and Unnode Pershad, possession of one-fourth of certain Zemindaries and Talooks mentioned in the decree, and of the dwelling-house of Beernugger, together with mesne profits of the Talook Shoulmarce, to the extent of Rs. 35,035, with interest down to the day of payment, and that the Respondent should, after an inquiry, obtain the mesne profits of the remainder of the decreed property from the day of the institution of the suit to the day of receiving possession.

Bambundoss Mookerjea, and Gourree Pershad and Unnode Pershad, appealed to the Sudder Dewanny Adawlut at Calcutta, and a cross appeal was also brought by the Respondent.

The decree of the full Bench of the Sudder Dewanny [177] Court was pronounced on the 30th of September, 1850, and was in these terms (a): "On the point of the right of a widow to sue on her personal claims as widow, in a plaint in which she also mentions that her husband had given her authority to adopt a son, which is the second objection which has been raised against the admissibility of the plaint, there have been long and able arguments in this case: it being contended against the Plaintiff, that since there is such a mention distinctly made of authority to adopt in her plaint before the Court, her personal right as a widow must be taken upon her own statement to have lapsed, the right vesting from the date of her husband's death in the boy thereafter to be adopted by her, according to the principles of Hindoo law, and specially according to the precedent in the case *Beejayah Dibbeah v. Shama Soondree Dibbeah* (Sud. Dew. Adaw. Rep. of 1848, pp. 762 to 766). The decision in the case of *Beejayah Dibbeah* had not been passed when the present suit was brought before the Principal Sudder Ameen. He, by a proceeding of December the 19th, 1845, admitted the suit for the personal right of the Plaintiff as widow, notwithstanding the mention of an authority to adopt, on the ground of an unpublished precedent of this Court (*Bhabunessuree Dibbeah v. Kubmunnee*, 10th of April, 1821). It does not appear that in that case, though the suit of the widow was admitted, any objection had been raised on that point. The admission of the suit is not, therefore, to be considered as having been directed on a judicial decision after argument. We have, after a full and careful examination of the question, and with the advantage of a very pro-[178]-tracted discussion and of a minute examination of all the authorities by the pleaders of the parties in this appeal, come to a conclusion differing from that of the majority, Messrs. Tucker and Hawkins, who ruled the point in the recent decision in the case above cited of *Beejayah Dibbeah v. Shama Soondree Dibbeah*, and are of opinion, that the fact of an authority to adopt a son being possessed by a widow (the actual existence of authority has not come to proof in this case, but has been assumed upon her own statement for argument as part of her own case) does not supersede and destroy her personal right as widow: and that those rights continuing of force till an adoption is actually made, there is no bar to the admission of the present claim by the Plaintiff as widow. We shall, in explaining the grounds for this opinion, allude first to the reasons on which the decision from which we dissent was passed, and then notice more generally the texts and principles of Hindoo law applicable to the subject. The subjoined extract from the decision in question shows all the grounds on which it rested. These grounds, it will be seen, are the opinion given by the Pundit on the question put to him in that appeal, and the opinions of the Pundits in *Ranee Kishenmunnee v. Rajah Oodwunt Singh* (3 Sud. Dew. Adaw. Rep. p. 228):—Messrs. Tucker and Hawkins there say: 'The Plaintiff sues for her share of the estate as heir to her deceased son, and in her plaint sets forth that she has power from her husband, in the event of her born-son's death, to adopt a son. The authenticity and validity of the testament conferring this power she asserts in the last paper filed by her upon the record of appeal. The question was put to the Pundit of [179] this Court, whether a widow, with power from her husband to adopt a son, can sue as heir in her own right for a share of the ancestral estate. The Pundit replies distinctly that she cannot; in fact, it was laid down by the Pundits in the case of *Ranee Kishenmunnee v. Rajah*

(a) This decree is from its importance set out at length. The judgment of their Lordships, *post* [7 Moo. Ind. App.], p. 206, adopted it *simpliciter*.

Oodwunt Singh, cited above, that the moment permission to a widow to adopt a son was pronounced, it had the same effect as if a child had been conceived in the womb of the widow, and her intention to adopt under the permission, operated to all intents and purposes as if she were *enceinte*, and that the boy subsequently adopted by her had all the rights of a posthumous child. It thus appears that the plaint in the present case cannot be sustained. The Plaintiff declares she has a power to adopt, and she asserts the present validity of that power. Her plaint therefore is much the same as if she had sued as heir, alleging that another existed having a right by inheritance prior to her own.' From the substance of the question to and answer of the Pundit, it is manifest that though the Pundit stated that, in his opinion, the suit for a personal right as widow could not lie under such circumstances, he has, in effect, when citing authorities, assumed the entire question as to that, its main point at issue, and has not quoted only texts which are quite valueless as to the doubts proposed to him,—their purport being merely that suits would not lie if they were opposed to the Shasters, ancient custom, or right. The case of *Ranee Kishenmunee v. Rajah Oodwunt Singh*, which is the other ground on which the judgment of Messrs. Hawkins and Tucker proceeded, is one which turned on a point perfectly distinct from that now before us. The point in that suit was, whether a retrospective right could be [180] claimed by a son after he had been adopted, so as to bar a sale made by his adoptive mother previous to his adoption, to the injury of the rights, at that time contingent and eventual, but which actually accrued to him upon his adoption. In that case, the son, when adopted, became the undoubted heir; and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity. There was, too, the peculiarity in the case, that it was held by the Pundits that, by the terms of the Will of her deceased husband, the widow was only an appointed manager of the estate, and that 'the right of property vested in the son subsequently adopted, from the time of the Rajah's death, and the adopting widow had no authority but that of intermediate management under her late husband's Will.' The case then stands by itself, and affords no general precedent, although even if it did it would relate only to the rights claimable by an adopted son after adoption made. Upon the general argument, we do not propose to follow the discussions which have been raised before us into the different points of speculative doubt and nicety that have been referred to, as to the possibility of the existence of rights, present or contingent, in a child from the moment of its conception in the womb,—as to what is the precise time of vital conception or existence, according to Hindoo law and usage,—as to analogies between the condition of a widow who has received permission from her husband to adopt, and of a widow naturally pregnant,—as to the abstract causes or grounds of inheritance,—or [181] as to modes and questions of Hindoo obsequial or other ceremonies. We believe that, were we to enter on these subtleties and niceties we should complicate and obscure the law by novel distinctions, such as have no sanction from past decisions of the Courts, or from the established usages of the Hindoo community, and such also as are not capable of being adopted as practical guides for judgment with any consistency and certainty. We shall rest our opinion on the admitted principles and positive texts of the Hindoo law, as current in Bengal, taking words in their plain and ordinary meaning, and endeavouring to collect all that is important on the subject in former decisions or published authorities, and to ascertain the correct sense, as to the point in question, of the varying notices of it which are to be gathered from those sources. Now, there is no doubt as to the declared right of a widow in Bengal, to succeed to her husband's estate upon his death, in default of lineal male heirs down to the great-grandson in the male line. This is a right certain and incontestable. It is urged, on the other hand, that there is not any direct text enjoining that in the event of the pregnancy of a widow on the death of her husband, her right to succeed shall be held in abeyance until it be seen whether she is delivered of male or of a female child. The argument as to a widow who has permission to adopt, is only that, according to the *dicta* of the Pundits, she is to be regarded as *enceinte*. If no text can be shown for the suspension of the rights of a widow actually pregnant, it is still more certain that there

is no similar provision for divesture of right in the case of a widow held only to be constructively pregnant of a son through the [182] effect of a permission to adopt. The single passage of the Hindoo law on which the objection to the widow's right, in the case either of a real or of a constructive pregnancy is directly rested, is the following, which is noted in the two cases (*Ranee Kishenmune v. Rajah Oodwunt Sangh*, above referred to, and *Ramkishen Surkhyl v. Mussumaut Sri Mutee Dibia*, 3 Sud. Dew. Adaw. Rep. 367), which have been much cited in the course of the discussion, and of which the translation is subjoined from Colebrooke's translation of the *Daya-Bhaga*, ch. i. sec. 45. 'They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured.' Upon this passage it has been contended, on behalf of the widow, that it prescribes a moral duty rather than a legal obligation; as, were it held to be of strict legal force, it would militate against the admitted right of a Hindoo father in Bengal to dispose of his property according to his own choice by Will. But apart from this, it is to be observed that the very terms of the text providing for sons yet unbegotten, refer to a contingent and future, and not to a present right. In perfect consistency with this, we find that the right accruing to an after-born son, in regard to real ancestral property, is thus described in the same treatise (ch. vii. sec. 11). That is declared by Vishnu,— 'Sons with whom the father has made a partition, should give a share to the son born after the distribution.' (Sec. 12.) So Yajnyawalkya,— 'When the sons have been separate, one, afterwards born of a woman equal in class, shares the distribution. His allotment must positively be made out of the visible estate corrected for income [183] and expenditure'; to which is appended the following note by the commentators Sricrishna, etc., as to the words 'must positively':— 'The particle *vā* is affirmative, and what has been consumed is consequently excepted.' See also the *Dayacrama Sangraha*, as to the right accruing to sons afterwards born, ch. v. secs. 21 to 24. So that the after-born son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception. A strong illustration to the same effect is to be drawn from the law of partition according to *The Mitacshara*, in which it is laid down (ch. i. sec. vi. 11, 12), that if the pregnancy of a brother's widow be manifest at the time of an intended partition, the partition should be postponed till after the delivery. Some commentators, as will be seen by the note, hold the sense of the passage to be, that partition may at once take place, but that a share should be set apart for the widow who is supposed pregnant, and when she is delivered, the share is to be assigned to her son; and this interpretation is rejected by others chiefly because, according to the law of the western schools in regard to an estate still undivided, 'widows are not entitled to participate as heirs.' The clear inference is, that could a widow have been heir, as she can incontestably be in Bengal, she might have been admitted on her own right during pregnancy, the share devolving to her son only on his birth. As to the law of Bengal, it need only be added, that the commentator Sricrishna, when expounding, *Daya-Bhaga*, ch. i. sec. 43, the peculiar doctrine of the Bengal school, as to a right of inheritance not vesting in the son till after the death of the father, says of a passage [184] of Gautama, cited in *The Mitacshara*, on birth being the means or cause of the acquisition of property, that the text is unauthorized, or, if it be authorized, it relates to the case of one whose father dies while the child is in the mother's womb. Here is an express and indeed, to our minds, a conclusive reference to actual birth after the death of a father, as the period of commencement of right. Of authorities other than the direct text of the law and commentaries, the following may be quoted:—Sir W. Macnaghten's '*Principles of Hindu Law*,' vol. i. p. 2: 'The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right,—the inchoate right which previously existed becoming perfected by the removal of the obstacle.' H. Colebrooke, in Strange's '*Hindu Law*,' vol. ii. p. 127 (2nd Edit.): 'Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper *Stridhana*, it ceased to be hers at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property,

coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own, after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband, and the widow could have no other authority but that of mother and guardian. The only means of evading the application of this opinion, so weighty and so directly to the point, has been by arguing that it was given in regard to a Madras case, [185] and had reference to the law of The Mitacshara. But first, no distinction between the two schools, as to the point in question, are in any way alluded to in the opinion; and next, the case itself was one of the succession of a widow to the separate property of her husband, in which case a widow has the same right under The Mitacshara as she has in all cases according to the Bengal law. There is a difference between the two schools as to the period at which, after birth, the rights of sons over the property of a father commence.—The Mitacshara school holding the commencement to be immediate and the rights of the sons to be concurrent with those of a father (as with us in the familiar case of an entail); and the Bengal school holding the rights of the sons to commence only on the death of the father. But there is nothing in that difference which affects the applicability of Mr. Colebrooke's opinion to the case of sons in Bengal, as well as elsewhere, antecedent to birth. See the *dictum* of the Privy Council in *Dhurm Das Pandey v. Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 243). Now, upon the authorities, there can be no doubt that that is the result of an act of adoption, because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divests it from the widow and vests it in the adopted son. Authorities are not quoted for this opinion, nor does the point appear to have been specially discussed in the case. But the passage shows the sense of the highest judicial authority as to the admitted doctrine on the subject. An anonymous case may also be cited from the manuscript papers of Sir Edward H. East, in Morley's Dig. (vol. ii. p. 18), in which incidentally, the same opinion is very strongly [186] expressed:—"Since the Defendant had come to the age of sixteen, the widow had given up the property entirely to his management and benefit, which was a strong corroboration of the truth of the Defendant's case, because the widow herself had actually, by the adoption, deprived herself of a life-estate." Of the cases decided by this Court at all bearing upon the question, those of *Ranee Kishenmunee v. Rajah Oodwunt Singh*, and of *Ramkishan Surkhyl v. Mussummaut Sri Mutee Dibia*, before referred to, and another case of *Pran Nath Rai v. Raja Govind Chandra Rai* (5 Sud. Dew. Adaw. Rep. p. 37), which has been cited in the argument, relate, as has been noticed, to the distinct point of retrospective rights claimable by a son after adoption; and the text of Hindoo law, in respect to the rights of sons unbegotten or in the womb, in which the entire stress has been laid in connection with the two first cases, has been above fully adverted to and explained. There is a case (*Mussummaut Bhuvani Munee v. Mussummaut Solukhna*, 1 Sud. Dew. Adaw. Rep. 322), which is in support of the general view which we have formed. A decree was there made by Mr. Harrington in favour of six daughters' sons, with reservation of the eventual birth of other sons to one of the daughters, who would be entitled to share with the other daughters' son. A case has been much relied on in opposition to the right of the widow, that of *Karuna Mai v. Jai Chandra Ghos* (5 Sud. Dew. Adaw. Rep. 42). See also *Kishen Lochan Bosi v. Tarini Dasi* (5 Sud. Dew. Adaw. Rep. p. 55) decided by Mr. Turnbull, the effect of which is thus stated in the marginal note:—"By the Hindu Law in Bengal, a sister's son (even though unborn or unbegotten, at the time of his maternal uncle's death) is an heir preferable to the [187] son of the paternal uncle of deceased; and a sister likely to produce male issue (though having none), as trustee for such issue, enters on the succession of her deceased brother's estate, to exclusion of his paternal uncle's son." The authority of this case has been much shaken by the subsequent decision of Mr. Walpole, in the case of *Lakhi Priya v. Bhairab Chandra Chaudhuri* (5 Sud. Dew. Adaw. Rep. p. 315), but on a ground distinct from that now under consideration. For the latter decision went on the point (see p. 321) that 'the text of Menu, which deprecates deprivation of subsistence of the unborn, had regard to the estate of the paternal grandfather,' and did not apply to the case then before the Court, of the estate of a maternal uncle. But the fact, which, under any circum-

stances, entirely distinguishes the case of *Karuna Mai v. Jai Chandra Ghos* from the present one, is that the question there was of the nature of the possession to be given to a sister who is incompetent to be an heir to her brother; and the question here is of a widow who is an indisputable heir to her husband's estate. Possession given in the first case to a sister could only be as trustee for others. On the merits, however, of the decision itself, it will be seen to have rested on opinions delivered by the same Pandit, so shifting and inconsistent as not to command much respect. There are passages at the same time in his first elaborate *Bywasta* which point distinctly to the rights of unborn sons as being eventual only; for instance, that *Bywasta* states, at p. 44, *ib.*, that the first authority adduced 'established, that the father's daughter's son took deceased's estate, if existing at the time of his death; but not that the ownership in the estate should remain in abeyance, and at the end of an indefinite time the succession [188] vest in the posthumous sister's son. And again, 'Inspired legislators had made provision for the custody of the estate of minors, but neither they, nor any writer, had provided for the charge of the estate of the unborn during an indefinite time; therefore the unborn could have no property.' It remains only to notice two cases; in one, *Mussumaut Himulta Chowdrayn v. Mussumaut Pudoo Munee Chowdrayn* (4 Sud. Dew. Adaw. Rep. p. 19), of which the fact of a widow having received a permission to adopt, was adjudicated on, although no adoption had been made; and in another, *Mussumaut Subadra Chowdrayn v. Goluknath Chowdry* (7 Sud. Dew. Adaw. Rep. p. 143), of which the majority, Messrs. Tucker and Reid, of the Court, held, that until an adoption was actually made, no action would lie in regard to the validity of an alleged deed of permission. Little of weight can be deduced upon either of these decisions as respects the point now under inquiry: they are in themselves brief and general as regards the point of receiving or rejecting a suit under the circumstances stated, and do not furnish strong authority in support of a judgment on either side in the present controversy. Against the direct authorities and reasonings above detailed, there is nothing to be stated, but some doubtful allusions as to what the term 'birth' positively intends, when employed in Hindoo Law. A passage in Colebrooke's '*Dig.*' vol. ii. p. 505, has been referred to, in which birth is spoken of 'as a particular relation of body, not a relation taking place at the first instant of procreation.' The Pandit of this Court, in the first *Bywasta* in *Karuna Mai v. Jai Chandra Ghos* (5 Sud. Dew. Adaw. Rep. p. 44), says 'birth was twofold': it might be referred to the period of 'conception or to [189] actual production.' In the marginal note by Mr. J. C. C. Sutherland (a gentleman whose opinion on points of Hindoo Law is deserving of much respect), to the case of *Lakhi Priya v. Bhairab Chandra Chaudhuri* (5 Sud. Dew. Adaw. Rep. p. 315), he has introduced the words (not to be found in the decision as set forth in the body of the report) 'Right of succession cannot remain in abeyance in the expectation of the future production of such heir not conceived at the time of succession opened.' It has been argued that Hindoo rules and family customs have established a period, in the sixth month of pregnancy, from which conception, in a legal sense, can be calculated. These, however, are very feeble grounds for introducing a novel and most perplexing standard and origin of right into our practical jurisprudence; and it is obvious that the rather fanciful analogy which has been contended for between a real pregnancy and a constructive pregnancy through a permission to adopt, will here fail; for the argument has been, that the right vests in the child to be adopted from the moment that permission to adopt is pronounced by the husband, and not from the sixth month or any other period after that date. The truth is, that the supposition of a positive and actual right vested in an embryo which may never come into full existence, is one which must almost be rejected on the mere statement of it. It is particularly repugnant to common reason in the case of a possible adoption, which may be made after the lapse of many years, or may never be made at all. If the supposition were to be admitted and acted upon, the effect would be to alter the whole course of natural inheritance, for there would be one course of inheritance as from the son to be adopted, and another (as [190] is usual at present) from the widow's husband upon her own death. The rights, for instance, of any daughters of the husband would in the former case be wholly set aside. It is true that a widow may, from the continuance of her life-interest, have an interest opposed to her duty, which should lead her, if she has a permission from

her husband, to adopt a son without any delay which she can avoid. But there appears to be no power under the Hindoo Law to compel a widow to adopt, though a case (in Macnaghten's 'Principles on Hindu Law,' vol. ii. p. 247) has been referred to, where there is a mention of an incompetency in a widow to succeed, if she neglect to make an adoption. The subject, however, is only cursorily noticed in that case, and in connection with a point which appears to have been ruled upon different grounds. The question of any possible check on a widow, who wilfully protracts or evades an adoption specially enjoined upon her by her husband, is not before us; and what we have to decide, viz., the power of a widow, duly authorized to adopt, to claim under any circumstances her personal rights until she does adopt, is not affected by a consideration of what might be the proper course, if she could be proved to have violated any clear and positive legal obligation."

The Court then proceeded to give judgment on the validity of the Will and alleged adoption set up by Defendants in these terms: "The objections, raised upon the nature of the plaint, being disposed of, it remains to decide upon the third and last plea preferred by the Appellants in the case No. 541 of 1847, namely, their claim under the Will of the deceased, Chunder Bosun, alleged to have been executed by him, the day before his death. On the subject of the Will, we find [191] it important to note the following observations. The document has not been registered. Radhanauth, the brother of Mohadeb, the common ancestor of the parties in this cause, is alleged to have been present when the Will was drawn out. It is alleged that the Will was executed and Muthooranauth adopted by his advice; yet the Defendant, Bamundoss Mookerjea, admits that he and Radhanauth had many disputes. Indeed, in his petition of the 9th of August, 1832 (or only six weeks before the alleged execution of the Will) which will presently be referred to, Bamundoss called Radhanauth his mortal enemy. Radhanauth's name is not attached to the deed, nor are the names of any of the relatives of the family; neither is there a particle of evidence to show when and under what circumstances this acknowledged bitter enmity ceased. It is said for the Appellants that respectable natives object to be witnesses to deeds, as it subjects them to be cited to give evidence in Court. This was a most urgent reason for having the Will registered as soon as it was drawn. No such precaution was however taken. It appears from a petition presented by Chundur Bosun, *in propria persona*, to the Magistrate, on the 4th of August, 1832, that he and Bamundoss Mookerjea were then great enemies. He therein complained that Bamundoss Mookerjea was about to drive him and his mother out, and had subjected him to extreme ill-treatment and indignity; that Bamundoss Mookerjea was making away with the accounts; that the Petitioner had only a few months to attain his majority, when the accounts must be rendered to him; notwithstanding which, the Will, dated but a few weeks afterwards, or on the 22nd of September *idem*, is altogether in favour of Muthooranauth, Bamun-[192]-doss Mookerjea's son. The existence of extreme enmity is thus shown, and no attempt has been made to prove that subsequent reconciliation took place. In answer to the above petition, Bamundoss Mookerjea, on the 9th of August, 1832, distinctly styled Chunder Bosun as a minor who had absconded, and for whom he was anxiously in search lest he should get into harm. There is no mention of preparation of draft or discussion of terms (such as is always usual with the natives of this country) of any Will before the 21st of September, the day of Chunder Bosun's death. Nevertheless the instrument is one most elaborately prepared, with every possible provision to secure the interest of Bamundoss Mookerjea's son, and to shield Bamundoss Mookerjea from every description of responsibility. If the state of the deceased was such as is shown by Bamundoss Mookerjea himself in the second paragraph of his answer on the record, namely, that having caused the Will to be written, the deceased the same day became perfectly senseless (*hotto chytunno*), it is hardly possible that he should have been capable of dictating and understanding its contents, drawn as they are with such studied particularity and precaution, and of signing it, as it appears to have been signed, with a perfectly firm and steady hand. The firmness of the signature is particularly remarkable, so as to be quite inconsistent with its being the act of a man reduced to the last stage of illness. Again, the recitals in the Will are opposed to statements made by the Defendants on other occasions. Inconsistencies of the kind must add to the impression arising from the other circumstances which

shake the credibility of the Will. The Will enjoins that the conditions and ceremonies of adoption shall be performed by the Plain-[193]-tiff, the widow. The Defendant's pleader, being asked by the Principal Sudder Ameen, on the occasion of the preparation of the proceeding under section 10, Ben. Reg. XXVI., 1814, on what date the Plaintiff performed the ceremonies, answered, that he must refer to his principal for information upon that point; and then on the 19th of December, 1845, said, that she had performed them on the 19th of June, 1834; that she was present in the room, and that she received the child in her arms. Several witnesses were produced to prove this fact, but they said she was in a separate room. Moreover, in the petition presented by two of the Vakeels of this Court (Bungshee Buddun Mittur and Rajnarain Dutt), on the 26th of December, 1844, it was stated by them, on behalf of Bamundoss Mookerjea, that Chunder Bosun, when in full possession of his senses, had himself performed all the ceremonies of adoption of Muthoornauth, according to the Bengal Shasters; or, to make use of the words of the petition, 'had completed all the conditions and forms of adoption;' and that, therefore, the Plaintiff could not object to his adoption in opposition to her deceased husband's acts. These discrepancies, though not conclusive evidence against Muthoornauth, who was a minor when the petition was filed, afford strong presumption that his claim under the Will has no good and just foundation. There is another circumstance connected with the Will, which, though we do not lay conclusive stress on it, must yet not be passed over without comment. It is a very remarkable fact that the alleged Testator throughout the Will, speaks of matters connected with his minority, and in no part of it declares himself a major. It may be said, that the making a Will is in itself a [194] presumptive proof and assertion on his part that he had attained his majority. It appears however to us worthy of notice, that in an instrument containing so much detail, and drawn with so much care, labour, and consideration, including a circumstantial narrative of all the antecedent circumstances of the family and property, the important fact that the Testator was of age was not set forth distinctly. It would be no strained inference from the terms and general purport of the instrument, to conclude that Chunder Bosun had not attained his majority. Indeed Bamundoss Mookerjea's petition of the 9th of August, 1832, already adverted to, which refers to his minority as to last for eight or nine months longer, is strong confirmation that Chunder Bosun at the time of his death was a minor. As to the verification of the Will, it is to be observed that the names of four persons are attached to it, namely, Bishnath Bose, Nusseeram Singh, Chundurnath Chatterjee, and Hurreemohun Chatterjee. Of these Hurreemohun is dead. Bishnath, alleged by the Defendant to be the writer of the instrument, although summoned, is not forthcoming; and the Appellants did not, as required by law, take at a proper time the necessary steps to cause his appearance. They made, indeed, at a subsequent period, a general application for a fresh *subpoena* to be issued to some sixty witnesses, Bishnath being one of them; but this the Principal Sudder Ameen rejected as being a mere device to protract the proceedings. Nusseeram and Chundurnath were examined by the Principal Sudder Ameen, as were sundry other witnesses as to their knowledge of the Will. He has rejected their evidence, but in so doing has, without any proof adduced, thrown an imputation upon the two witnesses above-[195]-named, of being professional witnesses, undeserving of any credit. As we find nothing on the record which justifies the expression of such an opinion, we deem it necessary to notice that the Principal Sudder Ameen's conduct in offering such remarks, unsupported by any proof, is most censurable. As to the other witnesses who have also been examined with a view to substantiate the Will, we find that they too have deposed to its execution, as well as to its attestation by Nusseeram and others. These witnesses say that they were present on the occasion, but we cannot attach such weight to their testimony as would induce us to declare the Will genuine in opposition to the very strong proofs already referred to, not adduced by the Plaintiff, but arising mainly out of circumstances and events over which she had no control. This circumstantial evidence, we would pointedly remark, is supplied by the principal Defendant himself. The non-registry of the Will, his discrepant petitions and statements, his petition of the 9th of August, 1832, to the Magistrate, added to the terms and conditions of the Will itself (the preparation of which is admitted to have been deferred to the very last moment), are circumstances over which the Defendants had every control; and which in our judgment create a

high degree of suspicion as to the genuineness of the instrument which greatly outweigh any testimony or proof that has been brought by the Defendants. It has been argued that the non-registry of the Will cannot be held to be a valid objection, inasmuch as the Court has prohibited the registry of Wills or documents of persons deceased. The answer is, that this rule was laid down in case No. 1218, of the 21st of June, 1839, long after the alleged date of the Will in [196] question. It has also been urged that the instrument has been in the public offices from a period within ten months of its alleged execution; but this can afford no satisfactory proof of its actual execution by the deceased: but further, even if it be admitted to be genuine, the validity of it is question on the ground of its being the act of a minor. The presentation of the petition of the 4th of August, 1832, *in propria persona*, by the deceased Chunder Bosun, to the Magistrate, which is acknowledged to be a genuine document, is evidence of the nature to which we have above adverted. It is evidence beyond the control of the parties before us. The Petitioner therein stated that eight or nine months of his minority still remained, and he died within forty-eight days of the presentation of that petition. The Defendant, Bamundoss Mookerjee, in his answer to that petition, given to the Magistrate a few days subsequent to it (a document also acknowledged by his pleaders to have been presented by him) repeatedly speaks of Chunder Bosun as a minor, whose well-being and conduct it was his (Bamundoss Mookerjee's) duty to look after. This is evidence drawn from unimpeachable sources, furnished, too, by the principal Defendant himself, many years before the institution of the suit, and forms the strongest possible presumption (we had almost said conclusive proof) of the fact of the deceased Chunder Bosun's minority at the time of the alleged Will. We cannot, then, after duly considering and weighing all that is before us, but declare that in our opinion the Defendants have altogether failed in proving the Will in their favour. There is, besides, the strongest ground on the record to believe it to have been the act of a minor, and, therefore, legally inoperative and inad-[197]-missible. We cannot, therefore, upon the oral evidence which the Defendants have brought to support the Will, and which is disproved by all the circumstances and probabilities of the case, believe that any permission, oral or otherwise, was given by Chunder Bosun for the adoption of Muthoornauth. Under such circumstances, the right of the Plaintiff, the widow of Chunder Bosun, to succeed to his estate under the provisions of the Hindoo law, is indisputable, and we have only to determine how much of the property claimed she is entitled to recover, as being part of that estate.

The Defendant, Bamundoss Mookerjee, has laid claim to the Talook Runghaut, in Zillah Nuddea, and to certain indigo-factories in Zillahs Mymensingh, Rungpore, and Dacca. The Talook he calls his own self-acquired property, and the factories are said by him to have been erected since the death of Chunder Bosun, and a factory in Zillah Nuddea is alleged to have been built by him (the Defendant) at his own cost. These pleas are by no means satisfactorily proved. It is admitted that the Talook was pledged to the common ancestor, Mohadeb. It is nowhere stated, nor is it in any way shown, that the pledge was redeemed. The Defendant states that after Mohadeb's death he paid the sum of Rs. 16 in addition, and got a bill of final sale in his own favour for Rs. 316 on the 17th Assar, 1231. This Kubalah, or bill of sale, is filed, but no witnesses have sworn to it. The Defendant caused his name to be registered in the Collectorate in lieu of Mohadeb, on the 18th Srabun of that year. Being manager for the family, this would be a matter of no difficulty; but neither the Kubalah nor the registry is proof of self-acquisition. The estate originally [198]-nally was held in mortgage by Mohadeb, and the Court have repeatedly ruled that proof of the specialty of self-acquisition is an *onus* which lies on the claimant when a question of succession to property, alleged on the other part to have belonged to a family which is admitted to have been generally joint and undivided in estate, arises between the heirs of a deceased ancestor. The Kubalah is not proved, and mere registration in the Collectorate is not sufficient to establish self-acquisition by the Defendant. Neither is the evidence adduced by the Defendant, as regards the indigo-factory at Nuddea, such as to prove that property his own. Two or three witnesses have in general terms deposed that it belonged to the Defendant; but their evidence is weak and inconclusive. In regard to the remaining factories, the Defendant has adduced no proof whatever, nor has he brought forward anything to disprove the claim which Plaintiff has laid to certain tanks and gardens at Beernuggur,

the family residence. We are, therefore, of opinion that a decree must pass in favour of Plaintiff for her husband's share of the above-mentioned property, as well as for that which, it is admitted, descended from Mohadeb to his heirs, and was held by the Defendant, Bamundross Mookerjea, as he acknowledges, for the benefit of his third son, Muthoornauth, alleged to have been adopted by the Plaintiff's husband, the late Chunder Bosun. In the plaint an allegation is made that the mesne profits of the estate on the Plaintiff's share amount to Rs. 13,000 per annum. The Principal Sudder Ameen records that the Plaintiff refused to take out an Ameen to calculate the actual proceeds, and that the Defendant declined, under various pretences, to furnish, for the period of his management, [199] the papers requisite to ascertain them, and he, therefore, rejected so much of Plaintiff's claim. We are of opinion that mesne profits must be awarded to Plaintiff from the date of her dis-possession, that is, from the date of Mohadeb's death, and that for the ascertainment of their amount an Ameen must be deputed in ordinary course. The Defendant will be called on to give up his accounts of the collections, and the Ameen will further take the usual steps to fix the amount realized by him. The Plaintiff having been debarred from an earlier suit by minority, interest is awarded at 6 per cent. on each year's mesne profits on the Plaintiff's share of all the landed property claimed, from the date of Mohadeb's death up to the date of suit, and at the rate of 12 per cent. from that date to date of decree, and the same interest on the aggregate so calculated up to the date of realization. Mesne profits and interest to be charged to Bamundross Mookerjea exclusively up to the date of Muthoornauth's majority, and to both Bamundross Mookerjea and Muthoornauth from that date to realization. It is to be here noticed that Muthoornauth has been recently allowed, on declaration of his majority, through his pleader in this Court, to appear as a joint party in the course of the appeal proceedings. Plaintiff's claim to certain gold and silver plate is disallowed by the Principal Sudder Ameen, who does not deem the evidence of the four witnesses adduced worthy of credit, for the reasons stated in his judgment. We see no reason to interfere with this part of his decision. He has also rejected so much of the plaint as lays claim to a share of Rs. 3,00,000 cash and Rs. 3,00,000 outstanding balances; on this point, likewise, discrediting the same four witnesses. The Plaintiff has sued speci-[200]-fically for these amounts, and has failed to establish any proof of their being due. The suit was not for production of accounts. We concur with the Principal Sudder Ameen, that no sufficient proof has been given of these claims, and, therefore, as regards them, dismiss the suit before us. Under the specialty of the case, in which we consider great wrong to have been done to the Plaintiff by a party who comes forward as the guardian of the Plaintiff's husband, a minor, and in consideration of the large amount of mesne profits that must undoubtedly have been collected, we charge all the costs of this suit to Bamundross Mookerjea, and to Muthoornauth, for whose benefit he acted, save those of the Defendants, Doorga Pershad and Kishen Pershad, who will, as having supported the defence of Bamundross Mookerjea, pay their own costs." It was, therefore, ordered that a decree pass in favour of Plaintiff, in amendment of the decision of the Principal Sudder Ameen, as indicated above; that all the costs of this Court incurred in both the causes, save the costs of Doorga Pershad Mookerjea and Kishen Pershad Mookerjea, Defendants in the Zillah Court, be charged to Bamundross Mookerjea and Muthoornauth, according to the amount prepared by the Accountant of costs of the Court, with interest thereof from the day of the decree to that of the liquidation thereof.

From this decree the present appeal was brought.

Mr. R. Palmer, Q.C., Mr. Leith, and Mr. Maude, for the Appellant.—Two questions arise; first, whether the evidence as to the Will of Chunder Bosun, and of the adoption of the Appellant's son, Muthoornauth, in pursuance there-[201]-of, justified the decree appealed from; and secondly, whether the Respondent, as widow of Chunder Bosun, was capable, in her character as widow, of bringing this suit, when an express power was given to her by her deceased husband to adopt a son. Upon the second ground, it is admitted by the Respondent in her plaint that her deceased husband executed a deed of adoption authorizing her to adopt a son, and of her intention to do so. Therefore, the failure of the Appellant to prove that deed to the satisfaction of the Court was immaterial, and the Respondent was estopped, as far as her rights as widow were concerned, from contesting the point. The

Court below having insisted on our producing this deed, which was not in our custody, we submit that it was a miscarriage of justice, and that the cause ought to be remitted to the Court below on that ground. Every probability is in favour of the adoption, which is indispensably required by the Hindoo law. The "Dattaka-Mimamsa," sec. i. cls. 2, 3, 6, 58, translated by Sutherland, pp. 2, 23. The widow being incapable of performing sacrifice, a substitute is admitted for the performance of that ceremony in the adopted son. The *Mitaeshara*, ch. i. sec. xi., note to sec. 9, p. 308. The wife, in such a case, is but the agent, the mere instrument; the primary author being the husband. The "Dattaka-Mimamsa," sec. i. cls. 19, 21, 22, translated by Sutherland, pp. 7, 8. The Court leans to the presumption in favour of an adoption having been made, the spiritual welfare of the deceased being depended upon it. *Huradhuu Mookurjia v. Muthoranath Mookurjia* (4 Moore's Ind. App. Cases, 414). Then comes the important question (who is to be [202] adopted: the Hindoo law says from among kinsmen, connected by an oblation of good in the first place. The "Dittaka-Mimamsa," sec. ii. cl. 2, translated by Sutherland, p. 26; and a preference is to be given to a brother's son. Strange's "Hindu Law," vol. i. p. 88 (2nd Edit.). W. Macnaghten's "Principles of Hindu Law," vol. i. p. 68. Everything is in favour then of our contention that the Respondent adopted Muthoornauth under the power of adoption given her by Chunder Bosun. The adoption was proved by the Purshita, or family priest, the medium through which the boy to be adopted is, by Hindoo custom, solicited. Secondly, after the admission that the Respondent was authorized to adopt a son, she was not, we contend, entitled to bring a suit in her own name, claiming as a childless widow, to be the deceased's heiress at law. She ought to have executed the solemn trust and performed the obligations imposed upon her by adopting a son for the benefit of her husband, and the suit should have been brought in such son's name, to whom she is, in fact, but a trustee. *Dhurm Das Pandey v. Mussamat Soondri Dibbiah* (3 Moore's Ind. App. Cases, 229). An adopted son has all the rights of a posthumous son, and a sale by a widow to his prejudice, even before adoption, is invalid. *Ranee Kishenmune v. Rajah Oodwunt Singh* (3 Ben. Sud. Dew. Rep. 228). The present case is distinguishable from *Soondur Koomarce Dabbea v. Gudadhar Pershad Tewarree* (*ante*, [7 Moo. Ind. App.] p. 54): there the widow had exercised the power of adoption, but the adopted son died a minor, and she sued in the two-fold character of heiress of her deceased husband and of the adopted son.

[203] At the conclusion of the Appellant's argument, the following observations were made by

The Right Hon. T. Pemberton Leigh.—On the first point their Lordships are perfectly satisfied that the decision pronounced by the Court below is right; and so far from being disposed to overturn the judgment of the Court upon that point, even if the judgment had been the other way, they would have felt themselves bound to have established it. An observation, however, is made by the Sudder Dewanny Court, that the Zillah Judge, with respect to two of the attesting witnesses, has spoken of them from his own knowledge, as being what he calls "professional witnesses," persons of no character, and, therefore, entitled to no credit whatever. He does not say that, as we understand him, from his own personal knowledge of the parties, as being in the habit of coming before his Court. Now, the Judges in the Sudder Dewanny Court have passed a severe censure upon the Zillah Judge, for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them. With these observations we do not think it necessary to trouble the Counsel for the Respondent at all upon this part of the case.

The other point discussed is a point of law, whether the widow, having a power of adoption, destroys her right to sue in her individual character as widow, and [204] in truth, therefore, has barred herself from maintaining the suit in which she has obtained a decree.

Mr. Wigram, Q.C., and Mr. W. Field, for the Respondent.—The question is

now narrowed to the single point, whether the Respondent, as the widow of Chunder Rosun, is entitled to recover her husband's share of the property; and that raises the question, whether the devolution of the estate on her would be prevented by a power of adoption being given, and the possibility of a third person coming into existence prevent her taking her husband's share in the family estates. Our contention is, that her husband's estate passed to her as a childless widow and as his heir. She takes a life estate. *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331), Strange's "Hindu Law," vol. i. p. 121 (2nd Edit.). W. Macnaghten's "Principles of Hindu Law," vol. i. p. 19. With regard to her right to sue, there being power given her to adopt a son, it is exactly the case of a possibility of having issue, the case in such circumstances resting on the analogy of a woman being *en ventre*; she would undoubtedly take on death of her husband, and receive the rents and profits until the birth of a child. Again, the child in the womb might never be born alive. But, in the meantime, and before the birth, who is to take? Who is to sue during the intermediate time for trespass? Certainly the widow on whom the estate devolves. These instances illustrate the great inconvenience which would ensue if the estate was left in doubt. A great distinction exists when the widow takes the interest under a deed giving her power to adopt, and under her rights [205] by the Hindoo Law as widow of a childless man. In this case her right to sue is as widow. Every case upon this point has been thoroughly investigated in the judgment of the Court below. They referred to, and relied upon, the following cases:—*Pran Nath Rai v. Raja Govind Chandra Rai* (5 Ben. Sud. Dew. Rep. 37), *Ranee Kishenmunee v. Rajah Oodwunt Sing* (3 Ben. Sud. Dew. Rep. 228), *Ramkishen Surkheyl v. Mussumaut Sri Mutte Dibia* (3 Ben. Sud. Dew. Rep. 367), *Chundun Koonwaree v. Sheo Ratna Singh* (3 Ben. Sud. Dew. Rep. 275), *Mussumaut Subudra Chowdry v. Goluknath Chowdry* (7 Ben. Sud. Dew. Rep. 143).

Mr. Leith, in reply.—First. By the Hindoo law a sister, likely to produce male issue, but not even begotten, surviving an only brother, is entitled to the succession, and to enter possession until the production by her of male issue. *Kishen Lochan Bose v. Tarini Dasi* (5 Ben. Sud. Dew. Rep. 55). *Mussumaut Solukhna v. Ramdolah Pande* (1 Ben. Sud. Dew. Rep. 324). Secondly. A widow, with power to adopt a son, cannot sue in her own right. *Ranee Kishenmunee v. Rajah Oodwunt Singh* (3 Ben. Sud. Dew. Rep. 228). *Mussumat Subudra Chowdry v. Goluknath Chowdry* (7 Ben. Sud. Dew. Rep. 143). It is true that in the former case she claimed as heir of her deceased son, and in the latter her claim was for the intended adopted son; but these cases establish that principle. The theory of the Hindoo law is, that the moment permission is given to adopt, it has the same effect as if a child was in the womb of the mother; and a boy subsequently adopted, as might be done in this case, has all the rights of a post-[206]humous son. *Ramkishen Surkheyl v. Mussumaut Sri Mutte Dibia* (3 Ben. Sud. Dew. Rep. 371). The widow, therefore, has no authority but that of intermediate management.

The Right Hon. T. Pemberton Leigh.—Their Lordships do not entertain any doubt upon this case; but as the question is one of extreme general importance, they were anxious to hear whether any serious objections could be made to the judgment appealed from by Counsel so familiar with the Hindoo law as is Mr. Leith. But, on considering this judgment, which is most able and elaborate, they entirely agree in the principles laid down in it, and can add nothing to the clearness and force of its reasoning. They have, therefore, simply to express their entire concurrence in the judgment of the Sudder Court, both upon the question of law and the question of fact, with the single qualification of that incidental observation made upon the language of the Zillah Judge in expressing his opinion with respect to the two attesting witnesses. They will, therefore, recommend Her Majesty to confirm the judgment pronounced by the Court below, with costs.

[207] CHEYT RAM,—*Appellant*; CHOWDHREE NOWBUT RAM,—*Respondent*;
Nov. 30, and Dec. 1, 1858).

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Aggra.

In a question involving the genuineness or forgery of an instrument sued upon, which the Courts in India had opportunity of personally inspecting, and held genuine, it is necessary that the evidence impeaching the document, be clear and strong to justify the appellate Court reversing the decree appealed from. Circumstances in which the Judicial Committee upheld a Bond impeached as a forgery, and reversed the concurrent decrees of the Zillah and Sudder Courts in India.

Costs in India and upon appeal allowed to the Appellant, upon a reversal of the decree of the Court below.

This was an appeal from a decree of the Sudder Dewanny Adawlut of the North-Western Provinces, affirming the decree of the Zillah Court of Bareilly, which decided against the authenticity of a Bond, the subject of the suit, in which Radhakishen, since deceased, the father of the Appellant, was the Plaintiff, and the Respondent, the party who had executed the Bond, was the Defendant.

[208] The pleadings and evidence are so fully stated in their Lordships' judgment as to render any statement here unnecessary, beyond an outline of the principal facts in issue.

The Courts in India, in their decrees, proceeded entirely upon the suspicious circumstances of the case, and decided against the validity of the bond, chiefly on the ground that the appearance of the impression of the seal of the Respondent affixed thereto was unsatisfactory: and on that ground charged Radhakishen with the forgery of the Bond, against the testimony of the attesting witnesses, who in their evidence deposed that the Bond was executed by the Respondent in their presence. Subsequently to the decree of the Sudder Dewanny Adawlut, the Magistrate of the District of Bareilly, to whom the investigation of the criminal charge against Radhakishen was formally made over by that Court, held that it was satisfactorily proved by the evidence before him that Radhakishen was innocent of the charge, and that the seal used was, in fact, the genuine seal of the Respondent: and he was further of opinion, that the impression of the seal on the Bond had been distinct and perfect when the Bond was filed by Radhakishen in the suit in the Civil Court, but had been tampered with (at the instance, as the Magistrate suspected, of the Respondent, through his agents) in the Civil Court, after the document had been filed, which the Magistrate thought accounted for the suspicious appearance that it presented when examined at the hearing of the original suit. A review of the judgment of the Sudder Dewanny Adawlut was applied for by Radhakishen, the application being grounded upon the Magistrate's judgment. The application was, however, refused, and this appeal [209] was instituted by the present Appellant, Cheyt Ram, the son of Radhakishen, who had died pending the proceedings, to reverse the two decrees of the Zillah and Sudder Dewanny Courts, which, the Appellant submitted, were, independently of the finding and judgment of the Magistrate, contrary to the weight of testimony given in the original suit, which established the authenticity of the Bond in question, and the due execution thereof by the Respondent, and the amount which formed the consideration of the Bond proved to be due to Radhakishen from the Respondent. The Respondent insisted, that, the question at issue being one of fact, and the Courts in India having inspected the document, and having had the opportunity of observing the demeanour of the witnesses while under examination, were most competent to judge of the credibility of the evidence: and he further insisted that the *onus probandi* was in the Appellant's father to prove the consideration for the Bond and its genuineness.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan. Assessor,—The Right Hon. Sir Lawrence Peel.

both of which points, the Respondent contended, he had failed to do, and that more over the Bond had not been registered.

Mr. Leith for the Appellant; and Mr. Forsyth, Q.C., and Mr. Joyce, for the Respondent.

The case of *Dearka Doss v. Baboo Jankee Doss* (6 Moore's Ind. App. Cases, 88), was cited by the Appellant, as authority that the items in Radhakishen's banking books were evidence to establish the consideration of the Bond; and Cir. Ord. No. 178, 29th July, 1836, to show the possibility of the Bond having been unfairly treated while in the custody of the Court. On the part of the Respondent, *Davidson v. Cooper* (11 Mee. and Wels. 778. S.C. in error, 13 Mee. and Wels. 343), *Crouch v. Hicken*, (6 L.J.N.S. Chan. 153), were relied upon as authority for the dismissal of the suit, the Bond, as it was alleged, having been tampered with while in Radhakishen's custody, which fact prevented the Appellant from recovering.

The appeal stood over for consideration.

Their Lordships' judgment was now delivered by

The Right Hon. Lord Kingsdown (Dec. 18, 1858).—The Appellant, in this case, has undertaken a task of no ordinary difficulty, since he asks for a reversal of the decision of two Courts in India, upon a mere question of fact, that fact being the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought.

The Judges in the Court below have formed their opinions mainly on an inspection of the document, which we have had no opportunity of seeing. The case must be very strong, to justify such an unusual exercise of authority, and the question is, whether the Appellant has established such a case.

Radhakishen, the original Appellant, and whom we shall call the Appellant in the observations we are about to make, brought an action against the Respondent on a Bond for Rs. 15,000. The name of the Respondent appeared to the Bond, impressed by the stamp of a seal. The Zillah Court, on examining the signature, and comparing it with other impressions of the seal of the Respondent acknowledged to be genuine, decided that the impression on the Bond was a forgery, and dismissed the suit. The Sudder Court, [211] on appeal, confirmed this decision, and, in effect, ordered the Appellant to be prosecuted for forgery. He was so prosecuted, and was acquitted. He then applied for a review of the judgment against him in the civil suit, which was refused, and he has now appealed to Her Majesty in Council.

The Appellant and Respondent were both residents at Bareilly, the former being apparently a Banker and money-lender, and the latter a landowner. It is admitted on all hands, that pecuniary transactions had taken place between these parties; that moneys were advanced by the Appellant to the Respondent, and securities given by the Respondent to the Appellant. In particular, a mortgage by the Respondent to the Appellant, under which the latter was in possession of a village of the Respondent, and a Bond for Rs. 4000, by the Respondent to the Appellant, are specifically mentioned.

But in addition to these transactions, the Appellant alleges that there were many other advances made by him to the Respondent upon Bonds and notes of hand, in respect of which, in the month of August, 1851, a large sum was due for principal and interest; that in the course of that month the parties came to a settlement of accounts; that the Appellant having consented to make an abatement from the amount due, the balance was settled at Rs. 15,000; and on the 30th of August, 1851, a Bond was executed by the Respondent to the Appellant, to secure the payment of that sum, with interest at one per cent. per month, in the month of May then following.

The amount due upon the instrument being unpaid, the Appellant, on the 30th of September, 1852, filed his plaint in the Zillah Court of Bareilly, claiming [212] the sum of Rs. 16,955 for principal and interest on the alleged Bond.

On the 2nd of October, 1852, the Respondent undertook to file a defence to the suit within two weeks. This, however, he neglected to do; and on the 2nd of December, 1852, an Order was made by the Court that the Appellant should proceed to prove his case *ex-parte*.

He accordingly, on the 3rd of December, 1852, obtained an order to summon

his witnesses, and brought into Court the Bond in question, which was ordered by the Court, on that day, to be kept with the mist or record of the proceedings.

The production of this Bond, and its deposit in Court at this early stage of the proceedings, when it was open to the inspection of the Respondent and his agents, appear to be of great importance in this case.

The Bond purported to have been given after a settlement of accounts, to be stamped with the seal of the Respondent, and to be witnessed by Doorgapershad, the Mootsuddee, or man of business, of the Respondent, who is also described as the writer of it, and it was dated only thirteen months before the suit was instituted. The Respondent was resident on the spot where the Bond was executed, and where the suit was brought, and both he and his agent must have known with absolute certainty whether the one had written and the other had sealed such an instrument, or whether the document was a mere forgery.

The Respondent had notice of this claim on the 2nd of October, 1852. It is difficult to suppose that if he had never executed any such instrument he should not instantly have protested against the forgery; but he took no step whatever to defend the suit on [213] this ground, or any other, till the case was ordered to proceed *ex parte*. He then, on the 9th of December, 1852, applied to be admitted to defend the suit, not on the ground that the Bond was a forgery, but on the allegation "that he has several objections to the Plaintiff's claim, which involves a considerable sum of money."

He was let in to defend; and on the 6th of January, 1853, he put in his answer. In this answer he states that the Plaintiff's claim is based on a fictitious Bond, and he assigns various reasons to show that the fact of his having given such a Bond is improbable; but he nowhere distinctly says, "I never executed any such Bond. The seal is not my seal; it differs from the genuine impression of my seal: the writing is not the writing of my agent." Amongst other circumstances of improbability on which he insists against the Appellant, he urges that it is very unlikely that the exact balance of accounts should result in a sum of Rs. 15,000, without any fractional sum, and that a Bond for so large a sum should not have been registered, more especially as the Bond for Rs. 4000 was registered.

On the 12th of February, 1853, the Appellant filed his replication. With reference to the two objections referred to, he states that, as to the amount of the Bond, the sum really found due on the settlement of accounts, for principal and interest, was Rs. 17,319. 1. 3.; but that the Appellant, on the importunate entreaties of the Respondent, consented to give up the surplus beyond Rs. 15,000, and to take a Bond for that amount; and he says, that the accounts and documents, showing the exact balance which were cancelled on the execution of the Bond, still exist to [214] remove the Respondent's objection. With respect to the want of registration he states, that he was in the habit of advancing thousands of rupees to the Respondent upon unregistered documents.

The rejoinder of the Respondent was filed on the 23rd of March, 1853, in which, amongst other things, he alleges, that if the former documents had ever any existence and were cancelled, they ought to have been given up to him, the Respondent, on the execution of the Bond, and that "when the former documents are produced, the imposture of the claim will be fully exposed."

In this state of the record the parties went into evidence.

The evidence of the Appellant in the suit may be conveniently considered under three heads:—First, the transactions leading up to the Bond. Second, the execution of the Bond. Third, the subsequent recognition of it by the Respondent.

The clerk of the Appellant, named Laljeemul, gives the following account under the first head:—"The facts are these: there are mutual dealings betwixt Chowdhree Nowbut Ram and Lalla Radhakishen. Radhakishen demanded payment from Chowdhree Nowbut Ram. Chowdhree Nowbut Ram sent to Radhakishen his Mootsuddee (Persian scribe) Doorgapershad, to compile accounts, and find the balance due by him. Doorgapershad, Mootsuddee, then came to Radhakishen and computed accounts, on which a balance of Rs. 17,389. 1. 3. appeared against Nowbut Ram. Doorgapershad returned to Chowdhree Nowbut Ram with the list of accounts, leaving one copy of it with Radhakishen, and telling him to have the accounts examined, and that he would himself do the [215] same. Radhakishen then gave no

the list of accounts, and told me to go to the firm of Lalla Muthar Doss, and to have the accounts examined by Lalla Doorgapershad, his agent. I accordingly went to Doorgapershad, agent, with the account, and showed it to him, and told him to see if there was any discrepancy in it. Doorgapershad and Kishen Chund, the principal agent of the firm, looked at the account, and said there was no discrepancy in it. I brought the account back to Lalla Radhakishen, and told him it was correct. On the same day, Doorgapershad, Mootsuddee, accompanied by Sheonarain, the brother-in-law (sister's husband) of Chowdhree Nowbut Ram, came again to Lalla Radhakishen, and said that Chowdhree Nowbut Ram had seen the account and understood it, but he had desired that some reduction should be made in the interest. On this Lalla Radhakishen said, 'Pay me my money, and I shall make any reduction you will propose in the interest.' On this Sheonarain and Doorgapershad, Mootsuddee, said, 'The money is ready, and we promise to pay in the month of Jeyt.' Radhakishen then asked what reduction he should make; and Doorgapershad, Mootsuddee, and Sheonarain, the brother-in-law of Nowbut Ram, said, 'You may have a Bond for Rs. 15,000, and relinquish the balance in our favour.' Radhakishen agreed, and said, 'Very well, pay Rs. 15,000, in Jeyt.' Then they returned to the Chowdhree, and must have told him everything." He then says, on cross-examination, that of the balance, actually due, 10,200 and odd rupees were for principal, and the remainder for interest: that interest was charged at 1 per cent. per month, and that there were six Bonds and notes of hand.

[216] This witness refers to an examination of these accounts by the Gomashita, or head clerk, at Bareilly, of the firm of Muthra Doss, one of the largest banking firms in India. This gentleman appears to be above all suspicion; he is examined on behalf of the Appellant, and he entirely confirms the account of Laljeemul. He says:—"It is something less than two years when Laljeemul, Mootsuddee of Lalla Radhakishen, brought me Chowdhree Nowbut Ram's account in order to have the computation of interest examined by me, and I and Kishen Chund accordingly examined it; subsequently, eight or ten days after, I heard that Lalla Radhakishen had relinquished 2000 and odd rupees, and that he caused Chowdhree Nowbut Ram to execute a Bond for Rs. 15,000."

He then says there were many previous dealings between the Appellant and Respondent; that whenever Chowdhree Nowbut Ram wanted money, no one but the Appellant supplied him with it. That dealings had been carried on from the time of Chowdhree Bussunt Ram, who was the father of the Respondent.

The statement of these witnesses, as to the settlement which took place, and the abatement which was made by the Appellant, is confirmed by the evidence of Ramsookh and of Gholam Hussun, who concur with Laljeemul in representing that Sheonarain, the brother-in-law of the Respondent, was one of the persons at whose instance the abatement was made.

That extensive dealings took place between the Appellant and Respondent, is further proved by the evidence of Seetaram, a Tehsildar, or who had filled that office, which we understood is one of respectability, who says that "dealings existed from the time of the Respondent's father, and that whenever [217] they wanted money they borrowed it from the Appellant, and that very often money was drawn on notes of hand, without the execution of a Bond."

In addition to this evidence the Appellant produced the Bonds and notes upon which the balance was alleged to have been found due, and the account said to have been made out, showing the balance.

The Respondent had alleged that when these documents were produced, the imposture, as he calls it, would appear. They are produced, and no attempt whatever is made to discredit them.

It is difficult to imagine proof more distinct and positive upon the first point: the transactions which led up to the Bond. But the Appellant's evidence distinctly names two persons, connections of the Respondent; one is agent, the other his brother-in-law, by whose intervention this arrangement is alleged to have been made. The Respondent does not examine either of these witnesses, or offer in any other manner whatever to contradict the testimony of the Appellant's witnesses.

That the balance was ascertained; that the abatement was made; that there

was an agreement to give a Bond for Rs. 15,000, are facts which must be considered as conclusively established.

Secondly, as to the execution of the Bond. Laljeemul, after the passage which we have read from his evidence, proceeds thus:—"Again the next day, four ghurries after sunrise (two ghurries and a half make one hour), Doorgapershad, Mootsuddee, came to Radhakishen, and said, 'Send your witnesses that the Bond may be recorded.' Lalla Radhakishen then sent myself (Laljeemul), Choteyloll, Ramsookh, Sheikh Ameeroollah, and Gholam [218] Hussun, with Doorgapershad, and told us, 'If the Chowdhree should record a Bond, and acknowledge it before you, you should witness it.' All five of us accordingly went in the dewankhanah (a hall for receiving visitors) of Chowdhree Nowbut Ram, accompanied by Doorgapershad. The Chowdhree was seated there. Doorgapershad told him that Lalla Radhakishen had sent us to witness the Bond. The Chowdhree told Doorgapershad to bring out paper and to record the Bond. On this, Doorgapershad brought out paper, and engrossed a Bond thereon. He gave the Bond to the Chowdhree, who saw it; and having sent for his box, impressed it with his seal, and told us to witness it. Doorgapershad, Mootsuddee (the writer), and Ramsookh, Choteyloll, myself, Sheikh Ameeroollah and Gholam Hussun, accordingly witnessed the Bond. The Bond was recorded in our presence."

His account is confirmed by Choteyloll, a friend of the Respondent, another attesting witness; by Ramsookh, also an attesting witness (though his name is written by Doorgapershad, the agent of the Respondent, as Ram Sing); and by Gholam Hussun, who was present, and saw the transaction, though there appears to be some error as to his being an attesting witness; at least, his name is not found in the instrument as printed in the record of the proceedings of the Court below.

These witnesses are cross-examined, but their evidence is not in the least shaken, and, if it be believed, it proves most distinctly that the instrument in question was written by Doorgapershad, the agent of the Respondent, who also attested it, and that the Respondent deliberately stamped his seal upon it, in order to give it effect.

[219] But what makes this evidence conclusive is this; that the Respondent having the means of disproving the story, if untrue, by producing his own agent to say that he did not write and did not witness the Bond, does not venture to call him, or any other witness, to the point. He examines thirteen witnesses upon matters totally irrelevant to the real issue, and does not examine one who tends even to throw a doubt upon one single material fact of the Appellant's case.

But the matter does not end here. So far from denying this Bond, the Respondent, after its execution, endeavoured to obtain time for payment of it, which brings us to the third head of evidence; the recognition. Doorgapershad, Mootsuddee, is asked: "Did any one, ever coming before you, make any acknowledgement?" He answers: "In the last month of Katuk I went to Chowdhree Nowbut Ram, to write a note on account of Lalla Kalka Doss, resident of Peelhibeet, who had mortgaged the village of Rooppoor. Chowdhree Nowbut Ram told me to give Lalla Radhakishen Rs. 4000, for which the latter had brought an action; further saying, 'There is another suit, for Rs. 15,000. You may give Rs. 4000, and Lalla Radhakishen will take something less in the amount of costs; you should have this matter settled, and the suit for Rs. 15,000 you may have adjusted afterwards.' I said that the matter as it then stood would cause disrepute, and that it should, therefore, be settled. Again Chowdhree Nowbut Ram said, 'You should have the matter settled.' I said, 'Tell me what to say, that I may go to him and settle accordingly.' Chowdhree Nowbut Ram replied, 'that he would be [220] able to pay the money in five years, and that if he were made to pay in a lump it would ruin him.' I said, 'Your and Lalla Radhakishen's affairs are founded on mutual friendship. He is like your patron, and will not ruin you; but he will not agree to the promise of payment in such length of time, because, in six years' time, interest on the sum of Rs. 15,000 will accrue to nearly Rs. 15,000. Such promise of payment, without interest, he will not agree to.' Again the Chowdhree said, 'You may give Rs. 4000 on account of the suit for that sum. I shall send Sheonarain, and, as you also will be there, you may have the matter settled; and, if he will not come to terms, I will defend the suits.' After this I came and told Lalla Radhakishen what the Chowdhree had said; and also that, as the transaction was like a family affair, he should settle it

amicably; adding, 'It is difficult for him (the Chowdhree) to pay Rs. 15,000, at once. It is advisable to agree to instalment payment.' Radhakishen said, 'I have no objection; but how can I agree to receive instalments without any one's coming to propose it? Have instalments ever been agreed to without interest?'

This attempt of the Respondent to obtain time for payment of the Bond is further proved by Seetaram, the witness already mentioned, who, speaking of Sheodut Ram, Jamadar, whom he describes as the Dewan of the Respondent and sole manager and agent of his household, says:—'Sheodut Ram, Jamadar, told me that 'Lalla Radhakishen had brought an action for Rs. 15,000, against the Chowdhree; you should persuade the latter to fix an instalment of Rs. 3000, per annum for five years without interest. You visit Lalla Radhakishen frequently, and should, therefore, [221] have this matter settled.' I and the Jamadar accordingly went to Radhakishen and introduced a negotiation relative to the payment by instalments. Lalla Radhakishen said, 'I will not agree to receive instalments for five years without interest.'

There was, therefore, clear, positive, consistent, uncontradicted testimony of the agreement to give the Bond; of its actual execution, and of its subsequent recognition; and, in the teeth of all this testimony, upon what grounds have the Courts below held it to be a forgery?

They compared the impression made by the seal on this instrument, with the impression made upon other instruments by what is admitted to have been a genuine seal of the Respondent, and they say that upon a very minute inspection, and measurement by a pair of compasses, the letters, or some of the letters, of the Respondent's name appear on the Bond to differ something in their size from the signatures admitted to be genuine. Whether this may have arisen from the mode in which the stamp was affixed on the different instruments, or from the greater or less quantity, or the greater or less fluidity, of the ink used on such occasions, it is immaterial to inquire. The question is, is it or not proved, beyond all shadow of doubt, that the Respondent did affix some seal to this instrument for the purpose of giving it effect? The evidence on this point is quite irresistible.

It is not till the case is on hearing that this objection is made. It never occurred to the Respondent, or his agents, to set up such a defence when the Bond was deposited in December, 1852, nor, as far as appears, till July or August, 1853. The Bond had been lying, in the interval, in the office of the Court; [222] and it is to be collected from the Circular Order referred to in the argument, that it is not difficult and not unusual for parties to procure access to, and to tamper with, documents so placed, and we cannot have the least doubt that such discrepancy as exists between this seal and the others produced, if they were the impressions of the same stamp, and if the difference is not to be accounted for by the accidental circumstances to which we have adverted, has been occasioned by the fraudulent acts of the Respondent's agents while the Bond was in the custody of the Court.

When the direct evidence in favour of the instrument is so overwhelming, it is needless to resort to confirmatory proof; it may, however, be observed, that it is shown that the stamp on the instrument had been sold, shortly before the date of the Bond, to an agent of the Respondent for his use; and if the Bond had been a forgery, it is utterly inconceivable that of all persons in the world, the name of the Respondent's own confidential agent should have been selected for forgery, as the writer of it and one of the attesting witnesses.

Every circumstance of suspicion which could be alleged against the Appellant's claim was brought forward, and urged with great force and ability by Mr. Forsyth, but there really is none of any value.

The only observations which at first had some weight with their Lordships were three—first, that the Bond was not registered; secondly, that the cancelled documents were not delivered up; and thirdly, that it was strange that a suit should have been instituted (as it was) upon the later Bond for Rs. 4000, instead of the two being united in one [223] suit, or that which was first executed (the Bond for Rs. 15,000) being first put in suit.

But as to the first point, we are informed by Sir Lawrence Peel, that in India two-thirds of the Bonds, which are payable at short dates, as this was, are not registered: as to the second, that a Plaintiff is required to prove the consideration for his Bond, and that the documents relating to it were, therefore, properly left in the

possession of the Appellant: and as to the third, supposing the two Bonds could by the practice be included in one suit, we think that the delay in bringing the second suit is sufficiently accounted for by the negotiations which were carried on for payment of the amount of the Bond by instalments.

Upon the whole, we can entertain no doubt that there has been in this case an entire miscarriage of justice in the Courts below: and we cannot but express our deep regret that the Appellant should not only have had his suit dismissed, but have been subjected to the indignity, vexation, and expense of a criminal prosecution, in a case where the claim is established by testimony, less liable to suspicion than we ever remember to have seen brought forward on an appeal from India, in a question of disputed fact.

We must do to this gentleman, or to his representative, such justice as is in our power, by advising Her Majesty to reverse the decisions complained of, to establish the Plaintiff's demand in the suit, and to order payment of the amount of the Bond with the interest due upon it by the Respondent, together with costs both in the Zillah and in the Sudder Dewanny Courts, and the costs of this appeal.

[224] KATCHY KULLYANA RANGAPPAN KALACKA TOLA OODIAR.—

Appellant; BALOOSAMY CHETTY,—*Respondent* * [March 18, 1859]

On appeal from the Sudder Dewanny Adawlut, Madras.

Suit to recover the amount of principal and interest upon certain pecuniary transactions set forth in an agreement, alleged to have been executed by the Defendant's father in favour of the Plaintiff, for moneys advanced by him, and also upon the Defendant's own promise after his father's death to pay the amount due from his father. Defence, first, that the agreement sued upon was a forgery; and, secondly, a denial of the promise of payment. Upon appeal (reversing the decree of the Sudder Dewanny Adawlut at Madras), the Judicial Committee, without declaring the agreement to be a forgery, dismissed the suit upon the ground of failure of proof to support the claim.

The Appellant allowed costs of the appeal here, as well as of the Courts in India.

The Appellant in this appeal was the Zemindar of Oodiarpolliem, in the Zillah of Trichinopoly. On the death of his father, the late Zemindar, in July, 1835, the Zemindary devolved on the Appellant's elder brother, Katchy Moottoo Vajaya Rangappah Kalacka Tola Oodiar, and on the death of the latter, which occurred in January, 1837, fell into the hands of his widow, Oppayee, as guardian of her son, Katchy Rangappah Kalacka Tola Oodiar, then a minor. The Zemindary was subsequently taken under the management of the Court of Wards. During the period in which the Zemindary was under such management, the [225] Collector, acting under the instructions of the Board of Revenue, issued a notice for creditors of the late Zemindar to come in and prove their debts. Accordingly, on the 28th of December, 1837, the Respondent presented to the Collector the following petition (afterwards described as Exhibit C.):—"Katchy Rangappah Kalacka Tola Oodiar, the late Zemindar of Oodiarpolliem borrowed from my father Rs. 2000, under a Bond executed on a stamped paper of Rs. 4 value, and on the 22nd Anee of Vyaya (4th July, 1826). Besides this Bond for Rs. 2000 (described as Exhibit B.), there were others executed by the said late Zemindar to my father for loans formerly obtained, and on the 22nd Poorattasee of Vyaya, the said Zemindar granted a sunnud directing pagodas 250 to be paid to my father out of the produce of Avandavady (one of the said Zemindar's istimurary villages), in full of all demands under the said old Bonds. When the said sunnud

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, The Right Hon. Sir Cresswell Cresswell. Assessor,—The Right Hon. Sir Lawrence Peel.

was presented to the Zemindar's agent, Rayapoorum Ramayar, and the money demanded, the Zemindar himself said that in that year the crops of the istimrary villages were damaged, and that the little money that could be realised was appropriated for his domestic expenses. Consequently the said pagodas 250, or Rs. 875, together with the other item, amounts to Rs. 2875, and my demand against the Zemindary in all, together with interest Rs. 2875, comes to Rs. 5950. I, therefore, pray that you will be pleased to examine my documents and witnesses, and pay my dues out of the surplus funds of the Zemindary."

The Collector having investigated this demand, disallowed the Respondent's claim.

[226] The minor, Katchy Rangappa Kalacka Tola Oodiar, died in July, 1842, when the Zemindary devolved on the Appellant.

On the 5th of February, 1847, the Respondent filed a plaint in the Civil Court of Trichinopoly against the Appellant for the recovery of Rs. 11,500, and in the plaint he alleged that, in addition to the securities mentioned by him in his petition to the Collector, the late Zemindar had executed to him an agreement, dated the 10th of February, 1835, binding himself to pay to him, the Appellant, by the 10th of February, 1839, the principal and interest of the documents, amounting altogether to Rs. 5750, and in the event of his failing to do so, to pay him that sum with interest at 12 per cent per annum. The plaint further stated, that the late Zemindar had died in July, 1835, without making any payment in liquidation of the above debt; and that although the Appellant had represented his claim to the Collector, no notice had been taken of it, and the plaint finally alleged that the Appellant had "all along made promises of payment, but never performed them."

The Appellant, by his answer, contended that the agreement in respect of which Respondent had filed his plaint was a forgery, and denied having made any promise of payment.

Issue having been joined in the suit, the following points were recorded by the Court for proof:—First, The Plaintiff was to prove that the debt of Rs. 2000, incurred on the 4th of July, 1826, was not included in the account alleged to have been adjusted subsequently. Second. The Plaintiff was also to state and prove the date on which the alleged adjustment [227] took place, with full particulars concerning the account itself. Third. He was also to produce the sunnud for payment granted to him, or to prove to the satisfaction of the Court whether any and what sums were paid thereon. Fourth. Whether any claim was advanced during these two years and upwards, and if advanced, what became of it? Fifth. The Plaintiff was to produce and prove the agreement alleged to have been executed on the 10th of February, 1835, with all full particulars. Sixth. The Defendant's elder brother having survived six months after succeeding to the Zemindary, whether the Plaintiff adopted any measures to have his claim recognized, and if so, what were they? and if not, why not? Seventh. The Plaintiff was to prove that he brought his claim to the notice of the Collector, and if not, why not? Eighth. The Plaintiff was to prove when and how he brought his claim to the notice of the present Defendant. Ninth. It appearing further that the last agreement alleged to have been executed in favour of Plaintiff was due in February, 1839, when the estate was under the Court of Wards, did Plaintiff then bring forward his claim? and if not, why not? Tenth. The Plaintiff having alleged that there were previous dealings between Plaintiff's father and Defendant's father, had he any evidence, oral or documentary, in support of this or any written account to produce? If so, he was to produce it.

The Respondent filed the agreement sued upon, which was on plain paper (described as Exhibit A.), and was as follows:—"Agreement executed on the 30th Tie of Taya (10th February, 1835), by Katchy Rangappa Kalacka Tola [228] Oodiar, Zemindar of Oodiarpolliem to Balooamy Chetty, son of Kitchy Chetty, of Combaconum. Whereas Rs. 2000 due under a Bond executed to your father on the 22nd Anee of Vyaya (4th July, 1826), and pagodas 250, due under a sunnud issued on the 22nd Poorattasee of the said year, directing the said sum of pagodas 250 to be paid out of the produce of the village Avandavady, has not been paid up to this date, I do hereby promise to pay you the said sum of Rs. 2875, with interest, amounting to Rs. 2875, making in all Rs. 5950, before 30 Tie of Vilumbee (10th February, 1839); should I fail to pay you the said sum of Rs. 5950 within the time above specified, I further promise to pay you the said sum with interest at 12 per cent per

annum from this date. As stamped paper cannot be procured just now, this agreement has been executed on this paper. Thus do I execute this agreement with my free will and consent. The writer hereof is Mahilingien." This instrument was sealed with the seal of the late Zemindar, and had the names of four attesting witnesses.

The Appellant filed seven documents proving the continuous existence of litigation between Respondent and Appellant's father from the year 1833, until the Appellant's father's death. Respondent named nineteen witnesses, of whom sixteen were examined. The purport of these witnesses' evidence is considered in the judgment of the Zillah Court. The Appellant did not examine any witnesses.

The decree of the Zillah Court of Trichinopoly, delivered on the 25th of September, 1852, after mentioning the pleadings, proceeded as follows:—"On a perusal of the evidence the acting Judge has to observe that much irrelevant evidence has been adduced by the [229] Plaintiff to prove the truthfulness of the Exhibit B, and the *bona fide* nature of the alleged debt of 250 pagodas alluded to in the pleadings. These transactions are embraced in the Exhibit A, upon which the Plaintiff sues, and if that deed is recognized by the Court, those transactions must, as a matter of course, be recognized by it. In support of the agreement A, the Plaintiff has filed two subsidiary documents B, and C, and has named nineteen witnesses. The document B has been already alluded to. The document C, is a copy of the petition presented to the Collector in December, 1837. A copy of this document was also filed by the Defendant. Of the witnesses named by the Plaintiff, the eighth witness, the alleged writer of the agreement A, has testified to its authenticity, and the sixth and eleventh witnesses depose to having attested it. The twelfth and thirteenth witnesses also depose to having been present at the time of its execution. Of the other witnesses, some depose to the money transactions in connection with the document B, and the sumud for the sum of 250 pagodas described above, and the rest to promises of payment on the part of the Defendant's father. This last declaration of evidence should always be received with caution, as it is very easily fabricated. It should also be observed in regard to the testimony of the eleventh witness, that it is open to great suspicion, as he admits never having seen the Defendant's father but on the occasion of his having been called to attest his agreement A. The Defendant has called no witnesses, but has filed seven Exhibits. Of these, the Exhibits 1, 2, 3, 4, 5 and 6 only benefit him, inasmuch as they prove that at the time of the execution of the alleged agreement A, the Plaintiff and the Defendant's [230] father were involved in a course of litigation, during which it is highly improbable that the agreement in question would have been executed without a fresh loan, which has not even been hinted at, because these petty Zemindars esteem it a high indignity to be dragged into Court by their creditors. The Defendant's Exhibit, No. 7, is a copy of the Plaintiff's own petition to the Collector, dated the 28th of December, 1837, and this by its entire silence in regard to the Exhibit A, leads the Court to believe the latter to be a forgery fabricated to prevent the operation of the Regulations of limitation in regard to the Plaintiff's primary claims. If the Plaintiff had then possessed the Exhibit A, and it had been *bona fide* executed by the Zemindar, there can be no doubt but that he would have brought it prominently forward before the Collector; the Plaintiff's own reasoning and excuses on this subject in his reply are futile. For the above reasons the Court is satisfied that the Exhibit A is a forgery, and resolves to dismiss the Plaintiff's suit with all costs."

The Respondent appealed from this decree to the Sudder Dewanny Adawlut at Madras.

The decree of the Sudder Dewanny Adawlut was delivered on the 4th of March, 1854. The material part of this decree was as follows:—"The acting civil Judge decided that the document sued on was a forgery, fabricated to prevent the operation of the Regulations of limitations, adverting particularly to the omission of all allusion to it in the Plaintiff's petition to the Collector in 1837, and to the improbability of its having been executed without a fresh loan, the more especially as Plaintiff's father and Appellant's father were involved in litigation at the time. He accordingly dismissed the Plaintiff's claim with costs. [231] From this decree the Plaintiff appeals. He contends that the acting civil Judge has improperly discredited the evidence adduced by him, and in explanation of his omission to allude

to the agreement A, in his petition to the Collector, states that the time specified in the agreement for the payment of the amount not having fully expired, he was under the apprehension that if he brought forward this document the Collector would direct him to wait until the expiration of the period named in it. He contends that the fact of his father and the Defendant's father having been engaged in litigation at the time of the alleged execution of the agreement was no reason why it should not have been executed. The Defendant repeats the arguments advanced by him in the original suit to prove that the agreement A is a forgery, and prays the Court to confirm the original decree. On consideration of the pleadings and evidence in this case, the Court have come to a different conclusion on it from that arrived at by the acting civil Judge. The Defendant has totally denied the occurrence of the transactions pleaded by the Plaintiff, alleging the documents A and B, produced by him, to be forgeries. The Court is unable to believe that a party seeking to defraud another by means of false deeds would enter upon such a course as that attributable under the Defendant's plea to the Plaintiff. First, that he should concoct the Bond, B, and advance the allegation of the supplementary debt of Rs. 875, the latter not assured upon any produceable document. Then, that he should adduce these claims before the Collector on his asserted debtor's estate becoming *zufted*; afterwards that he should allow the claims to become unactionable through lapse of time; and [232] finally that he should fabricate the consolidated document A, upon which this suit is brought, ante-dating it before the time of his application to the Collector, notwithstanding that the existence of such a document had not been hinted to the Collector. A party would hardly be guilty of such needless repetition of forgery, nor wilfully incur the blemishes to his case above indicated. On the contrary, the Court see nothing in the Plaintiff's proceedings irreconcilable with the truth of his claim, while the Defendant's plea in denial thereof is unaccompanied by tokens of its credibility. The document A is substantiated by oral evidence, which the Court have no ground for calling in question. The claim on which the document is founded was confessedly made to the Collector in the year 1837, nine years before this suit was brought. That this document was not produced before the Collector is to be accounted for by the extent of time given therein for settlement of the debt, and which was four years, not having then run out by upwards of a year. The document appears to have been designed as a collateral support to the prior Bond, B, else would the latter have been given up, and hence, having the opportunity, the Plaintiff would seem to have been tempted to produce Exhibit B, to the Collector, to have it enforced, seeing that there was an invitation to claimants against the estate to appear. That the litigation existing between the parties at the date of the document A, would be a bar to the Plaintiff's having obtained such a document as conceived by the acting civil Judge, the Court do not think. This litigation consisted in a suit on Bond preferred by the Plaintiff, in which judgment was finally given in his favour. The Bond had been acknowledged by [233] the indebted Zemindar, but it was pleaded by him that full consideration had not been received, and that the debt, with the exception of a trifling balance, had been discharged. Under such circumstances, the Plaintiff would naturally exact such a confirmation of the claim now in question as is afforded by the document A, under the penalty of otherwise proceeding to enforce the claim by suit. On the other hand, had the Plaintiff been guilty of the successive acts of forgery attributed to him, including that of the deceased Zemindar's seal as well as signature, it is obvious that a party in the position of the Defendant would not have been without some evidence to expose his malpractices and to disprove the signature and seal. Under these circumstances, the Court resolve to reverse the original decree, and to adjudge to the Plaintiff the sum sued for with the costs.

The present appeal was brought from this decree.

As the Respondent did not appear, the appeal was heard *ex parte*.

Mr. R. Palmer, Q.C., and Mr. Coryton, for the Appellant, argued, that the silence of the petition of the Respondent to the Collector on the 28th of December, 1837, as to the alleged agreement of the 10th of April, 1835, and the subsequent omission of the Respondent to bring the same forward until the institution of the suit in February 1847, constituted, in the circumstances of the case, sufficient ground for the decree of the Zillah Court, which discredited the evi-[234]-dence and rejected the Respondent's claim, as being founded in fabrication and fraud.

Their Lordships' judgment was delivered, as follows, by

The Lord Justice Knight Bruce.—This was an appeal from a decree of the Sudder Dewanny Adawlut at Madras, reversing a judgment pronounced by the Zillah Judge of Trichinopoly, before whom proceedings by plaint had been instituted for the purpose of recovering against the present Appellant an alleged debt stated to be due from his father. The Judge of the Zillah Court at Trichinopoly not being satisfied with the evidence, pronounced against the demand. The Sudder Dewanny Court having taken a different view of the evidence, came to a different conclusion, and this appeal is the consequence.

The original plaint was filed in the early part of the year 1847, and proceeded upon a Bond of old date, given, or alleged to have been given, by the father of the Defendant, the Appellant here; and inasmuch as the suit would have been barred by length of time, unless something had taken place subsequent to the Bond, the suit also proceeded upon an agreement of a later date, which would bring the demand within time. The agreement is in these words:—[His Lordship read it, *ante*, p. 227, and proceeded.]

This instrument purports to be signed by Katchy Rangappa Kalaacka Tola Oodiar, the then Zemindar, and there are, or purport to be, four attesting witnesses.

The Zillah Judge was of opinion that this was not shown to be a genuine document; and having come [235] to that conclusion, the inevitable consequence was the dismissal of the suit. On appeal the Sudder Dewanny Court, as has been said, came to a different conclusion.

Now, the attesting witnesses, or alleged attesting witnesses to this document, have been examined, and some other persons who are alleged to have been present; but, in their Lordships' judgment, they are not persons of a station or position, or in circumstances likely to have brought them upon the scene as witnesses on the occasion to which their testimony is applied. That consideration, however, would, in their Lordship's judgment not of itself have been fatal to the demand, but for some other considerations which present themselves.

It appears that this claim was brought forward during the infancy of the predecessor of the present Appellant, who was the son of the original debtor, who was stated to have entered into the Bond, and it was brought before the Collector. The matter was debated, and the claim was rejected by the Collector in the year 1841; and one of the most remarkable circumstances in the case is, that although the demand was then disputed, and successfully disputed, and, as has been said, rejected, the alleged agreement of the 10th of February, 1835, which, if genuine, cleared the matter from all doubt as to the truth and honesty of the debt, was not brought forward, and was not alleged to be in existence.

Of course it became necessary in the present suit for the Respondent, the alleged creditor, when he brought that agreement forward, to state a reason of some kind for not having produced it before; and his reason was singular enough. He had claimed the [236] debt as one immediately due, but this document of 1835 had extended the time for the payment of the debt, and accordingly it would have appeared that he had instituted the suit at a time at which he could not have sustained it; and he says that that was his reason for not bringing it forward at that time: a circumstance at once and obviously bearing against the truth and integrity of a person who could so conduct himself.

There is another consideration bearing importantly upon the probabilities of the case. The date of this document is the 10th of February, 1835, and it appears plainly from the proofs in the case, that the alleged parties to that agreement were at the moment engaged in warm and hostile litigation at the time: which was not determined until some time after. It is, therefore, manifest, that it was in the highest degree improbable that in such a state of things the alleged parties to the agreement would have signed such a document, or entered into such an agreement.

There is yet another circumstance to which their Lordships think it not immaterial to allude, namely, that documents are mentioned by the alleged creditor of various kinds, as evidencing the demand, and in effect establishing it, which were never seen, and which were never brought forward.

Now, their Lordships certainly, if the matter had come before them originally,

as it did before the Zillah Judge, would have come to the same conclusion, namely, that the original demand, which could alone sustain the suit, was not proved.

The Judge of the Sudder Dewanny Court appears to have considered that if the document had been fabricated, it would have been made more consistent [237] with probability, and not have borne the date or applied to the time which it did; but it is to be remarked, that it was necessary to give it a date anterior to the death of the alleged debtor, who died in the month of July, 1835, the year in the February of which this document was alleged to have been executed. Their Lordships, therefore, must respectfully dissent from that observation made by the learned Judge upon this part of the case, seeing that if forgery was the intent, the intending forger was in a strait, obliged by the force of circumstances to select a date necessarily carrying with it some degree of credibility.

Their Lordships, therefore, think, that in such a state of the evidence in support of the claim, the conclusion of the Zillah Judge, which was only that the demand had not been proved, is shown to have been right. We take the same view, as has already been stated, as the Zillah Judge did; and considering that their Lordships will humbly recommend to Her Majesty to reverse the judgment immediately appealed from, and that the original plaint should be dismissed, we think that the Appellant should have his costs, not only in the Courts of India, but also here.

[238] RAJAH ENAYET HOSSEIN,—*Appellant*: SAYUD AHMED REZA and MAHAMMAD REZA,—*Respondents* * [Dec. 4, 6, 7, 1858].

On appeal from the Sudder Dewanny Adawlut of Calcutta.

A. died in 1813. At A.'s death, one of his heirs, entitled to a share of the succession of his estate, obtained possession, claiming the entirety under a deed of gift. Another heir also claimed the entirety, first under a Will, and in the alternative, as customary heir. Suits were brought by the two claimants, in the course of which questions were raised as to who would be entitled, in case both claimants should fail, but from the frame of the suits it was impracticable to deal with those questions till the adverse claims to the entirety were disposed of. Ultimately, in the year 1842, those claims were disposed of by the Judicial Committee of the Privy Council in one of the suits, which in substance negatived the claims of both parties to the entirety, and decree that the heirs of A., according to the Sheah law of inheritance were entitled, and directed the mesne profits to be brought into Court and divided among such heirs. A suit was in consequence instituted in the year 1852, by one of the heirs of A., to carry into execution the decree of the Judicial Committee of the Privy Council made in 1842. Held—

First, that although the claim which accrued so long ago as the death of A. would have been, in ordinary circumstances, barred by the Bengal Regulations of Limitation, III. of 1793, sec. 14, and II. of 1805, sec. 3, yet that as the pendency of the appeal rendered it impracticable to bring the suit until the question was disposed of by the decree of the Privy Council in 1842, such suit was to be considered as supplemental to that decree, and that, as the suit was brought within twelve years from that date, it was not barred by those Regulations [7 Moo. Ind. App. 258, 259].

Secondly, that although one of the original claimants had obtained possession under an Order of the Court, and retained the same till the final decree in 1842, it was not such a quiet and undisturbed possession, in the circumstances, as to operate by Ben. Reg. II. of 1805, sec. 3, as a bar to the suit

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessor,—The Right Hon. Sir Lawrence Peel.

ultimately instituted by one of the heirs entitled to the inheritance [7 Moo. Ind. App. 259, 260].

This was a suit brought to recover possession of a 2 annas 16 gundahs undivided part or share of and [239] in a 8 annas part or share, or one undivided moiety, of a Zemindary named Soorjapoor (the whole having been taken to be nominally divided into 16 annas parts or shares), together with the mesne profits. The Appellant claimed the above share as heir-at-law of the late Ranees Soomrun, his paternal grandmother, he at the same time having in his own right by inheritance, as one of the heirs-at-law of his late father, Rajah Deedar Hossein, the remaining 8 annas, or one other moiety of the Zemindary. The principal questions of fact and law raised in the suit had reference to the construction and application of the Bengal Regulations of limitation, III. of 1793, sec. xiv., and II. of 1805, sec. iii., clauses 1, 3, and 4. The point at issue being, whether, under the circumstances of the case, and the litigation in India, while an appeal in England by Deedar Hossein was also pending respecting the title to a moiety of the Zemindary, the suit was barred by those Regulations.

The facts of the case which gave rise to this question, were as follows:—

Fookur-ood-deen Hossein, a Mahomedan, was possessed of the Zemindary of Soorjapoor, situate partly in the Zillah of Purneah and partly in the Zillah of Dinjapoor, both in the province of Behar. He died December, 1793 (*an*), leaving him surviving two sons, Rajah Akbar Hossein and Rajah Deedar Hossein, the former being the uncle, and the latter the father [240] of the present Appellant, and they jointly succeeded, as his heirs, under the Mahomedan law and family custom, to the Zemindary in equal undivided moieties. Rajah Akbar Hossein died in September, 1813, without male issue, but leaving three wives, Ranees Zuhoor-oon Nissa, Beebee Doornee, and Beebee Gool Chumun; and three daughters: Beebee Fyzoon Nissa, by Ranees Zuhoor-oon Nissa, his first wife, whom she predeceased, a minor and unmarried; Ameer-oon Nissa by his second wife, and Beebee Bhanqa; and also his mother, Ranees Soomrun. According to the general principles of the Mahomedan law, these persons jointly became his heirs-at-law, and as such entitled, in different shares, to his one undivided 8 annas share, or moiety, of the Zemindary of Soorjapoor. At his death, Ranees Zuhoor-oon Nissa, his eldest widow, took possession of his share of the Zemindary and the rents and profits, asserting that she was entitled thereto under a conveyance called a *hibbeh bilewas* (gift on a consideration), alleged by her to have been executed by Rajah Akbar Hossein in his lifetime, in lieu of her dower, and setting up at the same time, a deed of gift, in favour of the deceased's daughters, also alleged by her to have been executed by him.

Ranees Soomrun, in the month of March, 1814, filed a petition in the civil Court of Purneah, charging Ranees Zuhoor-oon Nissa with having fraudulently taken possession of the whole of the property of the Petitioner's son, the late Rajah Akbar Hossein, in which, as well as in that of her late husband, she asserted and claimed a right of property, and prayed that the moiety of the stipend, which she had previously received, out of the profits of the 8 annas share in the Zemindary, and which had been stopped since her [241] son's death, might be continued to be paid to her, and upon this petition an Order was made accordingly.

Rajah Deedar Hossein commenced a suit on the 31st of January, 1815, in the Provincial Court of Moorshedabad, against Ranees Zuhoor-oon Nissa, denying her title, and seeking to recover possession of the whole of the 8 annas share or moiety of the Zemindary, to which he claimed to be solely entitled as only brother of the deceased, Akbar Rajah Hossein, and as such, entitled by the custom and usage of their family as his sole heir, and he also claimed to be absolutely entitled thereto under a Will and *Ikrarnamah* stated to have been executed by his deceased brother in his lifetime, alleging, at the same time, that the two instruments set up by Ranees

(a) Very extensive litigation arose out of the succession to his estates. For the proceedings, see *Rajah Deedar Hossein v. Ranees Zuhoor-oon Nissa*, 3 Ben. Sud. Dew. Rep. 46, S.C. 2 Moore's Ind. App. Cases, 141; *Raja Deedar Hossein v. Rani Zahur-oon Nissa*, 5 Ben. Sud. Dew. Rep. 29; *Sayud Hossein Reza v. Ameer-oon Nissa*, 7 Ben. Sud. Dew. Rep. pp. 124, 316, and Vol. 10. p. 224.

Zuhoor-oon Nissa were fraudulent (see 2 Moore's Ind. App. Cases, p. 444). The answer of Ranee Zuhoor-oon Nissa put in issue her title under the bill of sale to the whole of the 8 annas share, denying the charge of fraud, and denying the title of the Rajah Deedar Hossein under the family custom and usage, and also under the Will and Ikramnamah, to the moiety of the Zemindary. The decree of the Provincial Court was pronounced in that suit on the 27th of August, 1817, to the effect that it had been proved that Abkar Hossein executed the two instruments while in possession of his reason and intellect, and that Ranee Zuhoor-oon Nissa was entitled, under the bill of sale, to one moiety of the Zemindary. From this decree Deedar Hossein appealed to the Sudder Dewanny Adawlut. Ranee Soomrun, the mother of the deceased, and of Deedar Hossein, died while the suit was pending, leaving the latter her sole heir. In May, 1820, Mr. [242] Fendall, Chief Judge, and Mr. Goad, the fourth Judge of the Sudder Dewanny Adawlut, gave judgment in the appeal (see 2 Moore's Ind. App. Cases, 454), decreeing that the bill of sale set up by Ranee Zuhoor-oon Nissa had not been proved and established, nor the other instruments, nor the family usage relied on by Deedar Hossein, and that it was, therefore, necessary to divide the one moiety of the Zemindary according to the Furraiz (law of division), among such as were heirs of the deceased, Rajah Akbar; and he directed an inquiry as to the persons entitled to succeed thereto as such heirs.

The case was then referred to another Judge of the same Court, Mr. Courtney Smith, who pronounced his judgment on the 14th of June, 1820, to the effect that there was a failure of proof as to the bill of sale set up by Ranee Zuhoor-oon Nissa, and that he considered it fabricated and altogether false; that if it had been executed by the deceased Rajah Akbar it would have been invalid, as being opposed to the family usage, which he considered proved; and further that the instruments set up by Deedar Hossein had not been established, but that the want of proof of these did not affect the family usage, and that Ben. Reg. XI. of 1793, did not bar Deedar Hossein's claim under the family usage. The case was once more carried before another Judge of the same Court, Sir James Edward Colebrooke, who, by his judgment, ordered that the decree of the Provincial Court of the 27th August, 1817, should be reversed and annulled, and that Deedar Hossein should be put into possession of the whole of the Zemindary, and that Ranee Zuhoor-oon Nissa should account to him for her receipts and dis-[243]bursements during the period she was in possession. Deedar Hossein, accordingly, entered into possession of a moiety of the Zemindary in question.

A review of the judgment of Sir James Colebrooke was allowed on the petition of Ranee Zuhoor-oon Nissa, who submitted, that there was a difference between the doctrines of the Sheahs and Soonees sects of the Mahomedans as to succession, and that the parties were Sheahs. A decree, on such review, was afterwards pronounced by another Judge of the same Court, Mr. William Leycester, on the 21st of January, 1822, to the effect that the family usage was not sufficiently proved; that if it had been, it was not valid under Ben. Reg. XI. of 1793; and also, that if any such family usage existed up to their father's death, it had been altered after that event by the two sons, who agreed to hold a moiety each of the profits of the Zemindary; and he ordered that the moiety in suit should be divided among Rajah Akbar's heirs when ascertained and declared, according to the book treating of Furraiz, and that the decree be altered and amended. On the 22nd of January, 1822, the former Judge, Mr. Goad, expressed his concurrence with the last-mentioned Judge. A reference was then made to another Judge of the same Court, Mr. Dorin, who gave his judgment on the 7th of May, 1822, to the effect that it was presumable that the family usage prevailed up to the death of the father, but that it was extinguished by the division of the Zemindary by his sons.

The final decree of the Sudder Dewanny Adawlut in this suit, was pronounced in the appeal on the 12th of August, 1822, by three Judges of that Court, Mr. Leycester, Mr. Goad, and Mr. Dorin, to the effect that the Appellant was of the Sheah sect of Mahomedans, [244] and by the Imamean code, containing the doctrines of the Sheah sect, a brother could not inherit when daughters, as in the case before them, survived; therefore, the decree of the Provincial Court of the 27th of August, 1817, so far as it dismissed Deedar Hossein's claim, was declared to be affirmed, and the judgment and decree of Sir James Colebrooke of the 4th of August, 1820, reversed,

and an Order made that Deedar Hossein should be made answerable to Rancee Zuhoor-oon Nissa for the wasilat during the period which he was in possession of the disputed moiety of the Zemindary, under the decree of the 4th of August, 1820.

Deedar Hossein appealed to the Privy Council from this decree.

Subsequent to the appeal to England, and in 1836, a suit was brought by Mehr-oon Nissa, grand-daughter of Akbar Hossein, to recover her share of the succession, and was pending at the date of the decree of the Privy Council made upon the appeal of Deedar Hossein. This suit was afterwards compromised.

On the 18th of November, 1835, Rancee Zuhoor-oon Nissa died, leaving Sayud Hossein Reza, her brother and heir-at-law, her surviving, who as such heir became a party to the suit, and at the same time got possession of the 8 annas share or moiety of the late Raja Akbar Hossein, the title of Zuhoor-oon Nissa to which share being then still in litigation in the suit. Deedar Hossein died in 1841, leaving the Appellant, his only son, having in his lifetime made a Will, by which he appointed the Appellant, executor and representative in estate, and also a Hibehnamah (deed of gift on a consideration), in favour of the Appellant, who was put into possession of the estate [245] and property of his deceased father, under Act, No. XIX. of 1841.

The decree of Her Majesty in Council in the above appeal was pronounced on the 15th of January, 1842 (2 Moore's Ind. App. Cases, 411), and by it the final decree of the Sudder Dewanny Adawlut was varied in certain particulars; by ordering that the Appellant should bring into Court the proceeds of the moiety of the Zemindary, whilst he was in possession thereof, and that such proceeds should be paid to those who were found to be the heirs, according to the Sheah law of succession, and to their representatives; but in all other respects the decree was affirmed.

Sayud Hossein Reza died in November, 1844, leaving the Respondents, his sons and heirs, who became parties in a suit, in which Ameer-oon Nissa, the daughter of Rajah Akbar Hossein, had brought to recover from Sayud Hossein Reza a portion of the 8 annas share or moiety of Rajah Akbar Hossein, deceased.

By an Order of the Sudder Dewanny Adawlut, dated the 1st of August, 1846, made on the petition of Sayud Enayet Reza, the husband and executor of Ameer-oon Nissa; and Mehr-oon Nissa, it was ordered that the Judge of Purneah, in execution of the decree of Her Majesty in Council, should give possession in the Zemindary of the share of the Ameer-oon Nissa; and of Beebee Donnee, deceased, the second wife of the Akbar Hossein, to the petitioner according to his proportion of the shares mentioned in the decision of the Sudder Dewanny Adawlut, of the 18th of May, 1830, and that the Judge should cause the wasilat of the time of his possession to be [246] deposited in Court by him, according to the terms of the decree of Her Majesty in Council, and paid to the petitioner in proportion to his share.

On the further hearing of Ameer-oon Nissa's suit, Messrs. Rattray and Tucker, two of the Judges of that Court, reversed the decree, declaring that the claim of the Plaintiffs was not barred by the Regulations of limitation, and also that they were within the provisions of Ben. Reg. II. of 1805, sec. iii. clause 4, and might have evaded that Regulation, if they had thought proper, but which they had not done. That any suit instituted by the heirs of the late Rajah Akbar Hossein, before the suit which was instituted by the late Deedar Hossein had been determined by the decree of Her Majesty in Council of the 15th of January, 1842, could not have been proceeded with, or if proceeded with, a decree obtained would not have been of any avail against a decision in favour of either Deedar Hossein or Rancee Zuhoor-oon Nissa, both claiming under a specialty adverse to a claim of inheritance; and that this alone brought the case within the discretion allowed to the Court under the concluding words of section xiv. of Ben. Reg. III. of 1793. The Court further decided that it was the decree of Her Majesty in Council alone that authoritatively and finally declared the property to be the estate of Rajah Akbar Hossein, and divisible among his heirs; that up to the date of that decree this question was in abeyance, and that the cause of action might fairly be taken from the arrival in India of that decree.

On the 16th of February, 1852, the Appellant, the heir of Deedar Hossein, brought a suit in the Zillah Court of Purneah against the Respondents and others to recover possession of the share of the late [247] Rancee Soomrun with mesne profits, from the 15th of January, 1842, the date of the decree of Her Majesty in

Council, determining the right of the general heirs. The plaint stated the principal facts before mentioned, and the proceedings in the original suit, in which the title of Zuhoor-oon Nissa was contested.

The answer of the Respondents pleaded, first, that the late Ranee Zuhoor-oon Nissa, and after her Rajah Sayud Hossein Reza, their father, as her rightful heir, and last of all themselves as his heirs, consecutively, for a period of forty years had been in undisturbed possession of the property in dispute, and that nearly forty years had elapsed since the death of the original proprietor, Rajah Akbar Hossein, and that the Plaintiff, with a view to bring his claim within the provisions of Ben. Reg. II. of 1805, set forth the allegation of forcible possession being kept of the property in dispute, by them, the Respondents. The answer then stated by way of defence, that no bar existed to a suit by the late Ranee Soomrun in her lifetime, as having survived the last-mentioned Rajah; it was also alleged that she had herself relinquished and abandoned her claim to her share in her lifetime; and lastly, it was pleaded that the Court was barred by Ben. Regs. II. of 1805, and III. of 1793, sec. xiv., from taking cognizance of the claim, and that the right of suit was not kept in abeyance by the legal proceedings in the original suit instituted and carried on by the late Deedar Hossein. The answer also denied the Respondents' liability to account for the mesne profits.

The Appellant in his replication denied the allegations in the answer, and contended that during the pending of the original suit, contesting the title of the [248] fraudulent possessor to the whole 8 annas shares, Ranee Soomrun and Deedar Hossein were precluded from bringing another suit for the specific share therein of the former, and that from the date of the decree of Her Majesty in Council of the 15th of January, 1842, which was the final decree in the original suit, and up to which time, therefore, that suit was still pending, the period of twelve years had not elapsed. The replication also charged the possession to have been taken and held by unfair means and fraud.

The hearing of the suit took place before Mr. George Loch, acting Judge, on the 20th of May, 1854. That Judge was of opinion, that, under ordinary circumstances, the suit would have been barred by cl. 3, sec. iii., Reg. II. of 1805; but that in the present case the decision of the Privy Council came in: for until the special claim of Deedar Hossein and Zuhoor-oon Nissa were disposed of, the rights of the heirs of Akbar Hossein were in abeyance; and the Court decreed that Ranee Soomrun was entitled, as heir of Akbar Hossein, to a share in his property, equal to 1 anna 8 gundabs of 8 annas Hissa; and that the Plaintiff, Enayet Hossein, as heir and executor of Deedar Hossein, to whom Ranee Soomrun's share was assigned by the Mooftees, were entitled to have possession of that share with mesne profits, but with interest only from the date of suit, owing to the delay in bringing the action.

The Respondents in the suit appealed to the Sudder Dewanny Adawlut at Calcutta, from this judgment. The grounds of appeal filed by them were as follows:—First. Because the suit was not instituted within twelve years from the date of its origin, the [249] 28th of September, 1813, the date of the death of Rajah Akbar, and that the case had only been brought on the 21st of February, 1852, and ought, therefore, to have been dismissed, according to Reg. III. of 1793. Secondly. That it was in evidence, according to the decision of the Zillah Judge, that first of all Ranee Zuhoor-oon Nissa was in undisputed possession of the property in dispute, and after her, Rajah Sayud Hossein Reza; and that the Appellants, without any opposition, had held the same under right of heirship for nearly forty years previous to the institution of the suit; and in such case according to sec. iii., Reg. II. of 1805, the claim of the Plaintiff ought to have been dismissed. Thirdly. That the relinquishment of her right by Ranee Soomrun, by accepting a monthly allowance, and her omission to sue for her right in her lifetime, barred the suit of the Plaintiff, on the plea of heirship to the late Ranee. Fourthly. That the Zillah Judge had reckoned the cause of action in this case to arise from the decision of the Privy Council, dated the 15th of January, 1842, and that this was erroneous, and not recognized by any law and practice. Fifthly. That the Zillah Judge has decreed on the ground of this case being precisely similar to that of Mehr-oon Nissa and others, decided on the 12th of June, 1847; but that that was erroneous. Sixthly. That the claim of the Plaintiff rested on the Will and inheritance of the late Rajah Deedar; but that what was

clearly incorrect, and that as the grounds of action conflicted one with the other, it ought to have been dismissed. Seventhly. That the Plaintiff having admitted the right of the Appellants to 8 annas share of the Zemindary in dispute, his suit in contravention of it was [250] inadmissible and invalid. Eighthly. That when the father of the Plaintiff in the former cases, from the Provincial Court to the Sudder and the Privy Council, preferred the claim on the allegation of the immemorial family custom, which was to the effect that females only get a maintenance, and no share of the Zemindary, in that case the present claim of the Plaintiff was contrary to his allegation, and the former claim of his father untenable. Ninthly. That the suit not having been instituted within twelve years from the date of the deed alleged by the Plaintiff, and there being no mention in it of this claim, it ought to have been dismissed in accordance to the precedents of the Court. Tenthly. That the Plaintiff was only entitled to wasilat from the date of the decree.

The decree of the Sudder Dewanny Adawlut in this appeal was pronounced on the 30th November, 1854. The material part of which was as follows:—"We are unable, after a careful consideration of the pleadings and of what has been urged by the parties in the cause, to adopt either the reasoning upon which the Judge has come to his conclusion, or the decision which he has passed upon the point of law at issue in the case. If the suit before the Privy Council had been between the same parties and on the same cause of action as the suit now before this Court, the argument of an estoppel which has guided the decision of the Court below would have been of some force, for no doubt the property now in litigation formed a part of that included in the suit decided by the Superior Court in England. But in our view, such is not the state of things; and the plaint must be dismissed under the law of limitation. In that case, special claims, upon the grounds of family [251] custom and a Will, were preferred by Deedar Hossein; both claims were rejected by the Privy Council. The Defendant, Zuhoor-oon Nissa, widow of Akbar Hossein, asserted her right under a byemokassa. This special claim was also disallowed, and the property was declared divisible amongst Deedar Hossein's heirs. In the present case, Deedar Hossein's son grounds his claim to the property in litigation upon his rights as heir to his father and his grandmother, Rancee Soomrun. He sues, amongst others, the sons of Hossein Reza, the brother of Zuhoor-oon Nissa, who, on her death, succeeded as her heir. It is thus clear that neither are the causes of action in the above suits identical, nor are all the parties to both suits the same. Such being the case, the pendency of the first-mentioned suit in the Privy Council cannot be justly held to create a right of action in the Plaintiff as heir to Akbar Hossein's estate by right of his father and grandmother. It is nowhere shown that either of these persons ever claimed or got possession of the estate. The appeal is decreed, with all costs, against the Plaintiff."

The Appellant brought the present appeal to Her Majesty in Council from this decree.

The appeal was argued by Mr. Rolt, Q.C., and Mr. Leith, for the Appellant; and Mr. R. Palmer, Q.C., and Mr. W. Field, for the Respondents.

The arguments turned upon the construction of the Bengal Regulations of limitation, III. of 1793, and II. of 1805. The contention of the Appellant was:—

[252] First. That the suit was not barred by effluxion of time by Ben. Reg. III. of 1793, sec. xiv., as the claim in the present suit could not have been effectually prosecuted, as a distinct and independent claim, until the claim of Zuhoor-oon Nissa to the entirety was disposed of, and it was submitted, that the Appellant was entitled to treat the litigation which resulted in the decree of the Privy Council of 1842, as part of the procedure, by which he sought to establish his claim, and his suit being supplemental to the original suits, brought the case within the exception provided in that section. Upon this point, *Prannath Chowdree v. Rajah Burrodakant Roy* (7 Ben. Sud. Dew. Repts. 97), *Syud Hossein Reza v. Amur-oon-Nissa* (7 Ben. Sud. Dew. Repts. 124), *Troup and Dyce Sombre v. The East India Company* (7 Moore's Ind. App. Cases, 104), *Neelmunee Pal Chowdree v. Rajah Burdakanant Roy* (6 Ben. Sud. Dew. Repts. 238), *Ram Koamar Neeare Bachesputte v. Sree Nath Bhattachary* (4 Ben. Sud. Dew. Repts. 14), *Mussumat Shumsoon Nissa v. Tannoo Beebe* (6 Ben. Sud. Dew. Repts. 58), were cited.

Secondly. That the Appellant was entitled to recover the share in the property

sued for, under Ben. Reg. II. of 1805, sec. iii. cl. 1 and 3, as the cause of action had not arisen sixty years before the institution of this suit; as Zuhoor-oon Nissa, from whom Sayud Hossein Reza, and the Respondents, derived title, had not held quiet, unmolested, and undisturbed possession for twelve years, the period prescribed by the last mentioned clause, as the right of possession was in litigation in the Courts; and on this ground the cases of *Musst-Ommut-o-Zuhra Begum* [253] v. *Lootfullah Khan* (7 Ben. Sud. Dew. Reps. 399), *Sheikh Imdad Ali v. Mussumat Koothy Begum* (3 Moore's Ind. App. Cases, 17), *Gopal Chand Pande v. Babu Kunwar Singh* (5 Ben. Sud. Dew. Rep. 34), *Marian Bibi v. Khwaja Awtic Ter Stephanos* (5 Ben. Sud. Dew. Rep. 84), were relied upon.

Thirdly. That the practice of the native Courts in India, when a case involved a question of right to succession, and there are more claimants than one, was not to pass a decree except it be adjudged among all the claimants.

Judgment was pronounced by

The Right Hon. Lord Kingsdown.—Their Lordships are of opinion, that in this case, they must advise Her Majesty to reverse the decree complained of.

The Appellant instituted a suit claiming a portion of the inheritance of his ancestor, Fookur-ood-deen Hossein. That suit was instituted in the year 1852, and the defence, the sole defence, to that claim is, that the suit was not brought within the period which is limited by the Bengal Regulations, III. of 1793, sec. xiv., and II. of 1805, sec. iii., clauses 1, 2, 3, as the period within which such suits must be instituted; that period being twelve years. The object of those Regulations appear to be to protect the title of parties who have been in possession under a *bona fide* title, or what is supposed to be a *bona fide* title for the period of twelve years. But certain exceptions are introduced into those Regulations, amongst others, that the limitation of twelve years is not to apply where [254] the party has been precluded by good and sufficient cause from bringing his suit within that period. Neither is it to apply if the original possession obtained by the party in possession has been obtained unjustly, and the Regulations are not to apply in cases where the property had so come into the hands of other persons from whom the parties in possession may have derived their title, and shall not have been subsequently held under a just and honest title.

The Appellant, in this case, says, in the first place, the Regulations do not apply to me at all, for in truth this suit, although instituted in 1852, grows out of and is founded upon and supplementary to a suit instituted at the death of Akbar Hossein, whose inheritance was the subject of long litigation. In the second place he says, if it is not supplementary to that suit and is not to be considered as a part of that suit, at all events that suit shows good and sufficient cause why it was impossible for me, till it was disposed of, to bring forward the present claim. It was not disposed of till the year 1842, and I bring my suit in 1852; and, thirdly, he says the parties in possession cannot rely upon quiet, unmolested, and undisturbed possession, held under the idea that they had a good title, and without notice of adverse claims.

The facts appear to be these. Akbar Hossein died in 1813. Upon the death of Akbar Hossein, two claims were set up to the whole property, which was in truth an undivided moiety. In the first place, one of his widows, Zuhoor-oon Nissa, claimed it, insisting that she was entitled under a deed executed in her favour by her husband before his death. In the second place, the brother of Akbar Hossein, named Deedar Hossein, claimed it, insisting that he was entitled under a deed executed by his brother before his death; and he also contended that if he was not entitled under that deed, he was entitled as heir; not as heir according to the general Mahomedan law, but as heir according to the custom of this family (which appears to have been a family of royal descent, with respect to which a particular custom as to inheritance existed), and by that custom he claimed to be heir, as being the next male relation.

Upon these adverse claims, which related to the whole of the property, the parties litigate in the Courts in India till the decree made in 1817, by the Provincial Court, in which the deed set up by Zuhoor-oon Nissa is established. There is an appeal against that decision, and that decree is reversed. In the decision so reversing the

decree of the Provincial Court, the Sudder Court was of opinion that Deedar Hossein had not established the deed under which he claimed. But the case coming before four of the Judges of that Court, they were all of opinion that Deedar Hossein was entitled as heir, two of the Judges being of opinion that he was entitled to the whole property as heir according to the custom, and the other two were of opinion that he was entitled only to a share with the other heirs of Akbar Hossein. Before, however, they gave effect to this opinion, it was suggested that the law of inheritance which applied to the family was the Sheah law of inheritance, and not the Soomee law of inheritance. According to the Sheah law of inheritance (as it had been ascertained to exist by the Court in a preceding case, in which the Court had taken the opinion of the Mahomedan law officers attached to the Court upon that point), a brother is not entitled to succeed to any portion of the property. In that [256] state of things, though all the Judges concur in Deedar Hossein's title as heir, they dismiss the suit.

Now, it is said, that the Court had no right in that suit, in which two titles were asserted to the whole of the property, one under a deed, and the other either under a deed or under customary heirship, to enter into the general question as to who were the persons entitled to succeed according to the law of inheritance, and that by recent cases in the Courts in India that principle has been fully established. It may be perfectly true that that principle has been established, but it has been in alteration of the law, and not in execution of the law, as it had previously existed. In the Patna case (see note, 3 Ben. Sud. Dew. Rep. 195), as appears from the note in Morley's Dig., Tit. "Inheritance," 265:—"A Mussulman died, leaving his widow and a nephew, who for some time had lived with him in the apparent capacity of his heir and adopted son; the widow claimed the whole estate of the deceased, under an alleged Will, and the nephew made a similar claim as adopted son." The Court was of opinion against both the claims, as the Court here is of opinion against both the deeds; but what do they proceed to do? "The Principal Courts directed a Kazi and two Muftis to investigate the matter, and on their reporting that neither claim could be considered as established, and that the inheritance should be divided according to the Mussulman laws, the Council confirmed their decree." But in this case it was actually a suit respecting the inheritance, because one alternative of the claim of Deedar Hossein was founded upon his right as heir; and it was, therefore, not only competent, but absolutely necessary [257] according to the Regulations, for the Court to proceed to inquire who were the heirs.

Against this decision, dismissing the suit, there was a petition filed by Deedar Hossein for leave to appeal to the Judicial Committee of the Privy Council. While that petition was pending, a suit was instituted by other persons claiming to be co-heirs, who filed their plaint in 1836, in which the title of Deedar Hossein, as representing his mother, Ranee Soomrun, as one of those co-heirs, was involved. The appeal was heard by the Judicial Committee of the Privy Council, and the Order which was made by Her Majesty upon that occasion was founded entirely upon this, that Zuhoor-oon Nissa had been in possession under a wrong title; that Deedar Hossein had no title as donee, because his deed was bad; that he had no title as customary heir, for that the custom had not been established to the satisfaction of the Court; and that the decree, therefore, was perfectly right in declaring that the property was to be disposed of according to the Sheah law of inheritance. Acting upon that principle, they direct to be brought into Court the amount of rents which the Appellant had been previously ordered to pay to his adversary, Zuhoor-oon Nissa, and that was done for the express purpose of their being paid to the Sheah heirs of Akbar Hossein.

Under these circumstances, was it not necessary, in execution of that decree, to inquire in the first place, who were the real heirs, and to make a distribution according to the rights so ascertained, either by a proceeding in the original suit, or by instituting a new suit for that purpose? It is clear that it was. The inquiry could not be directed in the former suit, because that suit had been dismissed, and the Judicial [258] Committee was of opinion that it had been properly dismissed, but there was a suit actually pending, in which such inquiry might be made, and in which the title of Deedar Hossein would, if he had a title, be established in common with the other co-heirs, unless they were barred upon some other ground.

In this state of things, the Court having for the first time decided that the property was to go according to the Sheah law of inheritance, a suit was rendered necessary for the purpose of ascertaining who answered the description of Sheah heirs; when, however, this Order was pronounced, a suit was actually pending, in which such inquiry could be made and those rights decided. By some arrangement between Zuhoor-oon Nissa, or those representing her, and the heirs, that suit was compromised, and so put an end to. This was in 1847, and then for the first time it really became necessary for the Appellant to institute a suit in his own name, the other suit having been put an end to, because, if the original suit had gone on, though he was nominally not a party to it, yet the execution of the decree in such suit would have necessarily brought him before the Court.

It appears to their Lordships that this case may be considered as a proceeding supplemental to and as carrying out the decree of the Judicial Committee in 1842, the execution of which was delayed for certain reasons till a very long period after it had been pronounced, but still to a period within the time limited by the Regulations. But supposing it were not brought within the proper time, according to the strict letter of the Regulations, was not Deedar Hossein precluded by a sufficient cause from [259] bringing his claim forward, so as to exclude the operation of the Regulations? In the opinion of their Lordships it was quite impossible for him to bring forward that claim till his suit was finally disposed of. He said, I have a good title to the whole as heir, or as donee under the deed, or as customary heir. He could not at the same time institute a suit, and say, the deed which is set up is good for nothing; the customary title of the Defendant is good for nothing, and he is not entitled in that character, but in the character of co-heir with two other persons, whose title in the other suit I am disputing.

In either view of the case, it appears to their Lordships that, on that ground, the Regulations of limitation cannot apply.

Again, there seems no pretence for saying that there has been a *bona fide*, quiet, unmolested possession of the parties against whom the suit is brought. The root of the possession was the order of the Foujdary Court, the Magistrate of which Court says, "It is utterly impossible for me to decide what you are entitled to. I am of opinion that the widow should be put into possession, and that the other should bring his suit" (as to the effect of possession under an Order of the Foujdary Court, see *Ram Rutton Rae v. Furrook-oon-Nissa*, 3 Moore's Ind. App. Cases, 233, and *Maharajah Moheshwur Sing v. The Bengal Government*, *post*, [7 Moo. Ind. App.] p. 283). In that way the possession continues during the whole period, with the interruption occasioned by the Appellant's possession for a short interval, till the decree of the Judicial Committee of the Privy Council in 1842, or at all events till a short period before that. But from the moment at which the deed which was set up by Zuhoor-oon Nissa was [260] disaffirmed, if the possession remained, it was not possession under the deed, it was a totally new possession. She had no right to possession under that deed, and her possession was held to be unjust and unfounded; and if she remained in possession at all, she remained in possession, not as donee under the deed, but as one of the co-heirs of Akbar Hossein. At the time that she died, and the immediate father of the present Respondents died, two suits were pending; one is the suit which was dismissed in 1842, and the other is the suit which was instituted in 1836. It has, therefore, been a litigated title from beginning to end, and there never has been the possession which it was the object and intention of the Regulations to protect: there is, therefore, no ground upon which, in their Lordships' opinion, the right of the Appellant can be excluded by these Regulations.

That being so, the question arises, what are their Lordships to recommend? The title of the heir has been established in a decree which, though a compromise was come to, has never been set aside. There is no substantial doubt as to what Deedar Hossein, as representing his mother, Ranee Soomrun, is, according to the Sheah law of inheritance, entitled to in that character. That being so, the only question is from what time he should be entitled to the mesne profits. Viewing all the circumstances of the case, and taking into consideration the vast length of time that elapsed while the suits were pending, and the enormous expense occasioned by them, their Lordships think that justice will be done if they recommend that the mesne profits should commence from the time when the suit was instituted, and they will accordingly advise Her Majesty, that the Appellant [261] should be put into possession of

the rents and profits from that time, and that he should have the costs both in the Court below and in this Court. The amount of the wasilat, from the time of the institution of the suit, without interest, will be ascertained in the Court below.

[See *Prannath Roy Chowdry v. Rookea Begum*, 1859, 7 Moo. Ind. App. 357; *Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Sing*, 1869, 12 Moo. Ind. App. 342.]

MUSSUMAT AMEENA KHATOOR and Others. Appellants: RADHABENOD MISSER.—Respondent * [Feb. 1, 1859].

On petition from the Sudder Dewanny Adawlut of Calcutta.

In estimating the appealable value, restricted by the Order in Council of the 10th of April, 1838, for regulating appeals from the Supreme and Sudder Dewanny Courts in the East Indies to Rs. 10,000, as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered.

A suit was brought to recover a Zemindary in the possession of different persons under deeds of sale in execution of a decree. The value of the property sued for was, by Ben. Reg. X. of 1829, sec. 17, stated in the plaint to be Rs. 14,325. The Sudder Court upheld the sales so far as related to the claim of some of the Defendants. The other Defendants applied for leave to appeal to England, which the Sudder Court refused, on the ground that, as the value of their portion was only Rs. 8215, it was not within the appeal value prescribed by the Order in Council of the 10th of April, 1838. Such construction overruled, and leave to appeal granted by the Judicial Committee.

Whether the stamp upon the plaint required by Ben. Reg. X. of 1829, sec. 17, being for fiscal purposes only, is conclusive of the value of the property sued for—*Quære*!

The petition stated that the Respondent brought a suit in the Zillah Court of Dinagepore against the Appellants to obtain possession of a Zemindary held by them in different portions, as purchasers under deeds of sale and under a sale in execution of a [262] decree. That the value of the lands sought to be recovered was stated in the plaint as provided by Ben. Reg. X. of 1829, sec. 17, to be Rs. 14,325. 1. 3. 1. That a decree was pronounced by the Zillah Court in favour of the Respondent. That the Appellants appealed to the Sudder Dewanny Adawlut of Calcutta, which Court, on the 21st of July, 1856, reversed the Zillah Court's decree with respect to two only of the Appellants, sustaining their respective right to possession. That the Court refused to allow the other Appellants leave to appeal to England, on the ground that the value of the lands held by those Appellants was only Rs. 8215, and that the Order in Council of the 10th of April, 1838, required the sum to be Rs. 10,000. That the actual value of the lands in question held by the Appellants was more than the sum prescribed by the Order in Council, and that the Sudder Court proceeded upon an erroneous ground, taking the value by the stamp required by Reg. X. of 1829, which they submitted was only for fiscal purposes, and also that the Sudder Court was wrong in not adding the mesne profits; and the Petitioners further submitted that the words "the value of the matter in dispute in any such appeal to Her Majesty in Council," related to the whole matter involved in the suit which was the subject of judicial inquiry in the Court below. That the right of possession of the Respondent in respect of his ancestral Zemindary was one of many questions in the suit and appeal, and that the sum of Rs. 14,325. 1. 3., the estimated

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—Sir Lawrence Peel.

value of the Zemindary as stated in the plaint, and not merely a proportionate part thereof, ought to have been adopted by the Court in estimating the appealable value.

[263] This petition was heard *ex parte*.

Mr. R. Palmer, Q.C., and Mr. Leith, in support of the petition, urged the same grounds as those contained in the petition.

The Right Hon. Dr. Lushington.—Leave to appeal will be granted, subject, however, to this reservation, that if the facts contained in the petition are not correct, the petition is to be dismissed. Security for £300 to be lodged with the Registrar of the Privy Council within six months from the date of their Lordships' report.

[Mews' Dig. tit. COLONY. III. APPEALS TO PRIVY COUNCIL, 2. *Appealable Value*.
S.C. 12 Moo. P.C. 470.]

JUGGOMOHUN GHOSE,—*Appellant*: MANICKCHUND and KAISREE-
CHUND,—*Respondents* * [June 25 and 28, 1859].

On appeal from the Supreme Court at Calcutta.

The Legislative Act, No. XXXII. of 1839 (extending to India the provisions of Statute, 3rd and 4th Will. IV., c. 42, sec. 28), concerning the allowance of interest in certain cases, enacts that "Upon all debts of sums certain, payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

Held,—That a wager contract (before the passing of Act, No. XXI. of 1848), upon the average price which opium would fetch at the next Government opium sale, was not within the scope of the Act, No. XXXII. of 1839, as that Act supposes a party to have been sued for breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time, and did not affect debts contingent in amount and time of coming due [7 Moo. Ind. App. 280, 281].

Whether the discretion vested in the Court by Act No. XXXII. of 1839, in allowing or refusing interest, in cases within the Act, is liable to review.—*Quære?* [7 Moo. Ind. App. 281, 282].

Where a usage was established, by which it appeared that interest was paid upon such contracts: Held further; that according to such usage, interest ought to have been allowed upon the principal sum recovered in an action, and the judgment of the Supreme Court at Calcutta refusing interest, reversed on that ground.

In respect to evidence of mercantile usage; to support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these grounds, becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient imported by the parties into their contract [7 Moo. Ind. App. 282].

In this case, the Appellant brought an action against the Respondents upon three distinct written con-[264]-tracts made between them in the nature of wagers, as to the average price of opium at the first Lelaum or public sale by the Government for the year 1846. These contracts were known as Tajee Mundee Chittees, and were, with the exception of the dates and sums, in similar terms.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

The following was one of the Chittees:—"11th. Taijee or rise on the average of thirteen hundred of the first Lelaum or public sale of the Patna.

"11 Sri Gunnaise Jee.

"No. 19.

"11. To Juggomohun Ghose. This is written by Manickchund and Kaisreechund, with salutations, which he will peruse.

"Further: we have eaten the Taijee or rise on the average of 1 lot of 5 (in letters five) Paitees, or chests of Patna opium, of the 30th day of November, Sumbat 1903, at the price of 1300.

"If the average of the first Lelaum or public sale [265] of the Company's 'Sircar' of the Patna rises above thirteen hundred, according to that we will give you the Bullun or rise. If it falls below thirteen hundred, in that event you have no Dauwah, or claim. We will not give you credit for the 'Nuzzurannah ka Roopea,' or bonus money that we have taken from you, marked in your kattah or account Sumbat 1903, Kartick the 10th day of the light side of the moon." And on the back were written these signatures: Kullean Mull, Sri Juggo Mohun Ghose, Moorleedhur Dutt, Sreekissen.

The public sale of opium referred to in these contracts took place on the 7th of December, 1846.

The action was brought by the Appellant against the Respondents. The pleadings in the action, and also the Chittees on which the action was brought, were similar to those in the cause of *Rughonauth Sohail Chotayloll v. Manickchund and Kaisreechund* (6 Moore's Ind. App. Cases, 251), in which the legality of such Chittees, and the right of the Plaintiff in that action to recover thereon, was established.

The action came on for trial before the Supreme Court on the 9th of April, 1857, when, by consent, the depositions of the witnesses in the cause of *Rughonauth Sohail Chotayloll v. Manickchund and Kaisreechund*, and also in the cause of *Chotayloll v. Uggerchund and Hurruckchund*, and the Chittees, were read and received as evidence. The only question in dispute was, whether, in addition to the sum of Rs. 7150. 6 annas and 3 pie (being the amount payable in respect of the sum by which the average price of Patna opium at the public sale, referred to in the three Chittees, respectively exceeded the prices men-[266]-tioned in such respective Chittees), the Appellant was entitled to recover from the Respondents interest on that sum and at what rate. The Appellant gave in addition, evidence as to the course of dealing in Tajee Mundee Chittees, and proved that the practice was to present the Chittees for acceptance to the parties who had issued them on the evening of the Government sale of opium, in order that the sum payable might be ascertained; that the Chittees, when so accepted, were presented again to such parties three days afterwards for payment, the time for payment being generally at the expiration of three days from the acceptance. The Appellant also gave evidence of the refusal by the Respondents after the sale of December, 1846, to accept the Chittees, on which the action was brought. The Appellant further examined witnesses who deposed that, according to the usage and ordinary course of dealing in Tajee Mundee Chittees, interest was payable on such Chittees whenever the loss thereon was not paid within a few days after the amount of such loss had been ascertained. The commencement of these gambling Chittees appeared from the evidence to be of recent date, not going farther back than 1840. The Appellant further proved that the Bazaar or market rate of interest in December, 1846, was not less than 8 per cent.

The Respondents did not enter into evidence, and at the close of the Appellant's case the Supreme Court expressed their opinion that the right to interest was not made out, and, therefore, gave a verdict for the Appellant for the sum of Rs. 7150. 2a. 3p. only, the principal amount due on the Chittees, reserving leave to the Appellant to move to increase the amount [267] of damages, with the amount of interest thereon at 6 per cent. (being the Court rate of interest), if the Appellant could satisfy the Court that it came within the Act, XXXII. of 1839.

The Appellant obtained a rule to show cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, or why the damages should not be increased by adding such interest at 6 per cent. This rule was argued before Sir James W. Colville, Chief Justice, Sir Arthur

W. Buller, and Sir Charles R. M. Jackson, Puisne Judges. Judgment was delivered by the Chief Justice on the 20th of July, 1857, discharging the rule with costs. The material part of this judgment was in these terms:—"The substantial ground of complaint is, that the damages have not been swollen with interest, either at the Bazaar rate or at the Court rate. The rule was obtained, and interest at the Court rate was claimed partly on the ground that the case might be brought within the Act, XXXII. of 1839, because the sums recoverable, and the times of payment, though neither of them certain, were capable of being made certain. But this ground, though not formally abandoned, has been but faintly contested; and it suffices to say, that, in our judgment, the great uncertainty of the evidence given as to the practice of payment, either on the day of the sale, or three days, or some other short period, after it, alone prevents us from saying that we have here 'a sum certain, payable, by virtue of a written instrument, at a certain time.' The question, therefore, resolves itself into one, Whether, on such a contract, interest is payable by law, independently of the Act! The contract is one, which, whether it is considered as, [268] what it purports on the face of it to be, a contract for the sale of opium deliverable at a future time, or as that which it really is, a wager, would not, *prima facie*, import a debt recoverable with interest. Nor do we think that these cases can be brought within the principle adverted to by Chief Justice Best, in *Arnott v. Redfern* (11 Moore, 209), upon which juries are held to be warranted in giving interest, which is not due *ex contractu*, in the shape of damages, on the ground of the improper detention, or unreasonable delay in the payment of the principal. For it is clear, that, for nine years of the period of the detention which has here taken place, the Plaintiffs, who have slept upon their remedy, are, at least, as responsible as the Defendants. If interest, then, is recoverable at all, it must be recoverable on the ground upon which the claim was originally put forward—viz., an obligation implied from the notorious usage of the trade or course of dealing to which the contracts relate; and the existence and notoriety of such an usage were what we had, at each trial, to determine, upon the evidence adduced before us. We stopped the first trial upon the close of the Plaintiff's case; and, therefore, if we were wrong in doing that, there can, at most, be but a new trial, in order to give the Defendants an opportunity of bringing forward evidence on their side. We do not, however, think that we were wrong. The course of dealing, which was in question before us, is something very different from the known mercantile usages in ordinary trades with which Courts of Justice have generally to deal. It is limited to gambling bets upon the average of a future Government sale of opium; and, although the witnesses differ as to the precise time at which the practice of making such [269] wagers began, it cannot be said to have been, in 1846, of very ancient date. It may, therefore, well be, that the usage concerning it fall far short, in point of certainty, of most known mercantile customs. Two classes of witnesses were called to prove the usage; the one consisting of men who generally engaged in these transactions, in the names of up-country Shroffs; the other, of Shroffs, or other persons, who dealt in Tajeer Mundeer Chittees directly. The latter class would, of course, afford the most valuable witnesses, because all the evidence went to show that the non-payment by Shroffs of these Chittees, on or about the day of sale, was exceptionable; and the Shroffs, who acted as agents, would, of course, debit their principals with the sums paid, as in an ordinary mercantile account, carrying interest. But the evidence of both classes, when sifted by cross-examination, we thought, established that the ordinary course of dealing was to pay as soon as the loss was ascertained; and that, in those exceptional cases in which time was given, a new contract, evidenced often by a separate writing for the payment of interest, was made. We did not think it was by any means established, that there existed so invariable an usage for the payment of interest on those Chittees, if unpaid on or about the day on which the average was ascertained, that those who granted Chittees must be taken to have been cognizant of it, and to have contracted with reference to it. In the other action, the evidence was fuller. Some of the Plaintiff's witnesses, no doubt, endeavoured to explain away their former admissions of a practice of giving a fresh and separate security when interest was payable, by asserting that this had originated since the passing of the Act for [270] avoiding wagers (No. XXI. of 1848), and had been adopted for the purpose of evading its provisions; but this is not consistent with what was admitted

by Madubehunder Mullick, a witness for the Plaintiff, on cross-examination, or with the testimony of some of the witnesses for the Defendants: and the manner in which the theory was propounded by those who supported it, strongly impressed us with the opinion that it had been concocted by some ingenious person since the date of the former trial. Again, the evidence of Buldeo Doss, whose interests seemed to be concerned in supporting the Plaintiff's claim to interest, and that of Mr. De Souza, were strongly against the existence of any notorious usage or course of dealing in this matter. Brijonauth Dhur, upon whose testimony the Plaintiffs now so much rely, can speak but to few instances within his personal knowledge—two in which he paid, two in which he received, interest. But he says, in cross-examination, that the practice was to write about the interest on the Chittees: that the debtor used to write, 'I will pay interest.' On his transaction with Nursingehunder Bose, there seems to have been a distinct, though verbal agreement, about the payment of interest: and Nursingehunder Bose speaks to another case, in which a promissory note had been given. We cannot, then, take that there was any error in our finding, upon this conflicting evidence, that the known usage relied upon was not made out. We continue to think, that the ordinary practice, up to this sale of 1846, when the liability on the Chittees was disputed, was to treat them as ready money transactions, as almost debts of honour: and that the losses were generally paid on or about the day on which the average of the Govern-[271]-ment sale was ascertained, with the regularity with which bets on the Derby are usually adjusted on the settling day at Tattersalls'. We continue to think that, in the rare cases in which losers failed to pay, either interest was not paid at all, or was the subject of a new and distinct agreement: frequently, though perhaps not invariably, evidenced by a fresh writing. We are strengthened in our conviction against the existence of a general and notorious usage, by the consideration of the lateness of the period at which this claim was brought forward in these actions. We admit that a count for interest is not necessary: that, in fact, as applied to the special contract on which the verdict is recovered, it would be improper. We admit that the Plaintiffs were not bound to set forth particulars of their demand on the special count. But we cannot but think it remarkable, that having done so, they have made no mention of interest in those particulars. It would further seem, that in the other actions of the like kind brought in this Court, no claim for interest had been asserted. We do not think the Plaintiffs would have so acted, had there been that known and general usage on which they now rely. We cannot but think that the claim for interest was first suggested by the decision of the Privy Council on the case from Bombay, reported in 5 Moore's Ind. App. Cases, 136. If that decision had clearly ruled that interest must be taken to run by force of an established mercantile usage on debts arising out of these contracts, we should of course have felt bound by it. But it simply rules that the Supreme Court of Bombay was warranted in giving interest, since there was evidence that interest was accustomed to be paid on such pecuniary transactions. [272] It seems that the evidence of the custom was in that case very scanty: but such as it was, it was uncontradicted. Here the right to interest has been strongly contested, conflicting evidence has been given respecting the alleged usage, and we have had, as a jury, to pronounce upon it. The arguments addressed to us have failed to satisfy us that we were wrong in the conclusion to which we came upon that evidence, and the rule must be discharged. We certainly feel in these cases the regret which one often feels in cases of fair and ordinary dealing between man and man, that the rules of our Court respecting interest are somewhat narrow: and we do feel that the claim for interest would fall very hardly on the Defendants after the number of years during which the Plaintiffs have lain by, awaiting the decision in other cases of the legal questions involved in these actions. The Plaintiffs were more interested in that delay than the Defendants: since but for it, those cases which are under the appealable amount might have been finally determined in a manner contrary to that which the appellate Court has since ruled to be the law. But our decision is wholly irrespective of these considerations, or of the absence of any thing like moral merits in either party to these transactions."

The appeal was from the Order of the 20th of July 1857, discharging the rule nisi.

Sir Fitz-Roy Kelly, Q.C., and Mr. Patterson, for the Appellant.—The sole question is, whether the Appellant is entitled to recover interest on the Tajeer Mundeer Chittees,

the name given to the gambling contracts [273] upon the average price at which opium would sell at the Government opium sale of 1846. No question arises as to the validity of these contracts: as at the time they were entered into they were legal (wager contracts in India are now declared invalid; see Act, No. XXI. of 1848). That point was established by this Court in *Ramloll Thackoorseydass v. Soojumull Dhoondull* (4 Moore's Ind. App. Cases, 339), *Doolubdass Pettamberdass v. Ramloll Thackoorseydass* (5 Moore's Ind. App. Cases, 109), *Chotayloll v. Manickchand and Kaisreechand* (6 Moore's Ind. App. Cases, 251). In the two first cases the Supreme Court at Bombay were of opinion, that the contracts carried interest according to mercantile usage. Perry, Chief Justice, in the second case, says (Perry's Oriental Cases, 220). "It is the universal practice amongst the trading classes of India to charge and allow one another interest on all book debts, and the practice of this Court is to carry out the contracts made by the parties, by awarding interest, unless some special reason intervene to prevent it."—[Lord Kingsdown: In the case of *Doolubdass Pettamberdass v. Ramloll Thackoorseydass* their Lordships proceeded on evidence of mercantile usage to allow interest.]—Here also is evidence of a mercantile usage to pay interest on the principal amount due on these contracts. The Court below, upon the evidence of usage and custom, ought, therefore, to have given interest on the principal amount recovered. Baron Parke, in delivering judgment in *Doolubdass Pettamberdass v. Ramloll Thackoorseydass*, was clearly of opinion that interest ought to be given. He expresses himself in these [274] terms: "We think the Court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions" (5 Moore's Ind. App. Cases, 136). The verdict, therefore, in not allowing interest is against the weight of evidence, and the express opinion of your Lordships, that interest ought to be allowed. But the sums due from the Respondents to the Appellant on these contracts were certain in respect both of time and amount within the meaning of the Act, No. XXXII. of 1839, extending to India the provisions of the Statute, 3rd and 4th Will. IV., c. 42, sec. 28, concerning the allowance of interest in certain cases (see *Rajah Bommarauxee Bahadur v. Rangasamy Mudaly*, 6 Moore's Ind. App. Cases, 232), and that Act ought to have been liberally construed by the Court in carrying out the intentions of the Legislature, who ought to have awarded the Plaintiff interest upon the principal sums recovered. Look at the case in this light. If the Respondents had accepted the Chittees when presented for acceptance, the Appellant would unquestionably have been entitled to interest: therefore, the Appellant is no less entitled to interest, though the Respondents refused to accept the Chittees. By the Common Law, if an instrument fixes a time of payment, from that time interest runs. Here the time of payment was to be on the day of the sale taking place, when the money was due. *Harper v. Williams* (4 Q. Ben. Rep. 219) is an authority to show that even if the Act, No. XXXII. of 1839, does not apply to this case, yet we are entitled to recover interest upon the principal sums found by the verdict to be due to the Appellant.

[275] Mr. Rolt, Q.C., and Mr. Leith, for the Respondents.—Two questions are raised by the Appellant to establish their proposition that interest ought to have been allowed. First, it is insisted that upon these contracts interest is payable by the Act, No. XXXII. of 1839; and, secondly, it is claimed upon an alleged mercantile usage in respect of Chittees of this nature. Upon neither of these grounds can the Appellant succeed in his appeal, as the amount recovered in the action was not a sum certain, payable under a written instrument, at a time certain. There was no improper detention or unjustifiable delay in payment of the principal sum, and interest is not allowed on such contracts by any mercantile usage proved. *Page v. Newman* (9 Barn. and Cr. 378, 381). The cases of *Harper v. Williams* (4 Q. Ben. Rep. 219 and 234), *Mowatt v. Lord Londesborough* (4 Ell. and Bla. 1044), *Attwood v. Taylor* (1 Man. and Gr. 278), *Braine v. Muttyloll Seal* (1 Taylor and Bell's Reps. Sup. Court of Calcutta, 97), *The Att.-Gen. v. The Corporation of Ludlow* (1 Hall and Twells, 218), conclusively disposes of the first ground. Interest would not have been allowed under the Statute, 3rd and 4th Will. IV., c. 42, upon such contracts, and, therefore, interest cannot be allowed under the Act, No. XXXII. of 1839, which limits the right "to debts or sums certain, payable at a certain time," which is essential. "*Certum est quod certum reddi potest*," Noy, Max. (9 Edit.), 265; and in the next

place there is no certain amount stated in the Chittees. In *Higgins v. Sargent* (2 Barn. and Cr. 348), before the passing of the Statute, 3rd and 4th Will. IV., c. 42, Chief Justice Abbott clearly states the law upon this point; he says, that "It is now [276] established as a general principle that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances." Interest is not allowed at Common Law, *Walker v. Constable* (1 Bos. and Pul. 306), although it is allowed where there is a contract to pay for goods sold by a bill of a certain date, which bill bears interest from the day when it would have been due, *Slack v. Lowell* (3 Taunt. 157). In *Cameron v. Smith* (2 Barn. and Ald. 305), Mr. Justice Bayley lays it down that there is a distinction between those cases where there is an express undertaking by the party to pay both principal and interest, and those where he undertakes to pay the principal only; and he adds (Ib. 308) "that although by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury in order that they may find the amount." The Supreme Court sat as a jury in this case; and no sufficient evidence of mercantile usage was established that interest has been paid upon Chittees such as these in default of payment of the principal moneys; one witness, indeed, says that such a custom began in the year 1840. That, however, will not be sufficient evidence to establish the alleged mercantile usage that interest is allowed upon these gambling contracts. Lastly, we submit, that under the Act, No. XXXII. of 1839, it was in the discretion of the Court, if it should think fit, to allow interest to the creditor, and that the refusal, in exercise of that discretion, to allow interest, is not a subject that can be reviewed or now questioned.

[277] Their Lordships' judgment was delivered by

The Right Hon. Sir John Coleridge (July 8, 1859).—The Plaintiff in his declaration stated that in consideration that he had paid to the Defendants the sum of Rs. 500, they had undertaken that if the average price per chest of Patna opium at the next ensuing public sale rose above Rs. 1300, they would pay him such excess or difference within a reasonable time after the said sale; that the sale took place on the 7th of December, 1816; that the average price did exceed Rs. 1300 per chest, but that the Defendants had not paid the difference.

At the trial the liability of the Defendants to pay the principal sum demanded was not in dispute: but the Plaintiff also claimed to be allowed interest on that sum, and offered evidence for the purpose of showing that it was usual to pay interest in default of payment of the principal on similar contracts. The Defendants cross-examined the Plaintiff's witnesses, and were prepared to offer evidence in opposition; but the Court being of opinion that the Plaintiff's witnesses had failed in making out the usage, stopped the case, and gave a verdict for the principal sum only.

The Plaintiff had also relied on the Legislative Act, No. XXXII. of 1839, and the Court were against him on this point also, but gave him leave to move to increase the verdict by the amount of interest at the rate of £6 per cent., if he could satisfy the Court that he was entitled to interest under the provisions of that Act.

The Plaintiff accordingly moved for a new trial on the first point, and to increase the damages at the rate above specified on the second. After argument [278] the rule was discharged on both points, and both have now been argued before us on appeal against that judgment.

The Legislative Act, No. XXXII. of 1839, was framed, as appears on the face of it, expressly in order to extend to India the provisions of the Statute, 3rd and 4th Will. IV., c. 42, sec. 28, and substantially adopts the language of it. It enacts that "upon all debts, or sums certain payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

Two questions arise upon the construction of this enactment; first, what is meant by a sum certain, and a time certain; the second, assuming the case to have arisen, which gives the Court jurisdiction to allow interest, whether the exercise of that jurisdiction, or the refusal to exercise it, is subject, in any way, to review.

With respect both to amount and time of payment, it was argued that the maxim "*ad certum est quod certum reddi potes*" must be applied; and, in a reasonable sense, this is true. In the simplest case we may be obliged to have recourse to calculation for the actual amount, or to the calendar for the precise day of payment. A promise to pay on the last Saturday of the year, at the rate of 15s. a-week for twelve months, would certainly be a promise to pay a sum certain at a time certain. It was argued also that in respect of both time and amount it was a question of degree, and in the same reasonable sense [279] that every Statute is to be construed, not captiously, but with a view to the expressed intention of the Legislature: this is true also. But these propositions do not remove the greater difficulty of determining at what period of the transaction between the parties must the amount and time of payment become ascertained. Is it necessary that these should be ascertained at the time the promise is made? or will it suffice if they become so at the time when it ought to have been fulfilled, and is broken? Ascertainment at any later period certainly could not suffice.

The Statute, by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty, and the obligation itself to pay the principal, should be created by a written instrument, by making the interest run from the time at which the principal is payable, and, finally, by giving the jury a discretion as to the allowance of interest, even where all these circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but also on that of penalty to the debtor for not paying punctually at a time when he must have known the debt or sum, specific in amount, was to be paid. But for this consideration there was no reason why all debts, without distinction, should not have been made to bear interest from the time when payable; no previous uncertainty of amount, or of time of payment, would have been material, nor should any distinction have been made between obligations by writing and by word of mouth; nor ought the jury to have had any discretion; for in all cases the need of compensation to the creditor may be assumed to have been the same. But, if the conduct of the debtor be taken into account, then the uncertainty of amount, and the contingency as to the time of payment, and that there is no writing, are all more or less material; obviously the most honest and punctual debtor may be unprepared to pay an uncertain amount, which may not be due for months, or years, or only on the happening of a contingency, the falling in of which he may not know of. On this principle, too, the discretion given to the jury to consider all the circumstances of each particular case becomes perfectly reasonable. It is quite consistent with this view that where the debt is payable "otherwise" than at a certain time, interest is not to be allowed except from and after the time of a written demand of payment. This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made; and, therefore, that the Act does not in this part affect debts contingent in amount, and time of becoming due: a construction strictly conformable to the natural meaning of the language used.

This reasoning applies very strongly to the case now before us, in which there is no promise absolutely to pay any sum, certain or uncertain, nor any time limited for the payment, but only a promise contingent on events which may never happen, to pay a sum capable of ascertainment only, and if when these shall happen, and the time for the happening of which, if they ever do happen, may be indefinitely postponed. Such are the facts here. If, at the next ensuing public sale, the average price per chest of Patna opium should rise above Rs. 1300, the Defendants promise to pay the difference between Rs. 1300 and such average price. That any such difference would ever exist was quite uncertain; in the expectation of the Defendants, of course, it was considered extremely improbable. If there should be any difference, what it would amount to was equally uncertain; and when the public sale would take place, which was the time for ascertainment, was also unknown. Now, there seems to be an insuperable difficulty in bringing such a state of facts within any but the most forced construction of the words of the Act. The Act supposes a party to have been sued for breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time. But how can it be said that, in the contemplation of either party, any such contract ever was made?

As their Lordships think that the Plaintiff failed in bringing the case within the Legislative Act, and, therefore, agree with the Court below in their decision, it is not necessary for the decision of the case, to express any opinion on the second general question, whether the discretion of the Court in allowing, or refusing to allow interest, in cases within the Act, is liable to review or appeal. Several cases were cited in the argument, in which Courts had refused to interfere with the discretion of the jury, under the Statute, 3rd and 4th Will. IV., c. 42, sec. 28, on the ground that the Legislature had left it entirely to them; but none in which the Court had so declined, at the same time stating that it disagreed with the jury's determination. We do not, therefore, think the authorities conclusive. We should, undoubtedly, be slow to interfere in any case before us in respect of any matter specifically within the power of the jury, as for example, the amount of damages; but dealing as we have to deal, with questions of fact as well as law, we are not prepared to say that, in a case either of allowance or refusal, in which we were clear that [282] the Court below, acting either through prejudice or misunderstanding, had committed injustice, we should not feel bound to recommend to Her Majesty that an opportunity should be afforded of reconsidering the matter in a new trial.

It remains now to consider the other ground on which the Plaintiff relied: the evidence of mercantile usage. To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.

We have examined the evidence before us by the light of this principle: it is certainly not conclusive; it is open to criticism: it may require and admit of explanation: but, such as it is, we think it required an answer, and the more so after the language of their Lordships in the judgment delivered here on appeal, in the case from Bombay, to be found in 5 Moore's Ind. App. Cases, 136, evidence which was, of course, well known to and relied on by the Plaintiff in preparing his case for trial. It would, moreover, be much to be lamented that a difference so important should prevail between the two Presidencies in the administration of justice.

This conclusion will make it proper for their Lordships to recommend to Her Majesty that this appeal be allowed, and the case be remitted to India for a new trial, if the parties should not come to some arrangement, and their Lordships will direct that the Appellant have his costs of this appeal.

[See note to *Doolubdass Petteramberdass v. Ramdall Thackoorseydass*, 1850, 5 Moo. Ind. App. 136. For subsequent proceedings see *Juggomohun Ghose v. Kaisreechund*, 1862, 9 Moo. Ind. App. 256.]

[283] MAHARAJAH MOHESHUR SING.—*Appellant*: THE BENGAL GOVERNMENT,—*Respondent* * [Feb. 1, 2, 3, 4, 1859].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Claim by Government, under Ben. Reg. II. of 1819, to resume lands asserted as La-khiraj, for the purpose of assessment. The lands the subject of the Government claim were owned by a Mahanth (the head of a community of religious devotees), against whom alone the Collector proceeded. These lands were intermixed with other lands belonging to a Zemindar, whose lands had been assessed at a fixed rent under the Decennial Settlement (made permanent by Ben. Reg. I. of 1793) and the Zemindar claimed a large portion of the lands sought to be assessed, as forming part of his Zemindary, for which a fixed rent was paid. Held: that although the Zemindar was to be considered as a stranger to the proceedings, as he had not been summoned by the Collector, yet as his interests were liable to be affected by the decision of the Collector, he had a right to intervene and become a party and to prosecute an appeal from the decree.

Ben. Reg. III. of 1828, sec. 4, cl. 5, extends the rules prescribed by Ben. Reg. XXVI. of 1814, cl. 4, regarding reviews of judgment in the Sudder Dewanny Court, to proceedings by the Special Commissioners in revenue cases.

Held.—First, that under the 2nd and 3rd sections of the latter Regulation, the procedure of the Sudder Dewanny Court in granting review of its judgment, was to be applied to judgments of the Special Commissioners in resumption cases.

Second, That in accordance with those rules a delay of five years and a half by Government in applying for a review of judgment, without satisfactory cause being shown for the delay in presenting a petition of review, was fatal; and an Order granting a review made by two of the Sudder Judges sitting as Special Commissioners of Revenue under Ben. Reg. III. of 1828, and all proceedings subsequently taken under it, reversed on appeal by the Judicial Committee of the Privy Council, as having been from the long delay improperly granted.

Difference between a review of judgment and an appeal explained.

The primary intention of granting a review is a reconsideration of the same subject by the same Judge, in contradistinction from an appeal, which is a hearing before another Judge.

A review before another Judge is an exception, and is only allowed, *ex necessitate*, as in the case of the death, or removal.

The jurisdiction of the Foujdary Court is confined to cases of possession only. It is beyond their province to inquire into and ascertain the title to real estate.

Semble. There is no Regulation which requires a party to appeal from interlocutory decrees; and in an appeal to the Judicial Committee from a decree adjudicating upon the whole suit, the propriety of interlocutory decrees made in the course of the suit, though acquiesced in and submitted to at the time, may be called into question.

So held where a party had not appealed from the Order of the Sudder Commissioners granting a review of judgment.

This appeal was brought from the decree of the two of the Judges of the Sudder Dewanny Adawlut, [284] sitting as Special Commissioners of Revenue, upon a review of judgment, granted by them on the application of the Bengal Government, after a delay on the part of the latter of five and a half years, which final decree reversed a decree of two other Special Revenue Commissioners, sitting as a Court

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

of appeal under the powers conferred by Ben. Reg. III. of 1828, upon a decision of the Deputy Collector of Revenue acting as Commissioner in resumption proceedings instituted under Ben. Reg. II. of 1819.

The sole Defendant in the proceedings before the Deputy Collector was Bhugwan Dass, since deceased, a Mahanth, the principal of an establishment of religious devotees, and the object of the proceeding was to investigate his title as Mahanth to certain La-khiraj land, described as Mouza Jankeenuggur and Puttee Mudhoobun, situate within Zillah Beernuggur in Pergunnah Dhurumpoor, for the purpose of assessing the land with Government revenue in the event of his failing to prove that the land was [285] La-khiraj. Maharajah Chutter Sing, the grandfather of the Appellant, claimed a large part of the lands sought to be assessed as forming an integral part of the rent-paying lands of his Zemindary of Dhurumpoor, which had been settled and assessed by Government at the period of the Decennial Settlement in 1789, declared permanent by Ben. Reg. I. of 1793.

The facts of the case were these:—

On the 3rd of October, 1836, Mr. Beresford, the Deputy Collector of Zillah Purneah and Maldah, under the provisions of cl. 2, sec. v. Ben. Reg. II. of 1819, ordered a notice to be served on Kirparam and Busunth Dass, the grantees, or other the holders of certain alleged La-khiraj or rent-free lands, called Mouza Jankeenuggur and Mudhoobun, and situated in Pergunnah Dhurumpoor, within the limits of the Collectorate, requiring them to produce the original Sunnud and other documents establishing their title to the lands.

In obedience to such notice, Bhugwan Dass put in a statement on the 8th of December, 1836, setting forth the decease of Kirparam and Busunth Dass, the original grantees, and of others who had succeeded them as holders of the lands, and that he was himself the succeeding Mahanth, was the holder of such lands, and that the produce of the same, conformably to immemorial usage, had been appropriated to the performance of worship of idols, and the payment of the expenses of the mendicants since before the date of the accession to the Dewanny by the East India Company, and that, therefore, under the provisions of sec. 2, Ben. Reg. XIX. of 1793, the lands were not liable to assessment by Government. Together with this statement, the Mahanth put in documents, purporting [286] to be original Sunnuds and boundary paper of the lands in question.

Upon this statement being filed, the Deputy Collector called upon Bhugwan Dass to bring forward evidence to prove the facts stated, and the validity of the documents filed, and also to prove the boundaries of Mouza Jankeenuggur and Mudhoobun. Upwards of twenty witnesses were produced on behalf of Bhugwan Dass, and from their depositions it appeared, that within the boundaries of Mouza Jankeenuggur were comprised Cote Jankeenuggur, Putty Mudhoobun, Tolah Rajwarah, Tolah Gungapoor, Jhanuggur Tolah, and Badh Sreenuggur, and that such Mouza had been in the possession of the successive Mahanths for a very long period of time; but Bhugwan Dass was unable to produce any satisfactory evidence, either documentary or by the depositions of witnesses, to prove the grant for holding such Mouza exempt from the payment of revenue, made previous to the 12th of August, 1765, the date of the Company's accession to the Dewanny.

By order of the Deputy Collector, a measurement of the lands within the boundaries of Mouza Jankeenuggur was made by Ameens, who reported the total amount of such lands to be 13,915 beegahs and 19 cottahs.

On the 7th of May, 1837, Maharajah Chutter Sing, the Zemindar of Pergunnah Dhurumpoor, presented a petition, stating that the Ameens had measured, as belonging to Mouza Jankeenuggur and the rent-free lands of Bhugwan Dass, about 10,000 beegahs of land which were within the boundaries of the rent-paying lands of the Maharajah Chutter Sing, and for which a Settlement had been concluded with the Government, [287] and that Bhugwan Dass had, by the execution of an Ikrarnamah, dated the 22nd of October, 1836, acknowledged that only 3000 beegahs of land were included in his La-khiraj lands, and he filed that instrument.

Divers other proceedings were held before the Deputy Collector, and further documentary evidence put in and depositions of witnesses taken, in support of the respective claims of Bhugwan Dass and Maharajah Chutter Sing, and on the 28th of January, 1838, the Deputy Collector decided to the effect that the lands in

question had been held by Blugwan Dass, as La-khiraj, without a valid title, there being no grant for the same made previous to the date of the Company's accession to the Dewanny, and that no satisfactory evidence had been adduced on the part of Maharajah Chutter Sing, to show that the lands appertained to his rent-paying lands and were included in the Settlement made with him; and with respect to the Ikrar-namah put in, the Collector held that even if the same were otherwise valid, it could not prejudice the right of Government to assess the lands. And he ordered that the case should be decreed in favour of Government, and that the revenue should be assessed on the whole of the lands measured by the Ameens.

In June, 1838, Maharajah Chutter Sing appealed from this decision to the Court of the Special Commissioner of the Zillahs of Calcutta and Moorshedabad. No appeal was brought by the Mahanth.

Further evidence was gone into before that Court.

On the 6th of December, 1841, Mr. Henry Moore, the Special Commissioner for the Zillah of Moorshedabad, pronounced his decision on the appeal as follows:—
 " My opinion in this case is, that previous to the year 1802-3, there existed no ascertained limit [288] or boundary between the La-khirajdar and the Zemindar. It appears from the papers that, in fact, two places, viz., Jankeenuggur and Mudhoobun, had before that time belonged to the La-khirajdar, the four sides of which were dense jungles. The proprietor of Jankeenuggur, from the date from which he established a muth and sthan, commenced cultivation, and it is not a concealed fact that the La-khiraj lands of Jankeenuggur and Mudhoobun are situated within the Pergunnah of Dhurumpoor, and that in the year 1198, Fuslee, whatever quantity of La-khiraj land there was, save and except the same, a Settlement was made with the ancestor of the Appellant, Zemindar, for the whole Pergunnah above-mentioned in a lump. Under these circumstances, at that time, whatever quantity of land appertained to Jankeenuggur was, in truth, the same quantity of La-khiraj land that there is now, and the other lands are mal (rent-paying). It does not appear from the papers produced by the Putwarries what quantity of land there was in Jankeenuggur in the year 1198, Fuslee. The one goshwarrah of the cultivated lands for the Mouza Jankeenuggur, which is here, contains mention of 219 beegahs 2 cottahs of cultivated lands. After this, the hustobodh amounted to Rs. 1138. 1½ anna in the Fuslee year 1210; and it appears that there were for Putty Mudhoobun, in the year 1194, Fuslee, 472 beegahs and 1 biswah of land; but now the Zemindar, Appellant, states that in the north and east corner of Jankeenuggur there is a peepul tree named Dhodurha peepul; and that on the south side is Chucknaha Dhur, which is fixed as the boundary of Jankeenuggur; and that on the east are the lands of Nagurdhar, which is undisputed: and the lands [289] within these boundaries being measured, it appeared, at the rate of 6½ cubics per cottah, to consist of 3300 beegahs; and out of the boundary of the same, besides Mouza Sreenuggur, most of the lands of the other places are a complete jungle from the time of the Decennial Settlement; the Mahanth of Jankeenuggur has cultivated the lands within that jungle; but the cultivation of the same took place after the Decennial Settlement, and it is not proved that the places in the jungle appertained to Jankeenuggur either at the time of the Decennial Settlement or previous to it. By the Charchittee of the La-khirajdar, only Jankeenuggur and its La-khiraj Putty Mudhoobun, have been proved to be the old La-khiraj tenures, and 3300 beegahs of land is not a small quantity for such tenure. Besides, it is evident from the papers that, in the Fuslee year 1194, Mouza Sreenuggur was in the possession of the La-khirajdar; in other words, it was in the possession of the proprietor of Jankeenuggur. And in the papers of the year 1194, besides the tenants' houses, 203 beegahs 14 cottahs of land in the chuckla above mentioned are recorded. When, under these circumstances, Sreenuggur, previous to the Decennial Settlement, was in a state of cultivation and in possession of the La-khirajdar, in that case, that Mouza also is proved to be a La-khiraj tenure. It is moreover evident, that before the Decennial Settlement, besides the tenants' houses, the Mouza above mentioned had 203 beegahs 14 cottahs of cultivated lands, etc. According to the survey map and measurement made by Hurkolly Ghose, the Deputy Collector, there are 794 beegahs and some cottahs of land, including the jungle with the Mouza above mentioned. Considering all these facts, it appears to [290] me that Jankeenuggur and

Mudhoobun have, at the rate of $6\frac{1}{2}$ cubits cottah measurement, 3300 beegahs of land; and the original habitations in Sreenuggur and the Mouzas above mentioned consist of 203 beegahs 14 cottahs of land in a cultivated state, which, according to the Regulations, should be entered into a settlement with the La-khirajdar. Let the remaining lands, therefore, be released from the claim of the Government, but let it be known that no orders are passed by this Court in regard to the possession or non-possession of any party. For the above reasons, therefore, the decision passed in the Court of First Instance must be amended." And he then made an Order: — "That the papers of the case be laid before another Special Commissioner for a concurrent voice and final orders to the effect that the decision of the Special Deputy Collector, dated the 28th of January, 1838, be amended; and out of all the lands in dispute, Jankeenuggur and Mudhoobun should have imputed to them 3300 beegahs of land at a measurement of $6\frac{1}{2}$ cubits cottah, and the original bustee of Mouza Sreenuggur, and 203 beegahs 14 cottahs of cultivated lands, which should be settled for with the La-khirajdar, conformably to the Regulations; that the remaining lands should be exempted from the claim of Government, and whatever collections have been made by the Government should be returned to the holder of the lands, with 6 per cent interest per annum, to the date of payment of the same."

Accordingly, the case was laid before Mr. D'Oily, another Special Commissioner of the Zillah of Calcutta; and on the 8th of March, 1842, he stated his opinion as agreeing with that expressed by the Special [291] Commissioner, Mr. Moore, and passed a final Order that the decision of the Deputy Collector, dated the 28th of January, 1838, should be amended in the manner ordered by the Special Commissioner.

About the time this Order was passed, Maharajah Chutter Sing died, and thereupon Maharajah Roodur Sing, as his heir, became the Zemindar of Pergunnah Dhurumpoor; and the Mahanth, Bhugwan Dass, also died, and was succeeded by another Mahanth, Girdharee Dass Goshayn. As no decision or Order was made by the Special Commissioner as to the possession or non-possession by any party of the 10,412 beegahs 5 cottahs of the lands in question, which were released from the claim of Government, the dispute for the possession of the lands so released still continued between Maharajah Roodur Sing and the Mahanth.

In consequence of this dispute, the Magistrate of the District within which such lands were situated, under Act, No. IV. of 1840, called for a statement of the claims of the respective parties, and subsequently referred the case for investigation and decision by the Foujdary Court of Zillah Purneah. On the 18th of April, 1844, the case came on before the Magistrate in the Foujdary Court, on the petition of Maharajah Roodur Sing, against the Mahanth, as the opposite party; and the Magistrate, after stating that it had been established that the lands in dispute had all along been in the possession of the Mahanth and his predecessors, made an Order that the case be decreed in favour of the Mahanth, Girdharee Dass Goshayn, the opposite party. That the lands in dispute should continue in the possession of the Mahanth, and a Perwannah be issued to the Darogah on the spot; [292] that possession of the disputed lands be made over to Mahanth, Girdharee Dass Goshayn, and take a receipt of the possession of the same having been given; and taking the produce of the disputed lands, in whose-ever possession the productions might be, make them over to the rightful Ryots and cultivators of the lands in dispute, and also send up to the Huzzoor receipts of the same. This Order was affirmed upon appeal to the Court of Sessions of Zillah Purneah on the 4th of January, 1845.

In consequence of the decision of the Foujdary Court, and the result of subsequent proceedings before the Deputy Collector, a petition on the part of Government was filed in the Sudder Dewanny Adawlut, at Calcutta, on the 21st of September, 1847, praying for a review of the judgment pronounced on the 8th of March, 1842, on the ground, that the opinions of both the Special Commissioners were formed contrary to the papers and the investigation made on the spot, and that since their decision of the case, new documents had been found which warranted a review of judgment, and, on the same day, a review of judgment was granted by Mr. Edward Currie, another Special Commissioner.

An answer to the grounds of review was filed on the part of Maharajah Roodur

Sing, to the effect that the 10,412 beegahs 5 cottahs of land were a part of his rent-paying lands, assessed and settled under the Decennial Settlement.

On the 24th of April, 1848, the case came on for hearing before Mr. Edward Currie, Special Commissioner and he recorded his opinion as follows:—"It appears that the application for the review of judgment has been admitted, and the case restored to its [293] former number on the file, on the ground that the papers filed by the pleader of the Government prove that, besides 3500 beegahs 14 cottahs of lands which have been resumed under the decree of this Court, the whole of the lands involved in the decision of the Special Deputy Collector amounted to about 14,000 beegahs, in the possession of the La-khirajdar, and were measured by a small rod, including the rent-free lands. Besides, it does not appear, from the decision of the Special Commissioners, why Sreenuggur was resumed, and the other tolahs were released. From a perusal of the whole of the papers of the suit, it appears that Mr. Henry Moore, the former Special Commissioner, held the Hudbundee papers filed by the La-khirajdar to be of no weight, and made the ground of his decision to rest upon the Ikrarnamah, signed by the La-khirajdar, in which the right of the La-khirajdar is stated to be at 3000 beegahs of lands. Moolvie Atakand Hossein, the Deputy Collector, found 3000 beegahs of lands, extending from the eastern boundary to the western side of Nagur Dhar, besides 300 beegahs of lands, according to the admission of the Zemindar, were found to belong to the La-khirajdar's rightful property. By the decision of Mr. Henry Moore, 203 beegahs 14 cottahs of land, including the bustee of Sreenuggur, were held resumable. By this it is proved that at the time of the Decennial Settlement, the aforesaid lands were in the possession of the La-khirajdar, in a state of cultivation. The particulars of the Ikrarnamah are these:—On the 3rd of October, 1836, the case was instituted, and the Ikrarnamah was executed on the 7th of the month of Kartick, 1244, corresponding with the 22nd of October, 1836. Hence it is clear that the Ikrarnamah above [294] mentioned was prepared after the institution of the suit, and such a document, therefore, cannot in any way operate against the claim of Government. It is clearly proved that, from the beginning to the year 1236 (1828-9), the whole of the disputed lands, without opposition, have been in the possession of the La-khirajdar; in that year the Zemindar made an attempt to resume the La-khiraj tenure. In the year 1240 (1832-3), Bhugwan Dass executed a pottah of the disputed lands, under the denomination of towfeer lands, to Rajah Ram Koowur, deceased. Under these circumstances, it is not surprising that the La-khirajdar feared the claim of Government, and suffered under the tyranny of the Zemindar, when he executed the Ikrarnamah according to the wish of the Zemindar; such an Ikrarnamah is no good and sufficient proof for the La-khiraj portion of the lands. It appears from the roodad (statement of the Deputy Collector), that in all tolahs, some lands have been in a state of cultivation for a considerable period, and that the tolahs above mentioned have no connection with the Mouzas in the possession of the Zemindar. From the map of the surveyor, it appears, that the jungles which were yet standing are in the heart of the cultivated parts. The several pieces of old papers of the Putwarries which have been filed show that, besides Sreenuggur, more or less, there are tolahs which have been cultivated at the time of the Settlement. Some of the papers aforesaid were filed in the presence of Mr. Henry Moore, after final orders had been passed, and the case had been referred for a second voice, when Mr. Moore directed, in concurrence with Mr. H. D'Oyly, that the case be referred to a full bench; but no full bench was held. Considering the whole of [295] the circumstances of the case, it is clear, in my opinion, that the whole of the cultivated and jungle lands which have been resumed by the decision of the Special Deputy Collector, and which have been lately measured and included with the melk (rent-free) land under the Thackbush, were in the possession of the Mahanth, from the time of the Decennial Settlement, as rent-free lands, and now that they are proved to be resumable La-khiraj must be assessed." And after recording such opinion, the Special Commissioner ordered that the papers of the case should be laid before another Judge for a concurrent voice, and final orders to reverse the former decision of the Special Commissioner, dated the 8th of March, 1842, and to affirm the decision of the Deputy Collector, dated the 28th of January, 1838; and that the whole of the lands in dispute should be resumed and assessed according to the Regulations.

The case then came on before Mr. Welsby Jackson, another Judge of the Sudder Dewanny Adawlut at Calcutta, acting as Special Commissioner, on the 8th of June, 1848, and he agreed in opinion with Mr. Edward Currie, Special Commissioner, and pronounced a final order and decree to the effect, that the decision of the Special Commissioner, dated the 8th of March, 1842, should be reversed: that the decision of the Deputy Collector, dated the 28th of January, 1838, be affirmed, and that the whole of the lands in dispute should be resumed and assessed according to the Regulations.

Against this decision the present appeal was brought. The Mahanth did not appeal.

After the appeal was granted, Maharajah Roodur Sing died, and Maharajah Moheshur Sing, his heir, was made Appellant in his stead.

[296] The appeal was argued by Mr. K. Palmer, Q.C., and Mr. Leith, for the Appellant; and The Attorney-General (Sir Fitz-Roy Kelly), Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Bengal Government.

As the questions decided by their Lordships turned upon grounds collateral to the merits in respect of the right of resumption of the lands for assessment by the Government, their judgment being confined, first, to the competency of the Deputy Collector, to allow the Maharajah to be a party to the proceedings; and secondly, to the competency of the admission of the review of the judgment, the arguments are not given upon that head.

The Appellant insisted that the review of judgment granted to the Respondents, after a delay of upwards of five years, was not in the circumstances justified, as no sufficient reasonable cause had been shown for the delay in presenting a petition for review; they cited upon this head, *Wise, Petitioner* (S.D.A. Sum. Decis., 1842, p. 68, 128), *Hur Govind Ghose, Petitioner* (S.D.A. Sum. Decis., 1847, p. 76), *Doodal Baksh, Petitioner* (S.D.A. Sum. Decis., 1851, p. 201), *Kaseenath Banerjee, Petitioner* (S.D.A. Sum. Decis., 1840, p. 23), *Hunter v. Gobindchund Moonshree* (2 Sev. Cases, 585); that the procedure of the Special Commissioners in revenue cases was governed by Ben. Reg. XXVI. of 1814, sec. 2, cl. 2, 3, 4, which applied to proceedings of the Special Revenue Commissioners under Ben. Reg. III. of 1828, sec. 4, cl. 5, *Maha Raja Dhewraj*

[297] *Raja Mahatab Chund Bahadoor v. The Bengal Government* (4 Moore's Ind. App. Cases, 466), and that, therefore, the admission of the review of judgment being in contravention of the Regulations, the whole proceedings subsequent to the decree of Mr. D'Oyly, were null and void. It was urged also that the proceedings were further irregular, as the review of judgment ought, by the procedure of the Sudder Court, and Ben. Regs. XXVI. of 1814, and II. of 1825, sec. 3, have been heard before the same Judge who passed the judgment.

The Respondents contended, that as no objection had been taken before the Special Commissioners on the question of discretion in granting a review, and that as no appeal was made from the Order admitting the review, the objection insisted on could not now be entertained. They further submitted, that the Appellant was no party at all to the proceedings before the Commissioners, and had no *locus standi*, as the report of the Deputy Collector as to the extent of the land to be resumed was not binding upon him, as a resumption decree in regard to the right of assessment of lands did not bar the jurisdiction of the Civil Courts in respect of the proprietary right, *Syud Shah Mohummud Yasin v. Syud Enyet Hussein* (7 Ben. Sud. Dew. Adaw. Rep. 256), *Sudder Board of Revenue v. Dilawur Ali* (ib. 284), *Hur, Gobind Ghose, Petitioner* (1 S.D.A. Sum. Cases, Pt. ii., 100). That the title of the Mahanth to possession was valid as against the Appellant, subject only to the right of the Government to assess the lands, and that as no suit had been brought in a Civil Court by the Appellant, or his ancestors, to recover possession of the [298] lands from the Mahanth, it was not competent to the Appellant to question the title of the Government to assess the lands in the hands of the Mahanth.

Mr. R. Palmer, in reply, urged that a claimant to lands sought to be assessed had a right to intervene, *Hureeram Bukshee v. Ramchunder Banerjee* (13 S.D.A. Decis. 1850, p. 407); as the resumption of the lands by Government was not open to question by the Civil Courts.

Judgment was delivered by

upon this case, two questions have been raised which, it appears to their Lordships, are ripe for decision.

The first question is, whether the Revenue Commissioners, who originally exercised jurisdiction upon the present occasion, were, with respect to the Appellant, entitled so to do; it being contended on the part of the Respondent, that the present Appellant was never properly a party to the suit. The next question is, whether the review which was granted in this case, was granted in due conformity with the existing Regulations.

In order to render our judgment clear on these two questions it is necessary to make a brief statement of the facts out of which they arise.

The original proceedings in this case commenced in the office of the Deputy Collector of the District. It appears that there is in the Province of Behar, a Pergunnah named Dhurumpoor, containing three Zillahs, but the present suit relates to one only, called Beernuggur. This Pergunnah was held in perpetuity by [299] the Zemindar for the time being, and his successors, on payment of a revenue to the Government, fixed at a permanent assessment under the Decennial and Permanent Settlement. By this Settlement, the Zemindar and his successors were exempted from all payment in the nature of land-tax, save the amount stipulated by the Umuldustick granted to the first grantee.

One of the few exceptions to which such Settlements are subject was insisted on by the Government in this case as applicable to some lands within the limits of the Zemindary, namely, the tenure of them as La-khiraj under an illegal or invalid title. It is an admitted fact that there were certain lands claimed as La-khiraj within their Pergunnah. Those which became the subject of dispute in this case were owned by a Mahanth, as the head and for the benefit of a community of religious devotees. The lands had, in fact, been enjoyed by them for a long time, free from assessment; and between this society, as represented by their head, the Mahanth, and the Government, the dispute arose, as to the assessable quality of the lands. The Mahanth had, of course, an interest to enlarge the boundaries of his lands, and unless the contiguous proprietor admitted the boundaries as claimed by the Mahanth, his presence as a party to the proceedings would seem to be conducive to the correct adjustment of so delicate and important a question, a course to be encouraged with a view to diminish subsequent litigation.

In this state of things, Mr. Henry Beresford, the Deputy Collector, on the 3rd of October, 1836, commenced the present proceedings, by a notice to two persons, Kerperam and Bhugwan Dass; the first being one of the original grantees, and the second the [300] Mahanth in possession. Bhugwan Dass was called upon to show his title, and to prove by what authority he held the lands free from payment of revenue.

It is to be observed that these proceedings do not state, by any description, whatever, the extent of lands to which this notice applied.

At some of the meetings it appears that the Mooktar of the Zemindar had accidentally, or otherwise, been present, and had been questioned by Mr. Beresford, the Deputy Collector. Under these circumstances, the Zemindar, apprehending that his interests might be affected by any decision of the Collector, declaring the La-khiraj lands to be more extensive than they really were, intervened by petition; and it appears to us that, in every view of the case, he had an interest which justified him in so doing: for even assuming it to be true that the Collector's report, as to the extent of the land subject to revenue, was not binding on the Zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous report being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to a civil Court to remedy an evil already inflicted.

And this view of the case seems to have been taken by all parties and by all Judges who were cognizant of the case: throughout the whole of the proceedings no objection was ever raised to his intervention; he was allowed the privileges of a party by the examination of his witnesses, and otherwise: and he was subjected to all the inconveniences of a suitor by the condemnation in costs in virtue of the ultimate decree.

[301] Looking at all that passed, and considering that in every possible point of view the Zemindar had an interest to protect before the Collector, we think it quite

rain to contend that he was not both *de facto* and *de jure* a party to this case, or that he had not a sufficient interest to justify him in assuming that character, or that the Collector and Commissioners were in error in so receiving him: therefore, we think that the plea to the jurisdiction has entirely failed on that ground.

We will now follow the course of these proceedings so far as it is necessary for our present purposes. Mr. Henry Beresford having made an investigation, which, to him, appeared to be satisfactory, having previously prohibited the Zemindar from collecting the rents from the disputed lands, on the 28th of January, 1838, gave his decision, and, by that decision, 14,816 beegahs of land were subjected to assessment: the Zemindar appealed to the appellate Court, namely, to the Special Commissioner of Revenue, under Ben. Reg. III. of 1828. On the 6th of December, 1841, Mr. Moore pronounced judgment, to the effect that 3513 beegahs alone were assessable, and that the collections made by Government on other lands should be restored to the possessors: on the 8th of March, 1842, this judgment was confirmed by Mr. D'Oyly, another Special Commissioner. On the 21st of September, 1847, a petition for a review on behalf of the Government was presented to Mr. Edward Currie, another Special Commissioner, which petition of review was granted. A hearing took place accordingly. Mr. Currie reversed the judgment of the 8th of March, 1842, by an Order bearing date the 24th of April, 1848, which was confirmed by Mr. Jackson, in June, 1848.

[302] Although the question which we have now to determine is distinct from that of the merits of the case, yet it is one of very grave importance, as it respects the rules to which the Special Commissioners are to be subject in reviewing a decision which has been made in a resumption suit. We proceed to consider whether the review was granted in conformity with the Regulations existing at that time with respect to the granting a review.

Before we enter into the particulars of that question, we deem it right to notice an objection which was taken at the bar on the part of the Respondents, that it was too late now to impugn the regularity of the proceeding to grant the review: that if the Appellant deemed himself aggrieved by it, he ought to have appealed at the time, and that he was too late in doing so after a decision had been pronounced against him.

We are of opinion that this objection cannot be sustained. We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have [303] been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory Orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

Before considering whether the review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case, five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made, were entitled, after the lapse of a sufficient period, no appeal having been asserted or petition for a review presented, to conclude that the Government acquiesced in what had been done by the Special Commissioners, and, in that rational conviction, to deal with the property upon the footing of the past decision.

Now, what are the evident consequences of delay, unless justified by particular circumstances? Those consequences are, that all the arrangements between man and man, concluded without any reason to suppose they were impeachable, may be set aside and thrown into confusion; producing, at one time, severe hardship to the proprietor, at another equal evil consequences to those who dealt with him: thus

all such arrangements and transactions, which are the very life and soul of property, and which it is equally the interest of the Government to support and encourage, may be disturbed to the detriment of all concerned. We think, for these reasons, that it must have been the wish and intention, as well as the interest, of Go[304]-vernment, so to frame the Regulations that these principles should be carried into effect, and that after a decision was past, unquestioned by appeal, its finality should be left in doubt no longer than the requisites of justice imperatively demanded.

Let us now address our attention to the Regulations which have passed relative to the question of granting a review. It must be borne in mind that a review is perfectly distinct from an appeal; it is quite clear from the Regulations, that the primary intention of granting a review was a reconsideration of the same subject by the same Judge, as contradistinguished to an appeal, which is a hearing before another Tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex necessitate*. We do say that in all practicable cases the same Judge ought to review; and that for the attainment of that object, expedition in presenting a petition for the review is indispensable, and the only practicable course for attaining that end by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge. Looking at all these circumstances, we should naturally expect to meet in the Regulations upon this subject such provisions as would prevent the evils necessarily incidental to delay and procrastination.

It may be well to observe, that the Regulations respecting the resumption of lands, and the subjecting them to be assessed, are Regulations in themselves almost necessarily severe in their operation; [305] and while we give to them the force and effect which we are bound to do, as the subsisting law upon this subject, we cannot, and ought not, to forget, that though it is manifestly, at first sight, the interest and duty of Government to bring under taxation as large an extent of land as possible, yet that it is equally the interest and the duty of Government to protect the rights of property; for if such rights be not protected, there can be no security for the prosperity of any country. For these reasons we must deem it to be our duty, in interpreting and carrying into effect these Regulations, to give full force and effect to those provisions which were manifestly intended to protect the rights of property, and prevent a vexatious interference with those rights.

By Regulation III. of 1828, sec. 4, cl. 5, it is enacted, that the rules prescribed by the existing Regulations, regarding a review of judgment by the Civil Courts, are to be held applicable to proceedings by the Special Commissioners in revenue cases; those rules are to be found in Regulation XXVI. of 1814, and in the 4th section. There has been much discussion at the Bar, as to whether the provisions contained in the 2nd clause of this section are applicable to the present case, or whether it falls within the operation of the 3rd clause. The 2nd clause directs that the petition for review shall be presented within three calendar months; this provision, however, admits of an exception, by providing that if the parties preferring the same shall be able to show just and reasonable cause for not having preferred such application within the limited period, such review will be allowed. It has been contended that if the Court, that is the Special Commissioner in this case, is satisfied, no further [306] inquiry can take place. But we think it clear that this argument cannot be sustained; for in the same clause the Courts are required to state at large their reasons for admitting such applications after the limited period: if they refuse the review, the decision of the Court below is final; if they admit it, it must be reported to the Sudder Court, and the Sudder Court may grant it if they think fit. It is manifestly clear, therefore, by the provisions of these two clauses, first, that to admit applications is not to grant a review; and, secondly, that all that they may do is examinable by the Sudder Court.

We are, however, of opinion, that the 2nd and 3rd clauses of this section must be read together, and that such of the substantial enactments of both as are in their nature applicable to the Court of the Special Commissioner, regard being had to its independence of the Sudder Dewanny Adawlut, must be held to have been applied

to it by the Regulation III. of 1828, sec. 1, cl. 5. We do not apprehend that a decree passed by Special Commissioners is to be subject in all respects to the rules applicable to a decree by a Zillah, City, or Provincial Court; and we think so, because the proceedings of the Special Commissioners are not subject to the cognizance of the Sudder Court; whereas, by the provisions of this Regulation, any Orders of the Courts specified, granting a review, must receive confirmation from the Sudder Court.

The construction which the Sudder Court has put on these Regulations, by framing its own procedure on reviews, by the provisions of the 2nd and 3rd sections viewed together, is also the construction which their Lordships think applicable to reviews of the judgments of the Special Commissioners.

[307] Whenever, therefore, a petition for a review of any judgment of the Sudder Court is presented after three months, it is indispensable that the party preferring such petition should, in the first instance, account for the delay.

The delay being satisfactorily accounted for, the review is to be granted, if, upon a consideration of the reasons stated, the circumstances of the case shall appear in justice to require it. We think that the true construction of these clauses is a consideration of the reasons stated in the petition presented for a review, and not of other reasons which might be suggested, but are not to be found in the petition.

To manifest the great care which the Government of India provided as a guard against improperly granting a review of a judgment, the Sudder Court is required to record on their proceedings the grounds upon which the review is granted.

We are of opinion that all the Regulations, applicable to the granting of a review by the Sudder Court of its decrees, are applicable to the proceedings of the Special Commissioners, in granting a review of their own decrees.

We have, therefore, in this case to consider two things: first, whether just and reasonable cause has been shown for the delay in presenting the petition for review; and secondly, whether the circumstances of the case, in justice, required it should be granted.

In order to prosecute our inquiry into these questions, we must look to the petition for the review of the decree of Mr. Moore and Mr. D'Oyly, presented on behalf of the Government on the 21st of September, 1847.

[308] We are unable, from a perusal of that document, to discover any satisfactory reason for the delay which has occurred; indeed, there is not to be found in this petition any attempt to state any reason why, looking to all the facts and circumstances as they existed at the time of the judgment of Mr. Moore and Mr. D'Oyly, the petition might not have been presented within the three months.

But true it is that circumstances might have come to the knowledge of the Government afterwards, which may at once justify the delay, and also the granting a review, because, giving a liberal construction to the Regulations of 1814, there might be cases in which fresh evidence would be admissible.

We are, however, of opinion, that for granting a review in the cases we have just supposed to exist, the causes accounting for the delay, and intended to justify the grant of a review, ought to be of grave importance.

Indeed, it is quite manifest that this must be so, or the litigation might be indefinitely suspended, and all the evils incidental to the uncertainty of the rights of property incurred.

Let us look again to the petition for review. The first statement is simply a denial of the correctness of the past decision. The first reason assigned is, that, on the 25th of August, 1842, Mr. Elliott and Mr. D'Oyly came to a contrary conclusion on similar premises. Assuming the fact to be so, and, for the moment, that it was good cause for asking for a review, it is manifest that such cause arose five years before the petition was presented, and there is not the slightest attempt to account for this delay. And, further, we are of opinion that, in a case of this description, the fact of two [309] Commissioners coming to a conclusion not altogether reconcilable with the prior decree of the Special Commissioners, is not a sufficient ground, after the expiration of so many years, for the granting a review.

The only other reasons to be extracted from this petition for a review are an impeachment of the grounds of the judgment of the 8th of March, 1842, with which

the parties must have been cognizant at the time, and, therefore, would be no excuse for delay; and a reference to certain proceedings had in the Foujdary Court. We are somewhat surprised that this last circumstance should have been introduced as a reason for a review: for we apprehend that the jurisdiction of that Court is confined to cases of possession, and that it is beyond their province to inquire into and ascertain the titles to landed property.

We derive no light from the decision of the Commissioner allowing this review; no further reason is assigned. Upon a consideration of all these proceedings, we have come to the conclusion that, in granting this review, the reasons assigned are wholly insufficient: that the requisites of the Regulations have not been complied with; that no just and reasonable cause has been shown for the delay in presenting the petition; and that that petition does not state any circumstances which, in justice, require the granting the review. It necessarily follows that if the review was granted without due regard to the Regulations governing such proceedings, it, and all that has been done under it, must fall to the ground. We shall, therefore, humbly advise Her Majesty to reverse the decree of the 8th of June, 1848, and to affirm the decree of the 8th of March, 1842: and, further, as imperatively required by justice, to condemn the [310] Government in all the costs incurred both in the Courts below and upon the appeal, in all the proceedings since the 8th of March, 1842.

We believe that a decree of this tenor will be in strict conformity with the Regulations which have the force of law in India, and, at the same time, may contribute to ensure a just confidence that these special jurisdictions, which in some degree displace the ordinary Tribunals of the country, will carefully observe those rules which have been prescribed to regulate their proceedings; rules which have been wisely introduced to guard against the possible abuse of authority, and a departure from which would be likely to produce distrust, and to defeat the principal objects of their institution.

[See *Forbes v. Amceroonissa Begum*, 1865, 10 Moo. Ind. App. 359; *Sheonath v. Ramnath*, 1865, 10 Moo. Ind. App. 423; *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 1868, 12 Moo. Ind. App. 185; *Luchmun Singh v. Shamshere Singh*, 1874, L.R. 2 Ind. App. 68.]

[311] MAHARAJAH HETNARAIN SING,—*Appellant*; BABOO MODNARAIN SING,—*Respondent* * [June 17, 18, 1859].

On appeal from the Sudder Dewanny Adaulut of Calcutta.

A deed of partition of a Zemindary between two brothers, carrying into effect a solunamah and family arrangement to put an end to litigation previously entered into by their father, and for a division of the family estates, upheld.

Such a deed can only be set aside upon strong evidence, either of mistake, inequality, undue influence, coercion or fraud.

This appeal arose out of a suit brought by the Appellant against the Respondent, in the Court of the Principal Sudder Ameen of Zillah Behar. The object of the suit was to set aside and cancel on the ground of fraud and deceit, a deed of partition executed in December, 1810, by the Appellant and Respondent, to give effect to a compromise and adjustment of family disputes, and to set aside an agreement for a division of the family estate, including an apportionment and division of estates at Patna.

* Present: Members of the Judicial Committee.—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

The circumstances under which the suit arose were as follows:—

The parties were brothers, the Appellant being the eldest, and the Respondent the youngest, son of Maharajah Mitterjeet Sing, the late Zemindar, who was [312] seised of the entire Zemindary. Family dissensions having arisen during the lifetime of Mitterjeet Sing, certain proceedings were instituted, and on an appeal to the Sudder Dewanny Adawlut, in a suit in which Mitterjeet Sing and the Appellant and Respondent were parties, a compromise was entered into, and a Razanamah and Ikrarnamah, dated the 7th of February, 1824, was filed by Mitterjeet Sing, which instrument was to the effect, that the real and personal estates held by him, after his death, was to be divided between the Appellant and the Respondent. The former was to take a nine annas share, and the latter a seven annas share. Partition deeds of the same tenor were also filed, and on the 4th March, 1824, the Sudder Court decreed, that the parties should act up to the terms entered by them in the above-mentioned instruments. Mitterjeet Sing died on the 3rd of October, 1840, when disputes immediately arose between the Appellant and the Respondent as to their respective portions of the estate of the late Mitterjeet Sing. The Revenue Commissioner of the Patna District having heard of the dissensions, recommended both parties to settle their disputes by an amicable arrangement, which was agreed to on the 24th of December, 1840, and accordingly, on the 30th of that month, a deed of partition of the Zemindary, as well also another deed of partition of some house property of the late Mitterjeet Sing, were executed by both parties in accordance with the terms of the original compromise. This latter deed was, however, not in dispute.

The Appellant at first was satisfied with the partition, but soon afterwards impugned the whole transaction, on the ground, that fraud had been practised [313] upon him in the division of the estate: and after proceedings before the Collector of the District in which the estate was situate, and objecting to the transfer of names, he brought the present suit in the Zillah Court of Behar, on the 3rd of August, 1849, against the Respondent, to set aside the partition of the Zemindary, alleging in the plaint that gross fraud had been practised upon him in the division of the property, and in preparing the partition deed, and also upon the grounds of inequality, concealment and fraud, and insisting that the deed of partition was on those grounds fraudulent and void. The answer of the Respondent stated, that the claim of the Appellant was unfounded, and set forth facts showing that the amicable adjustment and settlement, through the friendly intervention of the Commissioner, was consented to by both parties with a full knowledge of all the facts: and further stating that the deeds and instruments were all executed in the presence of the Commissioner and other witnesses, and were to be considered as part of one and the same transaction. The answer also set forth subsequent acts of the Appellant, which it was insisted operated as a confirmation of the partition. Witnesses were examined by the Appellant. The evidence in support of the Appellant's allegations was weak and unsatisfactory. Three of these witnesses were examined as to the alleged excess of the number of the villages, and the amount of produce of the entire Zemindary, but without proving any fraud or deceit on the part of the Respondent, or that the division and apportionment in the deed was different from that agreed to by the parties. Other witnesses were examined as to the Appellant having been ill previously to the execution of the deed of partition, but [314] without proving anything to lead to an inference even that he was not perfectly sound in mind and understanding, or that he was otherwise than fully capable of protecting his own interest when he personally attended before the Commissioner, and took part in the adjustment and settlement of the disputes between him and the Respondent, or when he executed the deed of partition. He did not examine any of the subscribing witnesses to the deed, or his dewans, or servants, who were engaged on his behalf in the examination of the Zemindary books and papers in preparing the list of the villages and the draft of the deed of partition, or any one who was privy to the division and apportionment of the villages or the principle and agreement on which such division was based and intended to be carried out by the parties to the deed. The fact of the due execution of the deed of partition and other contemporaneous deeds, and that the Appellant was of sound mind at the time of execution, as also the

participation of the Appellant and his agent in all the proceedings, was established by the evidence of the Respondent's witnesses.

On the 7th of June, 1847, Mr. William St. Quintin, the additional Judge of the Civil Court of Zillah Behar, before whom the case came, considered the deed valid and binding in every respect, and passed a decree in the Respondent's favour, dismissing the Appellant's claim with costs. The material part of his decree was as follows:—"The objections now raised by the Plaintiff to the deed in question, are, first, that he was deceived by the Defendant as to the real income and extent of the property under division; second, that the deed was exacted from him by the threats and undue haste of the Commissioner; and, lastly, that at the [315] time when he signed the deed he was too ill to know what he was about. It is in evidence that the details of this division of the property were drawn up by the agents of both parties, so that the allegation of deception on the part of the Defendant is untenable. Besides, if deception was practised, the Plaintiff ought to have discovered it during the time the affair was under negotiation, and before his seal and signature to a deed so complete in its legality as the one under review. The only threat on the part of the Commissioner which appears in the proceedings in the *Perwanah* dated the 24th of December, 1840, in which the Commissioner threatens a fine of Rs. 10,000 on the Plaintiff if he did not refrain from disturbing the public peace of the Raj. The Commissioner obtained the consent of the brothers to an amicable adjustment on the 24th of December, and the deed of adjustment was signed on the 30th of that month. The allegations of threats and undue haste on the part of the Commissioner is, therefore, untenable. Besides, on the 3rd of March, 1841, the Plaintiff addresses to the Commissioner his thanks for a *Khelut* and other titular distinctions about to be conferred on him by the Government, and takes the same opportunity to thank him for his amicable adjustment of the dispute between him and his brother, and to report that he has possession of his property in virtue of the deed of partition, having, between the date of his address to the Commissioner and the date of the deed of partition, brought to the notice of the Collector the frauds that had been practised upon him at the time of the division of the Raj. It is proved beyond doubt that at the time the Plaintiff signed this deed he was of sound mind and body. On the same day a second deed of partition [316] was drawn out in the same legal form, to divide the houses left by the late Maharajah; and to this deed no objection is urged by the Plaintiff."

The Appellant appealed from that decree to the *Sudder Dewanny Adawlut*, in which Court he again urged and relied upon in support of the appeal the allegation of the undue haste in which the deed of partition had been drawn up, and the imperfect manner in which, in consequence thereof, the division of the property had been affected.

The appeal was finally heard in the *Sudder Dewanny Adawlut* on the 24th of April, 1848, before Robert Haldane Rattray, Esq., one of the Judges of that Court, when that Judge affirmed the decree of the Zillah Court of Behar with costs.

The present appeal was from that decree.

The case of the Appellant was, that the deed of partition of the *Zemindary* did not carry out the arrangement of the 7th of February, 1824; that even supposing the proof of intentional fraud to fail, he submitted that the errors in the deed were so gross and so manifestly unjust in their operation upon his interest that it could not be upheld in a Court of Equity. The Appellant also urged that he was deceived as to the real value of the estates comprised in the division; that the matter had been concluded with undue precipitation, and that he was coerced by the threats of the Commissioner at a time when he was too ill to know what he was about, and to notice the fraud which was practised by the Respondent.

The Respondent, on the other hand, insisted that the Appellant had failed to prove the existence of any such grounds of objection. That, notwithstanding the [317] burthen of proving such charges lay on the Appellant, the Respondent had proved that the settlement was made *bona fide*, by and with the full knowledge and active co-operation of the Appellant, and that the deed of partition, as well as the other deed respecting the houses, were prepared by the agents of both parties acting together, and were deliberately executed by the Appellant with a full knowledge of their contents. Moreover, he insisted that the Appellant had shown by his

subsequent conduct and acts that he acquiesced in the deed and in the division and partition of the estate, and that he had so dealt with different portions of the property held by him under those deeds as now to prevent him putting the Respondent in the same position with respect to such property as he would have been in if the deeds had not been executed; and lastly, he insisted that the provisions of the deed of partition excluded a new division, Ben. Reg. XIX. of 1814.

Mr. R. Palmer, Q.C., and Mr. W. Field, argued the case for the Appellant; and Sir Hugh Cairns, Q.C., and Mr. Leith, for the Respondent.

Their Lordships' judgment was delivered by

The Lord Justice Knight Bruce (June 23, 1859). This is an appeal from a decision of the Sudder Dewanny Adawlut at Calcutta, confirming a decision of the Zillah Court of Behar, by which the Appellant's suit was dismissed with costs. That suit was instituted to set aside a deed of partition, which had [318] been executed by the Appellant, and his brother the Respondent, and which partition was, as to the shares of the brothers, based on a solunamah, or instrument of compromise of suit, ratified by the decree of the Sudder Court. This compromise was entered into in a suit in which the Appellant was the Plaintiff, and his father, Maharajah Mitterjeet Sing, and the Appellant's younger brother, Modnarain Sing, were the Defendants. That suit involved serious and important questions of difficulty concerning the partibility of and succession to the estates and property of the father, held by him in connection with his Raj, and his power of disposing of any part thereof by alienation in his lifetime. It involved also the validity of a donation by him to his son, Modnarain Sing, and a further question whether the Plaintiff had forfeited his inheritance by disgraceful conduct involving a loss of caste.

The Appellant had succeeded in the inferior Court, and from the decision of that Court the Maharajah had appealed. In the course of the suit, excommunications had been mutually made by the father and the son, and the litigation, had it proceeded, would probably have caused to the family much pecuniary loss and some disgrace. By the compromise, a family arrangement was effected, by which the father agreed to pay certain allowances to his sons respectively during his life, and they confirmed certain gifts of the father; he agreed to dismiss his appeal, and the sons agreed that Hetnarain Sing should, after their father's death, divide the ancestral as well as other property between himself and Modnarain Sing, in the proportion of nine to seven annas, the elder son taking the larger share. The Court acted on this instrument, dismissed the appeal, [319] ordered the costs of the Vakeels to be paid out of a moiety of the deposit, and the other moiety to be returned to the father, together with the stamp-money on the institution of the appeal. The partible nature of this estate, divisible in these proportions, stood, therefore, between these brothers on the footing of this compromise only. The instrument of compromise, though termed by Hetnarain Sing one of partition, contained no express provision for a partition; but that power flowed from the relation of joint-ownership in which they had agreed to stand.

After their father's death, the sons acquiesced in the instrument of compromise. It is immaterial to consider whether either could have disputed it, and whether anything had intermediately been done which entitled either, according to the law as administered in the native Courts, to recede from it. The disputes and litigation which subsequently ensued turned upon matters consistent with such acquiescence; each claimed the share of the estate which the compromise secured them, and these proportions had no other foundation.

The partition which took place, and which the suit of the Appellant seeks wholly to annul and set aside, was, in consequence of fresh disputes between the brothers, arising from their unfriendly feeling to each other, and their mixed enjoyment of the estate under such estrangement, suggested by Mr. Ravenshaw, the Revenue Commissioner for the District where the property was situate. It was a measure substantially in furtherance of the instrument of compromise. From the evidence of the respectable and wholly unimpeached witnesses who took part in the preparation of the partition deed under the direction of the Com-[320]-missioner, and, to some extent, under his own superintendence, it appears to their Lordships that the partition was prepared and settled with care and deliberation, without haste or precipitancy, and was executed by the brothers openly and publicly, without

restraint or coercion, and with full opportunity for inquiry; and on the part of both, with presumable competent knowledge, a presumption which is not rebutted.

The Appellant, in excuse of his own apparent negligence, (supposing his case to be as he states it,) alleges that he was sick at the time and incapable of attending to business; but his own temporary incapacity would not have extended to his competent agents and assistants in the work; and his own witnesses do not represent him as wholly incapable of acting in matters of business during this time, but, on the contrary, as occasionally taking part in the transaction of them. The alleged haste and precipitancy of the settlement, another explanatory cause which he alleges as conducive to the success of the deceit which he alleges to have been practised against him, is also disproved, in their Lordships' opinion, by the evidence as to the *factum* of the deed; and the alleged force upon him, which is said by him to have proceeded from the Commissioner, is altogether without proof. That the wishes and influence of the Commissioner may have operated upon the mind of the Appellant so as to induce him to join in the partition which the Commissioner applied himself to effect, is very probable; and that species of influence a dissatisfied party may readily transmute in his own mind into pressure and coercion. But their Lordships can find no evidence in the case of anything amounting to force or coercion [321] of the Appellant; and the letter of the Commissioner to the Appellant, on which so much stress was laid by Mr. Palmer in his reply, seems to their Lordships to bear really the meaning which the Counsel for the Respondent gave to it. It contains matter of suggestion; and the allusion to the Rs. 10,000, is an allusion to a species of recognizance not unknown in similar transactions, whereby a landed proprietor engages for the peace and good order of his Zemindary. If, then, there really were any gross inequality in the partition, and, as it is said, the 7 anna sharer really got in point of profit that which the 9 anna sharer should have received, so that their positions were in a manner inverted, their Lordships would in this case, under all the circumstances in proof of the participation in the transaction of the Appellant's own competent agents, be unable to ascribe the failure to negligence or mistake.

Corruption of such agents would be the more probable solution. But the case is abandoned on the ground of fraud; and the same weakness, indirectness, and argumentativeness of the evidence, which displaces that ground of charge, applies equally, if not in greater degree, to the ground of mistake, which can have no foundation, if the inequality of value be not established. Now, if this inequality really existed to any such extent as would have vitiated the partition, it is difficult for their Lordships to conceive that stronger and more direct proof of it could not have been given by the Appellant. He must have known, and have had the means of proving, his actual receipts soon after the partition: the actual value was capable of direct proof, yet he offered none of that character.

[322] The Courts in India are very particular in requiring the strictest proof when a deed prepared and executed as this has been, especially where it is one in furtherance of a compromise of suit, is sought to be set aside: a precaution which should never be relaxed, where the spirit of litigation has so little check, and so much wider means of mischief, than it has here. It appears, therefore, to their Lordships that the Courts below rightly dismissed the suit, and that it would be of dangerous consequence to allow a deed of this nature to be impeached on evidence no stronger than that which this case presents.

The view which their Lordships have taken of the evidence as to value, renders it unnecessary for them to express any opinion on the other parts of the case. They have no hesitation in recommending to Her Majesty to dismiss this appeal, with costs.

[323] PRANNATH ROY CHOWDRY,—*Appellant*: ROOKEA BEGUM, SYED AMAN ALLY, and RAM RUTTON RAE.—*Respondents* * [July 7 and 8, 1859].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A Bye-bil-wuffa, or Kut-kubala (mortgage or conditional sale), is redeemable like an ordinary mortgage, and is subject to foreclosure.

When a mortgagee seeks to foreclose, he must effect that object according to the mode prescribed by Ben. Regs. III. of 1793, sec. 14; II. of 1803, sec. 3; and XVII. of 1806, secs. 7 and 8 [7 Moo. Ind. App. 358].

The pendency of litigation as to the ownership of the equity of redemption, between the heirs of the mortgagor and a party claiming as purchaser, is a "good and sufficient cause" within the exception to the operation of the Ben. Reg. of limitation, III. of 1793, sec. 14, why a mortgagee should not have instituted proceedings for foreclosure, within twelve years, the time prescribed by that Regulation [7 Moo. Ind. App. 357].

The service of notice of foreclosure on the occupant of the mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title), does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises.

Payment into Court of the mortgage-money by the occupant of the mortgaged property, accompanied with a protest and a threat of legal proceedings to recover the amount paid into Court, is not a good tender, or such a tender as is contemplated by the Ben. Reg. XVII. of 1806, Secs. 7 and 8.

Section 7 of Ben. Reg. XVII. of 1806, provides for the equitable right of redemption "to the mortgagor and the owner of such property, or his legal representative." Whether a tender of the mortgage money and interest by a stranger, though in possession of the mortgaged property, is a good tender. *Quære?*

When a case is brought by appeal before the Sudder Dewanny Court, the whole cause is before that Court, although the appeal is limited to a single issue.

A cross appeal is not necessary.

This suit was brought to obtain possession of a dwelling-house, land and premises, which had been [324] foreclosed by the Appellant in giving effect to two deeds of conditional sale and mortgage, called deeds of Bye-bil-wuffa, or Kut-kubala. The principal question raised was, whether the suit was barred by the Regulations of limitation III. of 1793, sec. 14, and II. of 1805, sec. 3, cl. 3 and 4. The Sudder Court held, that as there had been twelve years' possession by one of the Respondents, Ram Rutton Rae, the suit of the Appellant was barred.

The suit arose under these circumstances:—

Meer Sydoo and Noor Jehan his nekahee wife, were, in 1825, in the possession and enjoyment of a house and land, part of the premises in question, situate in the village of Cossipore, in the suburbs of Calcutta, under a pottah made out in the sole name of Noor Jehan.

On 23rd of March, 1825, Meer Sydoo and Noor Jehan jointly borrowed of the Appellant the sum of S. Rs. 4001 in cash, and at the last-mentioned date jointly executed and delivered to him a Kut-kubala or Bye-bil-wuffa (deed of conditional sale) in the following form:—"To the high in dignity, Baboo Prannath Chowdry. This mortgage deed, or Kut-kubala, of the land and garden house, held under a Khirajee-pottah (rent lease), is executed in the year 1231, by Meer Sydoo and Bebee Noor Jehan, nekahee wife of the said Meer, inhabitants of Cossipore. In the village of Cossipore within the jurisdiction of Dihee, Punnahannogram, is our dwelling-house, with the garden measuring 14 beegahs and 7 cottahs of land, the annual rent of which is Rs. 38. 10a. 18g. Having mortgaged the said garden house and jumma lands, with the appurtenances, to you, we have received Rs. 4001,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

as a loan [325] through Ranchunder Bose, of Cossipore, on which we will pay interest at one rupee per mensem; the term of payment of the money is three years, from the date of the deed of mortgage, that is, up to 11 Cheyt, 1234. We shall pay the whole of the money with interest at once within this term. If we do not pay the money with interest at once within the term, the sale of the said land, with the appurtenances, will become absolute on the day after the expiration of the term for the said amount, as consideration money, and you being in possession of the said land after the expiration of the term, and having obtained a pottah in your own name, shall, with your descendants, enjoy the proceeds by paying the Government Revenue. The right of alienating the said lands, either by gift or sale, will rest with you: we shall have no claim or objection. Any deed of payment of money produced by us, other than that of redemption of mortgage, by repayment of the money at once, is null; and if the money should have to be paid by the sale or mortgage of the said land, it will be sold to you at a reasonable rate, or mortgaged, if it will have to be mortgaged. If we sell or mortgage to anybody else, it will be null and void. We or our heirs shall never raise any objections in violation of these terms; and should we do so, they will be false and null. Having received the said amount of Rs. 4001, from hand to hand in ready money, we have of our free will executed this mortgage deed, or Kut-kubala. Dated the 11th Cheyt of the aforesaid year."

Some time afterwards, and on the 4th of May, 1825, Meer Sydoo and Noor Jehan borrowed a further sum of S. Rs. 1000, from the Appellant; and at the same time respectively executed and delivered to him [326] another Kat-kubala, to secure by a like conditional sale of the same dwelling-house, land and premises mentioned in the first Kut-kubala, the repayment to him of the further sum borrowed, together with interest at the same rate, and at the same date (namely, 11 Cheyt, 1234), subject to the like terms and conditions as those respectively specified in the former instrument.

On the 25th of May, 1825, Meer Sydoo died, leaving Noor Jehan surviving, and also two minor sons, Meer Imdad Ally and Meer Looft Ally, who were his heirs, and who were born to him by his regular married wife, Jeena Begum. Meer Imdad Ally died in the year 1826, leaving Furkh-oon Nissa, his wife, and Meer Looft Ally, his brother, joint heirs, him surviving.

On the 3rd of July, 1827, Noor Jehan, not being able to manage her property and payment of her debts, by a deed appointed the Respondent, Ram Rutton Rae, her Mookhter, or attorney, for those purposes. Among other debts mentioned in the mookhternameh was the mortgage debt due to the Appellant, under the above-mentioned deeds, which Ram Rutton Rae was directed to pay off. The Respondent, Ram Rutton Rae, accepted the office of Mookhter, and took upon himself the duties thereof.

On the 28th of November, 1829, Looft Ally died, leaving Rookea Begum, his late father's sister's daughter, and Furkh-oon Nissa, since deceased, and Noor Jehan, his stepmother, his joint heirs, him surviving. Afterwards, on the 6th of February, 1830, Noor Jehan also died, leaving the Respondent, Rookea Begum, her sole heir, without having paid off by herself or through her Mookhter any part of the principal [327] or interest due to the Appellant under the two Kut-kubalas.

Rookea Begum and Furkh-oon Nissa afterwards executed a Kubala in favour of the Appellant, acknowledging the mortgage debt.

Quarrels took place between the respective heirs of Meer Sydoo and Noor Jehan, which led to summary proceedings being had under Ben. Reg. XV. of 1824, before a Magistrate, respecting the right and possession thereof. Ram Rutton Rae in these proceedings set up two unregistered Kubalas, or deeds of sale, alleged by him to have been executed respectively by Noor Jehan in his favour, on the 5th and 9th of January, 1830, and claimed to be put into possession as a purchaser for valuable consideration, of the dwelling-house, land, and premises, together with all other lands and premises of Noor Jehan. On the 19th of May, 1831, the Magistrate made an order, awarding possession of the dwelling-house, land and premises, as well as the other property, to Ram Rutton Rae, at the same time referring the other parties to a regular suit for the determination of their respective rights.

Accordingly, on the 30th of August, 1832, Rookea Begum and Furkh-oon Nissa,

brought a suit against Ram Rutton Rae, in the Provincial Court of Calcutta, to recover possession from him of 26 beegahs 15 cottahs of land, dwelling-house, orchard and bazaar, which included the dwelling-house, land and premises so conveyed by the two deeds of conditional sale to the Appellant. The Plaintiffs claimed under a hibbanameh, or deed of gift, alleged by them to have been executed by Noor Jehan in favour of Meer Imdad Ally and Looft Ally.

[328] The answer of Ram Rutton Rae in this suit, denied the validity of the execution of the hibbanameh set up by the Plaintiffs, and stated that the whole property in suit was exclusively acquired by Noor Jehan, and that the late Meer Sydoo had no right or title thereto, having had only the superintendence and management thereof given to him by the former as his nekahee wife: that she in 1829, for the liquidation of the claims of creditors, had sold to him (Ram Rutton Rae) the whole of the property, and having executed two Kubalas, gave them to him, and took the entire amount of the purchase-money from him, putting him in possession of the property.

The Appellant intervened as a party to protect his rights as mortgagee, and in his petition stated that the money secured had not been paid to him; and prayed that he might obtain his rights in that suit.

On the 8th of September, 1836, the original suit came on for hearing in the District Court of the Twenty-four Pergunnahs, when the Judge by his decree declared that the property in litigation had been acquired by Noor Jehan, and that Meer Sydoo had no right or title to it, and that the hibbanameh was fabricated; but that even if it were a genuine document, the same (according to the futwa of the Moulvie of the Court) being an undefined gift was invalid by the Mahomedan law. The Court moreover considered that the two deeds called Kubalas set up by Ram Rutton Rae, and his possession under them, was proved, and dismissed the suit, reserving the right of the Appellant to bring a separate suit in respect of his two deeds of conditional sale. The Plaintiffs appealed from that judgment to the Sudder Dewanny Adawlut. The Appellant again intervened: and, [329] on the 21st of September, 1840, judgment was pronounced in the appeal by Mr. Lee Warner against the hibbanameh, on the ground that it was invalid by the Mahomedan law; and he declared and decreed that the 14 beegahs 7 cottahs of land held under pottah was the exclusive property of Noor Jehan, and which she had a right to alienate; and that the rest of the land and premises in suit belonged to the late Meer Sydoo. The Judge also declared that the fraud and collusion of Ram Rutton Rae was evident in respect of the two Kubalas, alleged by him to have been executed in his favour by Noor Jehan, when he was her Mookhter, as she was of great age, and had lived only a few days after the dates of their alleged execution. As to the Kut-kubalas of the Appellant, the Judge declared them to be, apparently, just, but that no Order could be passed relative to them further than that whatever were the Appellant's rights, they should not be prejudiced by that judgment; and that whatever might be due to him, he had a right to recover whether by compromise or suit.

The proceedings were then carried through various stages, and ultimately appealed to the Privy Council (see 4 Moore's Ind. App. Cases, 233), and by a final decree it was declared that Ram Rutton Rae having been put by the Court in India in possession of the property in dispute, and the Respondents having been directed to bring a civil suit to assert their claim in such property, and having brought this suit accordingly, it was incumbent on the Respondents to prove some title to the land and premises before Ram Rutton Rae was called upon to make out his title; and their Lordships further declared that it appeared that the deed of possession set up by the [330] Respondents in favour of the sons of Meer Sydoo was a fabricated deed, and that the Respondents had no title, under such deed, to such property as belonged to Noor Jehan; and their Lordships further declared that as to the lands in the name of Meer Ghazee, the then Respondents had shown no title to such lands; and their Lordships further declared, that as to the 5 beegahs and 8 biswas in the name of Meer Sydoo, they appeared to have been purchased on account of Noor Jehan: their Lordships were, therefore, of opinion, that the decree complained of ought to be reversed, and the possession restored to Ram Rutton Rae, but that it ought to be declared that their decree was entirely

without prejudice to any question as to the validity of the deeds under which the Appellant claimed, as between him and any persons claiming under Noor Jehan.

The original suit being then finally put an end to, the Appellant took steps to enforce his rights under the two deeds; and being desirous of foreclosing all mortgage rights in respect to the dwelling-house, land and premises, and of rendering the conditional sale to him absolute, under the provisions of Ben. Reg. XVII. of 1806, sec. 8, on the 9th June, 1848, he instituted the necessary foreclosure proceedings, by presenting a petition to the Judge of the District of the Twenty-four Pergunnahs; and, at the same time, filed in the Court of that Judge the two Kut-kubalas.

The Judge on receiving the petition on the 24th of June, 1848, issued his Perwannah, notifying, in terms of the Regulation, that if the property mortgaged to the Appellant was not redeemed in the manner provided by the 7th section of that Regulation, within one year from the date of notification, [331] the mortgage would be finally foreclosed, and the conditional sale would become conclusive. The Perwannah, accompanied by a copy of the petition, was served by the order of the Judge on each of the Respondents.

Before the expiration of the period given for redemption, namely, the 11th of June, 1849, Ram Rutton Rae took upon himself to deposit in Court the principal and interest due to the Appellant, amounting to Rs. 11,426. 14. 2. The deposit was accompanied by a petition from Ram Rutton Rae, in the nature of a protest against the mortgage deeds of the Appellant being considered valid, and also against his own voluntary payment and deposit thereunder, and also against the validity of the foreclosure proceedings; and the petition concluded with a declaration that he would institute a regular suit for the recovery of the sum of money which he then tendered in payment to the Appellant.

On the 7th of July, 1849, the Appellant presented a petition, submitting two grounds for his refusal to accept the money deposited: first, that Ram Rutton Rae had no interest whatever in the property under foreclosure, and, therefore, being a stranger, had no right to make the tender so as to entitle him to the equitable right of redemption which was only given to certain specified parties by the above Regulation; and secondly, even if otherwise, that the deposit being accompanied by the protest and threat, was the same as if he had made no deposit at all, not being a legal tender under the terms and special conditions prescribed by the Regulation.

The mortgage premises became finally foreclosed on the 25th of June, 1849, and the conditional sale [332] to the Appellant made absolute; no other tender of any other party having been made.

On the 17th of September, 1849, notwithstanding the time for making the tender had been expired, Ram Rutton Rae filed another petition, stating that he had made no objection to the money being paid over to the Appellant; but the money thus deposited was returned to Ram Rutton Rae under a proceeding of the Judge.

In consequence of the foreclosure having been effected and the proceeding closed, the Appellant then brought a suit to recover possession under the foreclosure of the dwelling-house, garden, and of the 14 beegahs 7 cottahs of land included in the two Kut-kubalas, together with mesne profits, from Ram Rutton Rae. The plaint was filed in the Zillah Court of the Twenty-four Pergunnahs, and the Respondents, Rookea Begum, as heiress-at-law of Noor Jehan, Syed Aman Ally, heir-at-law of Furkh-oon Nissa and Ram Rutton Rae, were made Defendants. The plaint charged fraud against Ram Rutton Rae in setting up the two Kubalas and possessing himself of the mortgage premises, and stated that the Magistrate under his summary proceedings had awarded possession to him of the same, and the other portions of Noor Jehan's landed property, under the false statement of a purchase from her and by means of the fictitious deeds of sale. The plaint also stated the proceeding and decrees in the original suit, and charged with reference thereto, that the Appellant's two Kut-kubalas had been produced and proved; the plaint further stated the subsequent proceedings which ended in the final foreclosure of the mortgage premises as aforesaid, and concluded with a prayer for possession together with the mesne [333] profits from the date of suit to the date of recovery of the premises, besides interest and costs of suit.

The answer of Ram Rutton Rae set up and pleaded his two alleged Kubalas as

the foundation of his title to the land and premises in suit, stating that they were respectively executed by Noor Jehan on the 23rd and 27th Poos, 1236, and that he had obtained possession of the land and premises in suit, as well as of her entire property; that his purchase and possession having been proved, the Magistrate had confirmed his possession thereof, which Order had been affirmed by the Commissioner, and that his right had been established by the decree of Her Majesty in Council in the original suit. The answer then pleaded the Regulation of limitation III. of 1793, sec. 14, as a bar to the suit; that being in possession for about twenty years from the date of his purchase, namely, the 23rd and 27th Poos, 1236, no claim could accrue either to the Plaintiff, or his alleged mortgagors, after the lapse of so long a period of time, as the suit was barred by limitation of time under the provisions of section 14, of Ben. Reg. III., of 1793. The answer further charged that the period of limitation also applied to the foreclosure effected by the Plaintiff, and that the same could not be valid because it was not effected within twelve years from the time stipulated for the repayment of the mortgage money; and that also the two Kut-kubalas of the Plaintiff had become null and void by reason of the agreement of purchase and sale entered into by him with Rookea Begum, and Furkh-oon Nissa, and further, that the late Noor Jehan, after the expiry of the term of the Kut-kubalas, went with the money in her hands, and repeatedly prayed the Plaintiff to receive [334] the sum due to him and return the documents; and that on Plaintiff's refusal, she, on the 17th Poos, of the year 1236, filed a petition, on which a notice was issued in the Plaintiff's name; that seventeen or eighteen years having elapsed from that date, the limitation applied. And it was also pleaded in the answer, that the Defendant had deposited the amount of principal and interest in the Judge's Court in the foreclosure suit, with a petition of objections against the validity of the foreclosure proceedings; but that the Plaintiff had refused to accept the money deposited, and the Judge had returned the same to him; and it was lastly stated and charged by the answer, that Rookea Begum was not the daughter of Noor Jehan's brother, and, therefore, not the heir of Noor Jehan.

The other Defendants did not appear, or take any part in the suit.

The replication stated that Ram Rutton Rae was fraudulently and unjustly in possession of the disputed property, and that the plea of limitation could not be entertained, for that there was no rule that the petition of foreclosure would not be valid if not filed within twelve years; that in such a suit, where there has been foreclosure, the rule of limitation did not apply if the suit for possession thereunder has been brought within twelve years from the date of foreclosure; and that as to sec. 14, Ben. Reg. III. of 1793, if it applied at all, the Plaintiff was within the exception contained in it. The replication also re-asserted the fact stated in the plaint, that Rookea Begum was the heiress-at-law of the late Noor Jehan, and that there was a sufficient legal promise to pay the mortgage debt made by her within twelve years of the commence-[335]-ment of the suit, which appeared in the Kubala, executed by her and the late Furkh-oon-Nissa in favour of the Plaintiff, so as to bring this case within the exception in the Regulation of limitation; the Plaintiff denied that any tender of the mortgage debt had been made to him by Noor Jehan, or that she had ever to his knowledge filed any such petition as alleged; and he also denied that the alleged notice had been served on him, pointing out that the probabilities were all against such a supposition; and lastly the Plaintiff stated that as the mortgage money had not been paid, according to rule within the period of foreclosure, the sale had become absolute, and that the heirs of the original mortgagors had not appeared, or made any objections in the foreclosure proceedings in this suit; and he insisted Ram Rutton Rae was to be considered a stranger to the proceedings.

By a proceeding of the Principal Sudder Ameen of the Twenty-four Pergunnahs, the following issues were fixed:—Pleas in bar of the hearing of the suit. First. If foreclosure has been affected after the lapse of twelve years from the period fixed for repayment of the amount entered in the Plaintiff's alleged deed of conditional sale, will the law of limitation apply? Secondly. If the Defendant has been in possession of the disputed property in right of purchase more than twelve years, will the law of limitation apply to the Plaintiff's claim for possession of the property or not? Thirdly. If in lieu of the Plaintiff's Bye-bil-wuffa or Kubala, a

second deed of sale of the property having been executed, the same (namely, Bye-bil-wuffa) has been set aside, can the Plaintiff again [336] on the strength of the Bye-bil-wuffa bring the present action or not? Fourthly. The deceased, Noor Jehan, having put in a petition in Court depositing the amount due to the Plaintiff under his alleged Bye-bil-wuffa, and notice thereof having been served on the Plaintiff, is the present suit of the Plaintiff, instituted twelve years thereafter, valid or not? Fifthly. Did the Defendant, Ram Rutton Rae, file his petition relative to the deposit of the amount due under Plaintiff's Bye-bil-wuffa with or without protest? If the deposit was made without protest, is the Plaintiff's present action valid when he has refused to receive the money? Issues on the merits. First. Whether or not Plaintiff is entitled to possession of the disputed property in virtue of the foreclosure! and was Rookea Begum the heir of Noor Jehan, and was Furkh-oon Nissa the heir of Meer Sydoo or not? Second. Is it true as pleaded by the Defendant, Ram Rutton Rae, that he purchased the disputed property from the deceased, Noor Jehan! if true, can that circumstance affect the Plaintiff's claim or not?" Subsequently, on the petition of the Appellant, an additional issue was added, namely, whether a deposit made by a person not the mortgagor, or his legal representative, or by an uninterested third party, such as the Respondent, Ram Rutton Rae, could be held to be a deposit so as to affect the foreclosure of the mortgage?

Evidence was gone into, but the two Kubalas were not produced or proved by Ram Rutton Rae. He examined two witnesses, with a view of proving that Rookea Begum was not the heiress of Noor Jehan, and that she had died without leaving any heir; and also to prove that Noor Jehan, only a few [337] months before her death, had gone to the house of the Appellant and offered payment of the mortgage debt.

The hearing of the suit took place on the 12th of May, 1852, and judgment was then pronounced by the Sudder Ameen. This judgment was to the effect—First, that the Regulations of limitation did not apply to the suit, as no rule could be produced which declared that the petition of foreclosure under Reg. XVII. of 1806, should be filed within twelve years from the date fixed for repayment of the mortgage money; while section 8 of that Regulation rather distinctly ruled that it might be filed at any period subsequent thereto if the mortgage money had not been paid. Secondly, that even if the rule of limitation was applicable, that there were with regard to the present suit several good and sufficient grounds for delay in filing the petition of foreclosure, and that the case was brought within the exceptions to that law. Thirdly, that the foreclosure had not been affected because Ram Rutton Rae had deposited in Court the whole amount due under the deeds of conditional sale within the proper period; and that, although the deposit was made under protest, the same or any other objection against the mortgage made by him at the time would not invalidate such deposit, which he prayed might be paid to the Plaintiff, who had refused to accept it, and because he was served with notice of foreclosure, and even if he had not been served, that he was competent to deposit the money, and so prevent the foreclosure in accordance with a precedent of the Sudder Dewanny Adawlut, of the 1st of September, 1847. Fourthly, that the Plaintiff's two Kut-kubalas became necessarily null and void by the [338] execution of the Kubala of 27 Maugh, 1247, agreeably to a precedent of the Sudder Dewanny Adawlut, of 28th of February, 1834. And lastly, that the consideration and decision of the remaining issues appeared to the Court to be unnecessary. It was, therefore, ordered that the suit be dismissed, and that the costs of Ram Rutton Rae, with interest from the date of judgment, be paid by the Plaintiff.

The Appellant appealed therefrom, so far as related to the points therein decided against him, to the Sudder Dewanny Adawlut, at Calcutta.

Ram Rutton Rae did not present any cross appeal from the above judgment, in respect of the issues therein decided against him.

The hearing of the appeal took place before three of the Judges of the Sudder Dewanny Adawlut, on the 9th of January, 1854. It was then proposed by the Court that they should hear and determine in the first instance the two following issues, involving the consideration of the two several Regulations of limitation, III. of 1793, sec. 14, and II. of 1805, sec. 3. First issue—"Whether the enforcement of the foreclosure and claim of the Plaintiff (the Appellant) was not barred by the law of limitation, as more than twelve years had elapsed since the date on which the con-

sideration mentioned in the deed of conditional sale was promised to be paid." Second issue—"Whether law of limitation did not apply to the Plaintiff's suit, in case it was proved that Ram Rutton Rae, Defendant, was in possession of the disputed property from upwards of twelve years."

An objection to this course was taken by the Counsel of the Appellant, who submitted as the grounds of that objection, that the Court below had [339] decided the points and issues raised under the law of limitation against the Respondent, Ram Rutton Rae, and that he had not either appealed against that decision according to the rule and practice of that Court, or even filed the ordinary answer to the Appellant's reasons of appeal, and that the case came, therefore, before the Court purely on the points specifically raised by the Appellant.

Two out of the three Judges, Messieurs Dunbar and Colvin (the third Judge, Mr. Dick, being dissentient), overruled the objection, and directed the issues raised for the Respondent, Ram Rutton Rae, and in bar of the suit to be first argued. This was accordingly done, and with respect to the first of two last mentioned issues, two of the Judges, Messieurs Dick and Dunbar (Mr. Colvin being dissentient) decided that the admission contained in the Kubala executed by Rookea Begum, and the late Furkh-oon Nissa, in favour of the Appellant, was such an admission of the mortgage debt as was contemplated in sec. 14, Reg. III. of 1793, being coupled with a promise of payment of the same on a contingency which could not be fulfilled, and that this gave him a right of suit against the alleged heirs of the original mortgagors, and against any parties in possession of the property mortgaged. On the second issue, the point of limitation based on Ram Rutton Rae's alleged undisturbed possession of upwards of twelve years under Reg. II., 1805, it was held by two of the Judges, namely, Messieurs Dunbar and Colvin, to constitute an effectual bar to the suit, and they recorded the following judgment:—"On the second issue of the Respondent, it has been argued that the Respondent is the representative of the mortgagors, and that, therefore, the suit [340] if good against them is equally so against him; but he holds by another title than that which the Appellant sets up in this suit, and in fact throughout the whole course of previous litigation has set up a title opposed to that of the alleged heirs of the mortgagors. Of this the Appellant was cognizant, and should, if he had any claim against the Respondent, have brought it within twelve years from the date of his possession. Therefore, although it has been above ruled by a majority of the Court that the Appellant is not barred from preferring a claim on the ground of the original deed of mortgage, yet as the Respondent is an entirely distinct party, and has held possession under his own adverse title for more than twelve years, such claim cannot lie either against him, or the land in his possession. We uphold the order of the Principal Sudder Ameen, and dismiss the appeal with costs."

The third Judge, Mr. Dick, dissented from this judgment, and recorded his opinion as follows:—"On the second issue of the Respondent, Reg. II. of 1805, sec. 3, cl. 1, is merely a law declaratory of exceptions to the law of limitation, sec. 14, Reg. III. of 1793, and has reference solely to who may be sued. The original law of limitation, sec. 14, Reg. III. of 1793, on the contrary, refers solely to who may sue, and provides that under certain circumstances a suit may be instituted, and will lie without any exception as to the party to be sued or the property sued for. One of those circumstances is, that the complainant be able to prove that from good and sufficient cause he was precluded from sooner obtaining redress. In this case the Appellant has shown that the Respondent's ostensible possession dates from the Magistrate's Order of 1831, and that from 1832 to 1847 a suit was [341] pending in the Courts of Justice between the heirs of his mortgagor and the Respondent, Ram Rutton Rae, the party in possession of the property pledged to him. In 1849, he instituted this suit against both those litigants: I hold, therefore, that he was justified in not suing while that suit was pending between the very parties whom he would have sued. He did enough by presenting a petition that his claim might not be prejudiced by any decree passed therein. A suit by him in the interim would have been superfluous and litigious, as against the heirs of his mortgagor, who admitted his right; and nugatory as against Ram Rutton Rae, the party in possession, for no decision could have been passed until the final decision in the pending suit between those parties. Thus I think Appellant has shown such good and

sufficient cause for his delay, as was contemplated in sec. 14, Reg. III. of 1793, and enough to satisfy the requirements of justice."

The decree of the Sudder Dewanny Adawlut, founded on the judgment of the majority of the Court, ordered that the appeal be dismissed with costs.

The present appeal was from this decree.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—First. This case is on all fours with *Rajah Enayet Hoossein v. Sayud Ahmed Reza* (ante [7 Moo. Ind. App.], p. 238), the facts of which are similar. We submit, upon that authority, that the suit was not barred under Ben. Reg. II. of 1805, sec. 3, by the alleged twelve year's undisturbed possession of Ram Rutton Rae, as the possession relied [342] upon by the Sudder Court was not undisturbed, but was all along contested and the title on which it was founded the subject of continued litigation, *Ram Rutton Rae v. Furrookunnissa* (4 Moore's Ind. App. Cases, 233). This litigation began in a suit in the Zillah Court, and concluded by a decree of Her Majesty in Council; it involved the question of title to the whole of the land and premises claimed by the Appellant under the deeds of conditional sale, and prevented him from proceeding under the deeds for foreclosure and possession, the litigants being, on the one hand, the heirs of the parties who made and executed these deeds, suing as Plaintiffs, and on the other part, the Respondent, Ram Rutton Rae, who was Defendant, being then in possession under a summary Order of the Magistrates, made under Ben. Reg. XV. of 1821, in consequence of the quarrels which had taken place on the death of the survivor of the parties who executed these deeds. Ram Rutton Rae, the Defendant in that suit, claimed title directly from the survivor under deeds of sale made subsequently to the date of the deeds of conditional sale in question. While that suit was pending, the Appellant intervened as a third party to protect his rights as mortgagee. His rights were, however, not adjudicated upon in that suit, but his right to sue was reserved to him by each of the decrees pronounced therein, including the judgment of the Privy Council. This latter decree decided against the deed of gift set up by the Plaintiffs in that suit, but did not determine the validity of the alleged deeds set up by the Respondent, Ram Rutton Rae. It was unnecessary to do so, as the Plaintiffs had failed in proving their title. It [343] was expressly declared by Lord Brougham in giving judgment, that the decision was entirely without prejudice to any question as to the validity of these deeds, and any persons claiming under Noor Jehan, deceased, who was one of the parties who had executed the two deeds in favour of the Appellant (4 Moore's Ind. App. Cases, 263). There is no rule of law which creates an absolute possessory title on a twelve years' undisturbed possession, even if there had been such. But here the possession was not undisturbed, but was the subject of continued litigation. The Appellant has brought himself within the exception provided by sec. 14 of Ben. Reg. III. of 1793, by proving the former suit and continued litigation from 1832 to 1847.

Secondly. The deposit made by Ram Rutton Rae under the foreclosure proceedings, was no tender in law; as in the first place it was not absolute but restricted, and rendered nugatory by the protest which accompanied it, namely, that that Respondent would immediately bring an action against the Appellant to recover the same if accepted and taken out of Court by him. But, further, the terms of the equitable provision containing in Ben. Reg. XVII. of 1806 extending the period of redemption beyond the actual time agreed to between the parties for the conditional sale becoming absolute, expressly confined the benefit thereof to the mortgagor, or owner, and his representatives. Ram Rutton Rae having failed to bring himself within these terms ought, therefore, to have been considered and treated as a mere stranger, and, as such, not entitled to make a deposit to prevent foreclosure. *Gopaul Lal v. Maharajah Pitunber Singh* (3 Ben. Sud. Dew. Reps. 54). The mortgagor or his heirs only can sue the mortgagee [344] for an account and redemption. *White v. Parnter* (1 Knapp's P.C. Cases, 229), *Troughton v. Binkes* (6 Ves. 572), *Rochfort v. Battersby* (2 H.L. Cases, 388). The Zillah Court ought, therefore, to have decreed for the Appellant, and not in favour of Ram Rutton Rae. That Court held that the Regulations of limitation did not bar the suit, as under Ben. Reg. XVII. of 1806, sec. 8, a petition for foreclosure might be filed after twelve years, if the mortgage money had not been paid or duly tendered. The deeds of conditional sale of the Appellant were not affected by the subsequent deed of sale by the Respond-

ents, Rookea Begum and Furkh-oon Nissa, nor could they operate to prevent him from pursuing his remedy to enforce his rights.

Thirdly. The decree appealed from is wrong, as the Sudder Court ought not, by the practice of that Court, to have entertained the question of limitation, decided by the Zillah Court in the Appellant's favour, when the decree upon that issue was not appealed from by Ram Rutton Rae.

Mr. Forsyth, Q.C., and Mr. W. Field, for the Respondent, Ram Rutton Rae.—Upon the first point we submit that the Appellant's suit was barred by Ben. Regs. III. of 1793, sec. 14, and II. of 1805, sec. 3, which prevented him from proceeding to foreclose the parties entitled to redeem, the cause of action having arisen twelve years before any suit had been commenced. The expiration of the term of payment of the mortgage debt was cause of action under Ben. Reg. III. of 1793 sec. 14. Macpherson On mortgages, pp. 13, 31, 186. Elberling, sec. 146. The [315] only ground relied upon by the Appellant to take the case out of the operation of that section is that there was a good and sufficient cause, by reason of the pending suit respecting the title of the heirship to the mortgaged property, and that the Appellant was precluded by the fraudulent deeds set up by certain parties. That suit, however, did not afford the means of ascertaining who were Noor Jehan's heirs. Ram Rutton Rae has had undisturbed possession for upwards of twelve years under a *hona fide* title, subject, it is true, to an equity to pay off the mortgage, and unless fraud be established such possession under Ben. Reg. II. of 1805, is a bar to the suit. *Hurroo Shah v. Tootum-ool Ruheem* (a). Macpherson On civil procedure, p. 76 (Edit. 1850). The question of fraud is not pleaded or put in issue. Lord Kingsdown: The second issue on the merits, raises the question of purchase. Does not that put the question of fraud in issue?—The deeds of purchase were produced in the original suit.—[Sir Lawrence Peel: You say you purchased subject to the mortgage: is it not a question of fact whether you gave a full consideration?—Ram Rutton Rae was not in possession as trustee; we discarded the trusteeship. There was an equity to pay off the mortgage, and he came in and offered to pay the money. *Rajah Enayet Hosssein v. Sayud Ahmed Reza* (ante [7 Moo. Ind. App.], p. 238) is no authority and does not apply in this appeal. There the suit was supplementary to a former decree, which distinguishes it from the present case.

[346] The next point is the effect of the foreclosure on the suit, which the Appellant instituted for possession; for this is not a suit for foreclosure, but a suit for possession only. Macpherson On civil procedure, p. 38: it must be assumed that a foreclosure had been obtained. Ben. Reg. I. of 1798, sec. 1, was passed to prevent frauds on the part of mortgagees evading the receipt of the mortgage debt, to get possession of the mortgaged premises. Ben. Reg. XVII. of 1806, secs. 7 and 8, point out the course of proceedings to be pursued by the mortgagee, under a *Bye-bil-wuffa* like the present, when desirous of foreclosing the mortgage and making the conditional sale absolute. Section 8 enacts that the mortgagee is first to demand payment from the mortgagor, or his representative and to apply to the Judge of the Zillah where the property is situate, who is to cause the mortgagor or his representative to be served with a notice that if he does not redeem within a specified time the mortgage will be finally foreclosed, and the conditional sale become absolute. Under this head two principal objections arise as to the regularity of the proceedings, both of which we submit are fatal. First, the heirs of Noor Jehan have not been served. The Respondents, Rookea Begum, Syud Aman Ally, or Ram Rutton Rae, are not her heirs, neither has it been shown who are her heirs. The heirs not having been served with notice, the whole proceedings under the foreclosure are void by this latter Regulation. Secondly, the tender and payment into Court of the mortgage money in the circumstances was sufficient. The argument of the Appellant that the tender was not good, as it was clogged with restrictions, cannot prevail. *Manning v. Lunn* (2 Carr. and Kir. 13)

(a) Heard by the Sudder Dewanny Adawlut, 24th Dec. 1850. This precedent was filed in the Court below. In that case, the Sudder Court held, that as more than twelve years had elapsed from the date of the expiration of the period of the mortgage, to the date of the issue of the notice of foreclosure, the Plaintiff was barred by the Regulations of limitation.

is an authority to show that [347] where a tender of money was made under protest, yet it is a good tender.—[Sir John Coleridge: That case is inapplicable; here is a threat that if the Appellant takes the money he is to be subject to a suit. If he had taken the money the Appellant would have admitted the sale to Ram Rutton Rae to be good.]—Another objection of the Appellant is, that Ram Rutton Rae, being a stranger, he could not make the tender and deposit in Court of the mortgage money. He was no stranger: he was a purchaser of the whole interest of the mortgagor, and clearly was entitled to deposit the money in Court. But on this ground the Appellant is estopped by the service of the notification under the Ben. Reg. XVII. of 1806, secs. 7 and 8, upon Ram Rutton Rae to pay the mortgage money.

Lastly, the Appellant having brought the whole cause before the Sudder Court, Ram Rutton Rae, with the decision of the Zillah Court in his favour, was not bound to bring a cross appeal from the decision of that Court upon the issue of limitation. The practice of the Sudder Court upon appeal is to entertain the whole cause, and not to require a cross appeal.

Mr. R. Palmer, Q.C., in reply.

Judgment was reserved, and now delivered by

The Right Hon. Lord Kingsdown (July 27, 1859).—This is an appeal from a decision of the Sudder Dewanny Adawlut, at Calcutta, in favour of the Respondent, a Defendant in a suit wherein Prannath Roy Chowdry was the Plaintiff, and Rookea Begum, heiress of Noor Jehan, Syed Aman Ally, and Ram Rutton Rae were the Defendants.

[348] The suit, originally instituted in the Court of the Principal Sudder Ameen of the Twenty-four Pergunnahs, and thence transferred to the Civil Court there, was brought to recover possession of a house and lands, under a foreclosure of a mortgage of the same to the Plaintiff executed by Noor Jehan and her husband, Meer Sydoo. The property mortgaged belonged to the wife alone. The title of the mortgagor, Noor Jehan, to the property which was the subject of the suit, was undisputed in this cause. The mortgage, which was of the class termed Bye-bil-wuffa, or Kut-kubala, was effected by a deed of conditional sale for S. Rs. 4001, with a further charge, under a second deed of the same nature, for S. Rs. 1000. The first deed bore date 11th Cheyt, 1231, and the second was dated 23rd Bysack, 1232.

The Plaintiff contended that a foreclosure of the title to redeem had duly taken place, and on that foreclosure he sued for possession to perfect in himself the proprietary right to the lands free from redemption. Ram Rutton Rae was the only one of the Defendants who disputed the claim. He contended, amongst other things, that the claim to possession of the lands was barred by limitation of suit, and the right to foreclose defeated by a due deposit of the mortgage money under the Regulations hereinafter referred to. The Plaintiff had, as the Respondent contended, wrongly refused to accept the money, and was, therefore, not entitled to foreclosure. He further contended that, by a deed of sale from the representatives of the mortgagor, the Plaintiff's two Kut-kubala, or deeds of mortgage, had been rendered void.

[349] The first, second, and third points to be determined were stated by the Judge as follows: as on the remaining points, three in number, he passed on decision, it is unnecessary to state them.

"First point, whether or not limitation can apply, if the foreclosure has been effected after the lapse of twelve years from the period fixed for repayment of the amount of Plaintiff's alleged deed of conditional sale.

"Second, whether the foreclosure in question has taken place in due course or not; whether in the foreclosure case, the amount due under the conditional deed of sale, was paid by the Defendant, under protest or not; and whether the Defendant had any right to deposit the said amount or not.

"Third, when another deed of sale, referring to the two deeds of conditional sale, and in lieu of the amounts specified therein has been executed, which deed of sale has been set aside as invalid by the Court, then has Plaintiff or has he not again a right to sue under those two conditional deeds of sale?"

The Judge of the Civil Court of the Twenty-four Pergunnahs decided the first issue in favour of the Plaintiff, the Appellant; the second and third issues he decided in favour of the Respondent; and the remaining issues he judged it un-

necessary to decide, in consequence of his decision on the second and third issues in the Respondent's favour. He dismissed the Plaintiff's suit, with costs.

On appeal by the Plaintiff from that decision to the *Sudder Dewanny Adawlut*, that Court, not unanimously, however, reversed the finding on the first issue, and in effect decided that the Plaintiff's suit was barred by limitation.

[350] The Defendant, Ram Rutton Rae, had not appealed from the decision of the lower Court on the issue as to the limitation of the suit; and it was contended before their Lordships that the appeal Court had not authority to reverse the decision of the Court below on that issue; but their Lordships think that the appeal of the Plaintiff brought the whole cause before the *Sudder Dewanny Adawlut*, and that Ram Rutton Rae, who had the decision in his favour, was not bound to appeal from a finding unfavourable to him on a single issue.

The instrument of conditional sale in this case was described as one of mortgage on the face of the instrument itself. It was in the ordinary form of a *Byebil wuffa* or *Kut-kubala*. It contained a stipulation against a sale or mortgage to any body else by the mortgagor, and fixed, for payment of the money, a time certain, on the day after which, if the property were not redeemed, the sale of the lands was to become absolute. As this time had elapsed more than twelve years before the institution of the foreclosure proceeding, it was contended, on behalf of the Respondent, that the claim was barred under the rules of limitation contained in *Ben. Reg.* III. of 1793, sec. 14, and *Ben. Reg.* II. of 1805, sec. 3, and the Court of appeal, reversing on this point the ruling of the Court below, so decided.

After the execution of the mortgage, the mortgagor, Noor Jehan, under an instrument in writing, appointed the Defendant, Ram Rutton Rae, her attorney, to manage her affairs, and put him, as such, into possession of the property in question for herself. She thereby agreed to pay him a considerable sum for his remuneration for such service; he was to pay [351] certain debts which the instrument recites, including the Appellant's mortgage, which is expressly referred to and acknowledged therein, and an option was given to the Defendant to purchase the property, if he should be so minded.

The Defendant alleges that he purchased the property accordingly. In the former litigation hereinafter referred to he went into proof on this point, but he has not proved that purchase in this suit.

The sixth issue related to that transaction.

After the death of the mortgagor, disputes arose as to the property, and the Defendant, Ram Rutton Rae, was continued in possession under an order of the Magistrate, in a *Foujdary* proceeding for quieting the possession, who left the parties to proceed by regular suit for the decision of their rights.

A long litigation ensued between certain parties claiming the lands under an alleged gift from the husband of the mortgagor, Beebee Jehan, and claiming also by heirship; and Ram Rutton Rae, who claimed under the alleged sale to him by Beebee Noor Jehan. In that suit the Appellant intervened, according to the practice of the *Mofussil Courts*, for the protection of his interests. He went into evidence to prove his mortgage title; and the decrees which were made, from time to time, in the Courts in India in the progress of this litigation were expressed to be without prejudice to his claims as mortgagee.

The effect of this intervention on the question as to the limitation of his title to foreclose, and to acquire possession of the property pledged to him, will be subsequently considered.

Finally, by a decision in the Privy Council, the suit [352] of those Plaintiff's against Ram Rutton Rae (see 4 Moore's Ind. App. Cases, 233), was dismissed. The decision in the Privy Council was made without prejudice to the right of any person claiming under Noor Jehan, and on the meaning of that reservation, and as to its effect on the alleged title of the Defendant, Ram Rutton Rae, under the sale which he had set up, some discussion took place in the progress of the arguments in this case. Their Lordships deem it unnecessary to express any opinion on that point, which is not necessary to the decision of this appeal.

The questions to be considered are, whether the Appellant, the mortgagee, was barred by limitation of time from proceedings to foreclose the parties entitled to redeem him; and if he were not so barred, whether he proceeded so as to foreclose

such parties; and lastly, the effect of such foreclosure on the suit which he instituted for possession. By Regulation III. of 1793, a suit is barred where "the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it: unless the Complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promise to pay the money; or that he directly preferred his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that either from minority or other good and sufficient cause, he had been precluded from obtaining redress."

In considering the effect of a legislative bar on the [353] suit of a Plaintiff, created as it is here by general words, it is often important to regard the nature and object of the suit; the nature of the title to which the bar is set up; who the parties are who raise the objection, and against whom it is raised. The bar from twelve years' possession under that Regulation does not depend simply on the length of possession, it may exist in favour of one occupant and not of another; it may be powerful against one demand, or one sort of claim, and be, at the same time, inoperative as against others. The time may run from a date prior or subsequent to the Plaintiff's title to possession. A "cause of action" is not prolonged by mere transfer of the title. It cannot be laid down, therefore, as a rule universally true, that under the Regulation III. of 1793, section 14, a mortgagee's proceeding for a foreclosure under a mortgage, of the class of *Bye-bil-wuffa* simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations, and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the laches of the demandant or of others before him. The contention, on the part of the Respondent, indeed, was not pushed to that extent, and it was conceded that a possession continuing under and in privity with and with acknowledgment of the claimant's title, would not operate as a bar; as, for instance, in the case of a trust, and the ordinary possession of a *cestui que* trust, or trustee under it. These instruments of conditional sale have now an operation different from that which they originally had. They are mortgages now, redeemable like ordinary mortgages, and subject to foreclosure. There is some danger of falling into error in decisions as to the limitation of suits founded on them, if their old, rather than their present, character be regarded. As long as the transaction was one of sale, conditional at first, and absolute at a certain period afterwards by lapse of time, unless, on the prior performance of a certain condition, the title to the land was on that condition terminating in favour of the conditional purchaser, the same as that of any ordinary owner, and a possession *prima facie* irreconcilable with it, might well be deemed adverse from the date of the completion of the perfect title in the buyer.

But if the transaction be viewed as it should now be regarded under the Regulations, as one of mortgage, redeemable at any time by the mortgagor, or those claiming under him in privity with his title as mortgagor; then, as no difference between the law prevalent in India and the law prevalent here as to the relation between mortgagor and mortgagee on this point has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title, there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to [355] assume possession of the pledge, or to shorten the period of its redeemable quality.

In addition to this, it is to be observed that, as under the Regulations an adverse title must also be a *bona fide* title, under the shorter period of limitation; and as neither mortgagor nor mortgagee can, in ordinary cases, be unconscious of the conditional nature of their own titles, there is no ground for presuming generally between the immediate parties an adverse title from mere length of possession.

Where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows, as a consequence, that the mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession. Foreclosure is a step towards that object, under the law relating to these securities, where the object is to obtain a proprietary right; but in the mortgagee's suit for possession, consequent on the foreclosure notice, the Plaintiff may, according to the character of the Defendant, be met and defeated by proof of a prior, or of a superior, title; or by proof of want of title in himself, or that he has not perfected his title to possession. But such defences are not open alike to all Defendants, and between mortgagee and mortgagor some of them would be inadmissible.

Their Lordships can find in this case no evidence, and nothing to support an inference, that the once undoubted right of the mortgagee to force possession was at an end, or barred, or incomplete. His intervention in the litigation before alluded to, his proofs and proceedings in that litigation, the decrees in relation to his title, the objection to it by Ram [356] Rutton Rae, on the untenable ground that his mortgage title was merged, as it were, in a conditional purchase which never took effect, afford the strongest proof that no payment or other act had extinguished his lien on the lands hypothecated to him. The Defendant, Ram Rutton Rae, if he became a purchaser, as he has alleged, took with notice of the mortgagee's title which in terms forbade any subsequent sale.

A mitigation of this restrictive condition appears to have been established by a series of decisions in the Company's Courts, which limit it to sales or mortgages, not made subject to the prior mortgage: so that, in the view most favourable to the Defendant, the case stands thus: if his could be considered a *bona fide* possession at all, it must be taken to have been a possession originally not adverse to, but consistent with, the mortgage title. If such were its character, there is nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the Appellant's foreclosure suit. The litigation before referred to was consistent with the recognition by both parties of the title of the mortgagee, who intervened in that suit. It is stated by one of the Judges that both parties admitted the mortgage title. Whether this was so or not their Lordships have not in this suit the means before them of judging; but they find, certainly, no proof of a repudiation by Ram Rutton Rae of the mortgage title at any period twelve years before the institution of the foreclosure proceeding and the notification under it. Had such a repudiation appeared, such repudiation, whilst it would have established from its date the commencement of adverse possession, would, at the same time, under the circumstances of [357] this particular case, have established, in the opinion of their Lordships, from the same date, an absence of *bona fides* in Ram Rutton Rae as to the mortgagee's title; consequently their Lordships, in any way of viewing the question, are unable to concur in opinion with the majority of the Judges in the Sudder Court that the claim was barred by limitation as to time.

The intervention of the Appellant in the suit, his proceedings in it, the recognition of his title in the decrees, all serve to show that the Appellant was not sleeping upon his claims, and that he was deterred from enforcing them in a distinct suit of his own only by the circumstances of that litigation. He was certainly not precluded by any physical or legal impediment from the institution of a suit; but, as one of the litigant parties admitted his title: as the right of the Respondent was still *sub judice*; as the title to redeem could be but in one of these parties; as he had been allowed to intervene and was a continuing party in that suit, their Lordships think that it would be an inconsistent course in the Courts to hold that he had been guilty of laches, and that the pendency of such a litigation, with the proceedings in it, furnished no "good and sufficient cause" for his not proceeding with his own claim in a distinct suit, a step which would have increased the cost of litigation to the parties who were only contesting *inter se* for the title, which gave the right to redeem. The case, in this point of view, falls in with the principle of that lately decided in the Privy Council, *Rajah Enayet Hossein v. Sayud Ahmed Reza* (*ante*, [7 Moo. Ind. App.] p. 238).

The question remaining to be considered is, whether the foreclosure proceedings were regular. The mortgagee, under this form of mortgage, unless he be put [358]

into possession of his pledge by the act of the mortgagor, must, according to the law prevalent in the Courts of the East India Company, under the Regulations, seek the assistance of a Court to give him possession of his pledge. When his object is also to foreclose the mortgage, he must effect that object in the mode prescribed by Regulation III. of 1793, sec. 14; Regulation II. of 1805, sec. 3; and Regulation XVII. of 1806, secs. 7 and 8.

If this mode be not followed, the foreclosure will not be regular, and the mortgagee's title to possession will not be complete.

The objections which were raised at the Bar to this proceeding were, that the heir of the mortgagor was not duly served, and that the mortgagee had refused a valid tender of the money due to him under his mortgage.

With respect to the first objection, it appears to their Lordships, upon the evidence, to be sufficiently established for the purposes of this cause that Rookea Begum, upon whom the notice was served, was the heir of Noor Jehan.

The remaining objection relates to the payment into Court, in the nature of a tender, which was made by the Defendant, Ram Rutton Rae. Ram Rutton Rae directed the money to be paid out to the Appellant; but, at the same time in his petition to the Court, he disputed the validity of the Appellant's title to foreclose, and expressed an intention, amounting to a notice, to sue the Appellant to recover back the very money which he was tendering.

The meaning of the direction that the money may be paid into Court clearly is, that the mortgagor may have adequate and lasting evidence of that which is [359] put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgement of the title.

The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon his acceptance of the money; and though mere words in the form of a protest, which may accompany a tender, will not defeat it, where they can reasonably be regarded as idle words, their Lordships think that the proceedings of Ram Rutton Rae with respect to the mortgagee's title to foreclose forbid such an interpretation of his language and his act. But independently of this objection to the payment, another and a graver reason exists for holding it to be not such a payment as the Regulations contemplate.

The title of Ram Rutton Rae to redeem was neither proved nor admitted. A grave suspicion rested on his alleged purchase, which the litigation, so far from dispelling, had increased. Had the mortgagee accepted his money, he would have admitted a title to redeem in which he was not bound to acquiesce; and as that title has not been proved in this case, the refusal must be viewed now in the same light as if the money had been tendered by one who had no title to redeem the mortgage, and who did not offer it with due consent, in the name of the heir of the mortgagor. Their Lordships think that the service of the notice on Ram Rutton Rae raised no case of estoppel. The mortgagee cannot tell the exact nature of an occupant's title in all cases, nor how far he may be entitled, with the mortgagor's consent, to tender in his name. It is best to have a general rule, and ser-[360]-vice on the occupant is calculated to prevent errors. Consequently, their Lordships think that the objections to the foreclosure fail.

Had the course of proceeding in the Courts below admitted of a judgment for the mortgage-money, with interest and costs, on a suit for possession of the property pledged to secure it, their Lordships would have so limited their decision on this appeal. As the decision in this proceeding is not final, it will not affect any right to redeem to which the heirs of Noor Jehan may be entitled, upon which their Lordships forbear from offering any opinion.

Their Lordships will recommend to Her Majesty to reverse the decision which has been given, and to direct judgment to be given for the Plaintiff, with his costs below, and the costs of this appeal.

[361] THE EAST INDIA COMPANY.—*Appellants*: ANDREW ROBERTSON, JOHN GOLDINGHAM and Others.—*Respondents* * [March 15, 16, 17, 1859].

On appeal from the Supreme Court at Madras.

The Madras Civil service annuity fund was created for the purpose of providing annuities to the civil servants of the East India Company in the Madras Presidency, upon retiring from service. The annuities were to be provided for by subscriptions of the civil servants to that fund, to the amount of one half, and by contributions by the East India Company to the extent of the other half. These contributions were to be received by trustees and applied by them to make good the deficiency which was to be supplied by the Company. It appeared that in some instances the trustees of the fund, where an excess of subscriptions had been paid by a subscriber entitled to an annuity beyond the half value of the annuity, had returned the excess. R., a subscriber, from the institution of the fund in 1825, had contributed beyond the half value of his annuity. Held that, although the regulations of the Madras civil service annuity fund did not justify a refund to a subscriber of the amount of his subscriptions in excess of the prescribed amount, yet that the practice which had prevailed of the trustees refunding the contributions in excess, and the acquiescence of the East India Company in such practice, precluded the Company from disputing the right of the subscriber to repayment of the surplus of his subscriptions in excess of the half value of the annuity payable out of the fund.

Two sets of Defendants severd in defence (their interests involving an alternative as to which was responsible to the Plaintiff), and the Court below fixed one set of the Defendants with the liability. Upon an appeal in which the Plaintiff was made sole Respondent, the other Defendants were held entitled to appear, and to lodge a separate case.

This was an appeal from a decree of the Supreme Court of Judicature at Madras, which declared [362] the Respondent, Robertson, entitled to the repayment by the Appellants of the accumulated amount of his subscriptions to the Madras civil service annuity fund, and of interest thereon in excess of half the value of the annuity payable to the Respondent, Robertson, out of the fund.

The suit was instituted by the Respondent, Robertson, against the Appellants and the other Respondents, John Goldingham, Guy Lushington Prendergast, Thomas Pycroft, Franklyn Lushington, George Ellis, Alexander John Arbutnot, and James Duncan Sim, the managers and trustees of the Madras civil service fund. The object of the bill was to compel a refund or repayment by the Appellants, and the trustees of the fund, of the accumulated amount of the Respondent, Robertson's, subscriptions to the Madras civil service annuity fund, and interest in excess of half the value of the annuity payable to him out of the fund. The question turned upon the constitution and construction of certain deeds creating the Madras civil service annuity fund, and the rules and regulations for the administration of that fund. The facts, with the history of the institution of the fund, are so fully set forth in the judgment, that any further statement here is unnecessary.

By the decree of the Supreme Court at Madras, it was declared that the Plaintiff was entitled to a refund or repayment of the surplus or excess paid by the Plaintiff to the Madras civil service annuity fund, as a subscriber to the fund, with interest thereon from the 28th of April, 1855, to the day of payment, at the rate of five per cent per annum. And the Court further decreed that the Defendants, the East India Company, should pay to the Plaintiff the sum of [363] Rs. 39,014, being the amount of such surplus or excess, and also the sum of Rs. 5055, being the amount of interest, making together the sum of Rs. 44,069. And the Court further declared that the

* Present: Members of the Judicial Committee,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell. Assessor,—Right Hon. Sir Lawrence Peel.

Defendants, the East India Company, were liable to pay to the Plaintiff an annuity of £1000 per annum up to the time of his death.

The Appellants brought the present appeal from that decree. They made Robertson, the Plaintiff in the Court below, the sole Respondent to the appeal.

In consequence of which, Mr. W. W. Makeson moved (Dec. 2, 1858 *), on behalf of the Defendants, the trustees and managers of the civil service annuity fund, for leave to appear separately, as they had an interest distinct from the East India Company, who sought to make the trustees of the fund responsible to the Respondent.

Mr. W. H. Melvill, for the Appellants, opposed, on the ground that it would entail unnecessary expense upon the fund, if the trustees were made parties.

Their Lordships were of opinion, that as the trustees had put in a separate answer in the Court below, and the Appellants sought to fix them with the liability, they were entitled to appear and lodge a separate case.

The appeal was argued by Sir R. Bethell, Q.C., Mr. E. J. Lloyd, Q.C., and Mr. W. H. Melvill, for the Appellants; and Mr. R. Palmer, Q.C., and Mr. Freeling, for the Respondent, Robertson.

Mr. Rolt, Q.C., and Mr. W. W. Makeson, appeared for the trustees of the fund, but were not called upon, as the Appellants undertook the responsibility of the trustees.

The points submitted to their Lordships in argument sufficiently appear in the judgment. The authorities cited were, upon the question whether Robertson was entitled to have the excess of his subscriptions refunded, *Boldero v. The East India Company* (26 Beav. 316; affirmed on appeal by the Lord Chancellor, Jan. 11, 1860), *Davis v. The trustees of the Madras civil service fund* (a). And, as to the effect of the mistake in the construction of the rules and regulations of the Madras civil service annuity fund, by the trustees in granting a [365] refund to annuitants, entitling a subscriber to relief in equity, *The Directors of the Midland Western Railway of Ireland v. Johnson* (6 H.L. Cases, 798), *Kerr v. The Middlesex Hospital* (2 De G. Mac. and Gor. 576), *Stokes v. Heron* (12 Clk. and Fin. 161), *Rawlings v. Jennings* (13 Ves. 38) *Stretch v. Watkins* (1 Madd. 253), and *Clough v. Wynne* (2 Madd. 188), were referred to.

Their Lordships' judgment was delivered by

The Lord Justice Turner (June 20, 1859).—This is an appeal by the East India Company from a decree of the Supreme Court of Judicature at Madras, by which that Court declared the Respondent, Robertson, to be entitled to a refund or repayment of the surplus, or excess, paid by him to the Madras civil service annuity fund, as a subscriber to the fund, with interest from the 28th of April, 1855 (the date to which the Respondent's account was made up by the trustees of the fund), to the day of payment, at the rate of £5 per centum per annum; and the Court decreed the East India Company to pay to the Respondent the sum of Rs. 44,069, the amount of such surplus, or excess, and interest; and the Court also declared that the East India Company was liable to pay to the Respondent an annuity of £1000, up to the time of his death, and decreed the Company to pay the same accordingly; and, further decreed the Company to pay the Respondent's costs of the suit. There were some further directions in the decree as to [366] acts to be done by the trustees of the fund, for the purpose of effectuating the payments decreed to be made by the

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

(a) This case is not reported. The facts were these:—In the year 1852, Davis, a member of the civil service, and a subscriber to the Madras fund of 1825, filed a bill in the Supreme Court of Madras against the then trustees of the fund, for the refund of the excess of his subscriptions over the half value of his annuity; the suit was defended by the trustees on behalf of the East India Company. On the 7th of August, 1856, a decree was passed, whereby it was declared that Davis was entitled to a refund of such surplus; and the trustees were directed to pay the same to him with costs. The trustees accordingly paid the surplus.

Company, but it is unnecessary to refer particularly to those directions, the Company having very properly, upon the hearing of the appeal, taken upon themselves the case of the trustees.

The Madras civil service annuity fund had its origin in the year 1800, when it was determined that the objects of an institution, which had been founded in the year 1787, to provide for the widows and children of the civil servants of the Madras Presidency, should be extended for the purpose of securing to a certain number of the civil servants of the Presidency annuities on which they might retire from the service.

The extension was carried into effect by a deed poll, dated the 1st of September, 1800. In the year 1814, the funds of the institution, to which the East India Company were large contributors, had greatly accumulated, and it was determined to separate the charity and annuity branches of the fund, and to increase the number of the annuitants.

A deed poll, dated the 1st of July, 1814, was accordingly executed by a large number of the civil servants of the Presidency. The provisions of this deed were to this effect: the accumulated funds of the institution were assigned to trustees, as to five-eighths, in trust for the charity branch: and as to the remaining three-eighths, in trust for the annuity branch. There were to be seven trustees of the funds, of whom the Chief Secretary and the Accountant-General of the Madras Government were to hold the office *ex officio*, and the others were to be annually elected. The Sub-treasurer of the Madras Govern[367]-ment was to be the treasurer of the institution, and the moneys belonging to the fund were either to be kept in the public treasury, or invested on public Government securities; and as to the annuity branch, in order to secure the payment of twenty-three annuities of £400 each, a capital of two and a half lacs of star pagodas was to be raised by the three-eighths of the capital belonging to the fund and the accumulations upon it, and by the contributions of the East India Company, and the payments of the parties to the deed. Each party was to pay to the annuity branch two per cent per annum on all his salaries, allowances, emoluments, and fees of office, until the two and a half lacs of star pagodas should have been accumulated; but no party was to be required to subscribe towards forming the accumulated capital more than 2500 pagodas. When the two and a half lacs of star pagodas should have been accumulated, the rate of subscription was to be reduced to such an amount as would provide the annual sum of 8000 pagodas, being the sum required, with the interest, on the accumulated capital, to answer the twenty-three annuities of £400. Each of the annuities was to be payable for the life of the person accepting it. The annuities were to be offered to the civil servants, parties to the deed, according to their seniority, but no party was to be allowed to accept an annuity from the fund until he should have paid to the annuity branch the sum of 2000 pagodas. The number of the annuities was not to exceed twenty-three, unless the Court of Directors should previously sanction an increased number. Any party accepting an annuity was to resign the service before the 1st of January next following his acceptance.

[368] Another deed poll, dated the 1st of May 1818, was afterwards executed by many of the civil servants of the Presidency. By this deed, after reciting the deed poll of 1814, it was agreed that sixty annuities of £600 sterling should thereafter be granted and paid to the persons who were parties to the recited deed, and to that deed, under the same provisions, however, as were contained in the recited deed as to the annuities of £400; it was further agreed that none of the parties to the deed should be allowed to accept an annuity of £600, until he should have paid to the annuity branch of the fund the sum of 5949 pagodas, except that a remission or abatement was to be made in favour of certain parties. It was also agreed that the increased monthly contribution to the annuity branch of the fund should be paid by each of the parties to the deed so long as he continued to receive salary, allowance, emoluments, or fees of office, notwithstanding he might have subscribed the whole of the 5940 pagodas; and the contribution thereafter to be made by the parties to the annuity branch was fixed at the rate of three and three-quarters per cent per annum, on all salaries, allowances, emoluments, and fees of office.

In the year 1824, the East India Company concurred with their civil servants in Bengal in the establishment of a fund for granting them annuities on their retiring

from the service. The principles on which that fund was to be established, and the rules by which the application of it was to be governed, were contained in a despatch from the Court of Directors to the Government of India, dated the 8th of December, 1824, and in paper appended to that despatch, containing the regulations of the fund as [369] proposed by a committee of the Bengal civil servants, with the alterations in those regulations which the Court of Directors considered to be necessary.

The despatch is to this effect: it notices, in the early part of it, the annuity funds at Madras, and that at Madras the condition of the grant of the annuities was that the grantee should have paid, either in subscriptions to the fund, a certain aggregate sum, or that he should pay the difference between such sum and the amount of his subscriptions. It then points out, in paragraph 40, that an annuity fund to be successful must derive material assistance from the Company; and then in paragraphs 41, 42, 43, it proceeds thus:—"41. A contribution to an annuity fund from the Company is evidently a boon to the service, and operates precisely in the same way as if the Company itself were to grant annuities to civil servants upon retirement, so that the real pecuniary advantage to the service of a fund so constituted is, that a civil servant, when he retires, has in addition to his own savings, whether they have accumulated in the shape of subscriptions to the fund, or in any other mode, a life annuity proportionate to his share of the Company's contribution to the fund; and if, in aid of their direct contribution, the Company protect the fund from loss by establishing fixed rates of interest and exchange, then the servants derive the further advantage of individual protection from these contingent losses to the extent of their individual property in the fund.

"42. With a view to establish a fund on such liberal principles as to insure its success as a measure highly beneficial to the whole service, we conceive that the Company's contribution should be propor-[370]-tionate to the contribution of the service, and the amount of both must necessarily be fixed in relation to the extent of the advantages which the fund may be destined to afford.

"43. These advantages should certainly be considerable, because, in order that the fund may be beneficial to the service, it is important that all the annuities from it, as they accrue, should be accepted by old servants, so as that the fund may not be instrumental to the retirement of young and active servants; and it cannot be expected that old servants in the possession, as they generally are, of lucrative offices, would be tempted to retire if the annuity did not afford a material addition to such income as the party may possess."

Then in paragraph 44, it states that the attention of the Court of Directors has been directed to four particulars: first, the amount of each annuity; second, the number of the annuitants; third, the proportion of the value of the annuity which should be paid by the annuitant; and fourthly, the security that the annuities will be regularly paid.

As to the amount of the annuity, it states, in paragraph 46, that the Directors have come to the determination that the annuities should not fall short of Rs. 10,000 each, payable in England at the rate of 2s. the rupee, being £1000 sterling.

Then, as to the number of the annuities, it proceeds in paragraph 47 thus:—"The next point which has called for consideration is the number of annuities which should be granted in each year; upon which we have found it necessary, in the first place, to determine what should be the qualification of an annuitant in respect of length of service; and we have resolved [371] that a civil servant should not be eligible to accept an annuity, unless he had been actually in the civil service the full period of twenty-five years, or upwards, and resident in India in the service not less than twenty-two years"; and then in paragraph 48, "We are also of opinion, that the fund should be so constituted as to afford a reasonable expectation that at the end of twenty-five years from the date of appointment to the service, a civil servant, having completed the term of actual residence already specified, would obtain the offer of an annuity."

And then, in paragraph 51, it states that the Directors have determined that nine should be the number of the annuities in each year. It then enters upon the question as to the proportion of the value of the annuities which should be paid by the annuitants; as to which it proceeds in paragraph 52 thus: "The third

point requiring attention, is the proportion of the value of the annuity which should be paid by the annuitants, or, in other words, what should be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity if otherwise eligible: upon which point, we must observe, that we consider it of essential importance that, so far as may be practicable, the advantages afforded by the fund should be available by those eligible to receive them upon terms of strict equality." "53. If the annuitants were all of the same age when they became such, this point could, in a great degree, be accomplished by fixing an aggregate sum as the purchase-money for the annuity: but as the ages of the annuitants must naturally vary, it follows that, to maintain strict equality, the amount of the purchase-money should depend upon the value of the annuity, [372] which, of course, is regulated by the age of the annuitant." "54. The Committee of the servants upon your establishment propose that 'any subscriber who may accept the tender of an annuity should be required, to entitle him to such an annuity, to pay to the institution the difference between two-thirds of the actual value of the annuity on his life and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former.'" "55. But as, for the reasons already assigned, we have determined that the annuity be Rs. 10,000, we are of opinion that, in order to render that arrangement of important value to the service, the proportion of purchase-money should be reduced, and we have accordingly resolved to fix it at one-half the value of the annuity, according to the following table, which is calculated upon the principle of our allowing an interest of 6 per cent per annum upon all the balances of the fund, as hereafter explained, viz.:—

		Rupees.
If of the age of	40 years	1,07,050
"	41	1,05,800
"	42	1,04,730
"	43	1,03,560
"	44	1,02,350
"	45	1,01,100
"	46	99,800
"	47	98,410
"	48	97,070
"	49	95,630
"	50	94,170
"	51	92,730
"	52	91,290

[373] "56. Upon this principle, a servant getting an annuity at the expiration of twenty-five years' service, and at the age of forty-five, will pay altogether, including interest upon his subscriptions, Rs. 50,550, for an annuity of Rs. 10,000, instead of Rs. 47,180, the sum proposed by the Bengal civil servants, for an annuity of Rs. 7000."

"57. But although in the mode here proposed all servants, upon becoming annuitants, will pay half the value of their respective annuities, and no more, and will so far be placed upon an equal footing, yet it has not escaped our observation that there will be a material difference in the value of the risks incurred by the several subscribers of losing, by death or early retirement, the amount of their contributions."

And, after pointing out in this 57th paragraph the differences of risk arising from the different amounts which would be payable by the different subscribers and the different periods for which they would pay, it brings this part of the subject to a conclusion in the same 57th paragraph, in these words:—"Thus it is clear that subscribers becoming annuitants during the first twenty-five years, will not have incurred a risk of equal amount, either relatively one with another or with those who become annuitants after the expiration of that period. Of this advantage, however, existing servants could not be deprived without sacrificing one important object of the fund, viz., the inducement which it will afford to old servants to retire: and it may also be observed that the benefit which the younger servants will derive from such retirements, together with the advantage which they will severally

possess of accumulating a fund for the purchase of the annuity by gradual deposits, in [374] proved at a fixed and favourable rate of interest, will, in a great degree, countervail the difference of risk as compared with their seniors, who will not have enjoyed to the same extent the benefit either of accelerated promotion or accumulation by gradual deposits at interest."

Proceeding then to the fourth head, that of security, it points out, in paragraph 58, that when an annuity was granted, the value of it should be set apart; and it then enters upon the means by which the advantages to be derived from the annuity fund are proposed to be secured, and states those means to be, first, by subscriptions from civil servants proportioned to their official income, the rate of which is fixed at four per cent upon the salaries and allowed emoluments of subscribers; secondly, by contributions from the Company, as to which there are the following provisions in paragraph 61:—"With a view essentially to promote the welfare of this important class of the Company's servants, to whom is intrusted the discharge of very arduous and responsible duties, and from a conviction that pecuniary advantages of equal extent could not so beneficially be communicated in any other mode, we have resolved that, provided an annuity fund be formed in Bengal upon the principles explained in this despatch, and under such a modification as we shall prescribe, of the regulations framed by a Committee of the civil servants, on the 28th of January, 1822, the Company shall contribute whatever sum may be required in addition to the contributions of subscribers, to enable the fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum." Then paragraph 62 says,—"[375] With this view, we desire that the fund be annually credited with a sum equal to the amount yielded within the year by the subscription of four per cent on the official incomes of the subscribers, and that you receive into deposit, and allow interest at six per cent per annum, to be computed annually upon the balance belonging to the fund; we also desire, that if, at the expiration of five years from the date of the institution of the fund, the balance shall be less than the amount apparent in the prospective calculation contained in a subsequent part of this despatch, the fund be credited by you with the amount of the deficiency; that if, on the other hand, the balance shall exceed the balance so calculated, then an annual deduction equal to the income derived from the excess of balance shall be made either from the Company's contribution, or from the rate of interest allowed on the accumulations of the fund, at the option of the Court of Directors; that a similar adjustment be effected at the expiration of each succeeding five years; and that, when the fund shall have arrived at the twenty-fifth year of its operation, the table of the valuation of annuities be corrected according to the experience of the intervening period, and the Company's contribution be then finally limited to the sum which, when added to the contributions of subscribers, and to the income derived from the accumulated balance, will make a total income equal to the grant of nine annuities annually, according to the valuation which shall then be fixed.

"63. Upon the principle which we have thus explained, the number of nine annuities annually is virtually guaranteed by the Company, and the Company's contribution is limited to the amount necessary for the accomplishment of that important object.

[376] "64. We have further resolved that an interest of six per cent per annum be allowed on the funds set apart for the payment of annuities."

And, thirdly, by fines from subscribers on becoming annuitants, which are referred to in paragraph 66, in these terms:—"There is another large source of income; viz., the difference between the accumulated value of a subscriber's contributions, and one-half of the value of his annuity. This, in the earlier periods of the operation of the fund, will be considerable, but its amount will, of course, decrease annually until the end of twenty-five years, when we calculate that the accumulated value of a subscriber's contributions for the whole of that period will average Rs. 38,876; that the age of the subscriber will be about forty-five, and half the value of the annuity Rs. 50,550; so that the fine to be paid up on becoming an annuitant, after having subscribed to the fund for twenty-five years, will be about Rs. 11,674. In this view, therefore, when the fund shall have been in operation

twenty-five years, its income from fines will probably average Rs. 1,05,000 per annum."

The despatch then, after expressing the wish of the Directors to bring the fund into operation with the least practicable delay, sets out a prospective calculation of the receipts and disbursements of the fund, proceeding upon this footing: first, the ages of the subscribers at the times when they would become annuitants are estimated, the age in the eighth and subsequent years being taken to be forty-five, and then the average of the salaries of the Bengal civilians at the several periods of their service are taken, and from these data the income to be derived from fines is calculated; then the entire income in each year [377] from contributions and fines is computed, and the expenses and the value of the nine annuities at the expiration of the year are deducted, and thus the state of the fund at the end of each of the first twenty-four years is ascertained; the result of the calculation, as summed up in paragraphs 72 and 73, being that, at the end of the twenty-fourth year, there will be an income exceeding the value of nine annuities, upon lives of forty-five.

Paragraphs 74 and 75 then point out possible disturbances in these calculations, in these terms:—"74. It is probable that in the course of the years included in the foregoing statement some of the subscribers, by obtaining accelerated promotion through the retirements occasioned by the fund, will have contributed a larger amount in the shape of subscriptions than has been assumed, but this effect will in a great degree be counterbalanced by the cases in which the contributions of subscribers will be suspended for the period of their absence to Europe under the regulations announced in this despatch.

"75. Any variation of importance that may occur in the actual result, as compared with our calculation, will be satisfactorily adjusted by the arrangement which we have prescribed in the 62nd paragraph."

And, lastly, the despatch states that the Directors have determined that every annuity, as it should become due, should be paid over by the managers of the fund to the Government of Bengal, and issued to the annuitant by the Company in England at an exchange of 2s. the sicca rupee.

The regulations of the fund, as altered by the Court of Directors, which were appended to the despatch, so far as material to the question before us, were as [378] follows:—The subscribers were to contribute one twenty-fifth part of their salaries and other emoluments. The annuities were fixed at Rs. 10,000 each, payable in England at 2s. the rupee, being £1000 sterling. They were to be tendered to the subscribers having served in the civil service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the gradation list of the service as fixed by the Court of Directors: and the right of preference was not to be barred by refusal in a preceding year.

The number of annuities was not to be more than would complete nine per annum. The actual value of annuities tendered and accepted was to be passed to a separate account on the books of the institution, under the head of appropriated funds, and to the debit of this account were to be entered all payments in satisfaction of annuities. Any subscriber having resided in India in the civil service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retiring from the service before the option of an annuity should devolve on him, was to be entitled to the same in his proper turn, without any payment to the fund, save what might be claimable under the following rule: and any subscriber so retiring previous to having paid the subscription for the aforesaid period of twenty-two years, was to be similarly entitled, provided he continued to contribute for the deficient years, according to the average of the contributions of those of his own standing, or made such payment in hand as the manager should regard as equivalent. Any subscriber who might accept the tender of an annuity was, in order to entitle him to [379] such annuity, to pay to the institution previous to the date at which the annuity was to commence, the difference between one half of the actual value of the annuity on his life, and the accumulated value of his previous contributions, in case the latter quantity should be less than the former. Any member so choosing might decline paying the difference defined in the foregoing rule, and was, in such case, to be entitled to an annuity diminished in pro-

portion to the sum by which the accumulated value of his contributions was less than one-half of the actual value of an annuity on his life.

Rules 14 and 16 were as follows:—"14. Any subscriber who may be dismissed from the Honourable Company's service shall forfeit all right to benefit by the institution, and be entitled to no refund of payment which he may have made."
"16. The resignation of the Honourable Company's service is an essential condition to entitle an individual to an annuity from the institution."

The affairs of the institution were to be managed by a Committee of nine, of whom four were to be *ex officio*: the Chief Secretary to Government, the Accountant-General, the Sub-Treasurer, and the Civil Auditor; the others were to be elected at a general meeting. Rule 21 was as follows:—"The Sub-Treasurer of Government shall, with the permission of his Excellency the most noble the Governor-General in Council, be requested to act as treasurer to the fund, and all money, and securities for money, belonging to the fund in India, shall be kept in the public treasury, subject to the direction and control of the trustees and managers of the fund."

The funds of the institution, as well as those set [380] apart for the payment of annuities as those arising from the accumulation of capital, were to be deposited in the public treasury. All questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members who might either be present at such general meetings or vote thereat by proxy, and upon all general questions involving any increase or diminution of the rate of contributions, or any essential addition to or alteration in the original rules and principles of the institution, all subscribers in India who might not be able to attend the meeting in person were to be allowed to deliver their sentiments and votes by a written communication to be signed by them and addressed to the chairman of the meeting: provided always that no decision upon such question should be valid or have any effect until sanctioned and approved by the Court of Directors of the Company, to whom all parties considering themselves aggrieved by such decision should have a right of appeal, and the decision of the Court of Directors was, in all cases, to be final. The actual value of an annuity on the life of any subscriber was to be determined by a table annexed.

Paragraphs 34 and 35 were as follows:—"34. To determine the accumulated value of the contributions of any subscriber, the accountant shall keep separate accounts of the receipts from each member, and these accounts shall be annually made up with the rate of interest at which it shall appear the funds of the institution may have approved."
"35. At the close of every third year the managers shall, according to the annexed table, calculate the actual value of the pending annuities, and shall then compare the total of their values with the assets belonging to the [381] appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society, and be available for the purposes of the institution. On the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter fund to the former."

The plan of the Bengal fund having been thus arranged, the East India Company were desirous of providing for their civil servants at Madras the same advantages as had been conceded to those in Bengal; and accordingly they caused a copy of their despatch, as to the Bengal annuity fund, and of the regulations under which they have given their sanction to that fund, to be laid before the managers of the civil fund at Madras, with an intimation that if the subscribers to that institution would effect such alterations and modifications of the annuity branch as would make it correspond with the regulations prescribed for the Bengal fund, and would fix their subscriptions to that branch at a rate equal to that which had been fixed for the Bengal servants, they (the Company) would be prepared to make the necessary addition to their contribution to the fund.

In consequence of this communication the trustees of the Madras civil service fund made a report to their subscribers, dated the 22nd of July, 1825, by which, after noticing that the Court of Directors required a contribution of four per cent upon the salaries and other emoluments of their civil servants, and also required the payment, as a fine, of half the estimated value of every annuity granted, after

allowing the annuitant credit for his subscriptions and for [382] interest thereupon, and after referring to the other parts of the Company's plan, and to the difficulties arising from that plan, differing in several material points from that by which the subscribers to their fund stood pledged to one another, they proceeded to point out the rules by the introduction of which they might be enabled to carry the Company's plan into effect, and which were as follows:—

"Rule 1. That the present capital of the annuity branch of the civil fund shall be set apart as appropriated funds for the payment of outstanding annuities, and of the annuities of £400 which have still to be granted as lapses occur.

"Rule 2. That those annuities shall be paid—First, from the Honourable Court's annual donation of Rs. 35,000, to the annuity branch of the civil fund; secondly, from the interest, at the rate of eight per cent allowed by the Honourable Company on the capital to be set apart; and, thirdly, as far as necessary, from the capital itself.

"Rule 3. That the subscriptions of those civil servants who may assent to the plan sanctioned by the Court of Directors, shall commence at the rate of four per cent on their salaries and other official emoluments from the 1st of May, 1825.

"Rule 4. That credit shall be given as heretofore to each subscriber for the amount of his past contributions to the annuity branch of the civil fund, but without interest, none having heretofore been allowed.

"Rule 5. That those subscribers to the civil fund of 1818 whom circumstances may not permit to take advantage of the Honourable Court's plan shall continue their subscriptions at the rate of three and [383] three-quarters per cent, and in their turn, as heretofore, shall succeed to annuities of £600, on the terms prescribed by the annuity fund of 1818.

"Rule 6. That subscribers to the annuity fund of 1818 who may assent to the Honourable Court's plan, but may afterwards be precluded by circumstances from qualifying themselves to succeed to annuities according to that plan, shall be permitted to revert to the present annuity fund, under the 5th rule.

"Rule 7. That each member of the civil service in India shall be required to declare his choice whether he will assent to the Honourable Court's plan within
from the present date, and each member of the civil service
absent from India, within from the date of his return to India."

The subscribers to the Madras fund, at a meeting held on the 24th of August, 1825, approved of the adoption of the Company's plan in the mode proposed by the trustees' report; and the report having been forwarded to the Madras Government, the Governor in Council approved of the mode suggested by it, as affecting as near a conformity between the annuity branch of the Madras civil fund and the plan for granting annuities sanctioned by the Court of Directors, as the nature of the case would allow; and, subject to the confirmation of the Court of Directors, sanctioned, from the 1st of May, 1825, the operation of the new annuity fund in the manner suggested by the report. Ultimately the Court of Directors, in a despatch to the Government of Madras, dated the 10th of November, 1826, approved of the modifications suggested by the trustees' report, as the means of introducing the new plan, except that, in the first [384] instance, they declined to sanction the reversion to the old fund by those who might join the new scheme, and be unable to complete the requisite period of service; but we collect from the trustees' report of the 9th of October, 1851, that they afterwards conceded this right.

There are some passages in this despatch of the 10th of November, 1826, which seem to be worthy of attention. They are as follows:—

"20. We acquiesce in the proposition that subscribers to the new fund shall have credit for the amount of their past contributions to the annuity branch of the old fund, but without interest, none having heretofore been allowed: interest at the rate of six per cent. per annum, to be computed annually, will be allowed by us upon the subscription to the new fund agreeably to the regulations contained in our despatch to the Government of Bengal, dated the 8th of December, 1824.

"21. Referring to the principle explained in paragraphs 49 to 51 of that despatch, we have determined that the number of annuities to be granted annually to civil servants upon your establishment shall be four; which number, however, is to include any of £600 and of £400 to persons not yet retired from the service, either

by resignation or by an absence of more than five years from India, as well as those of £1000 under the new plan.

" 22. In order to accomplish these objects, a larger proportionate contribution than is allowed to the Bengal fund will probably be required from the Company, because the Bengal allowances being upon a larger scale than those of Madras, the annual contributions of the service in the shape of per-centage [385] upon salaries will be larger in Bengal than at Madras; but, on the other hand, the eventual payments in the shape of fines or difference between the aggregate of annual contributions and half the value of the annuity to be received from annuitants who have not subscribed, or who have not long subscribed, to the old fund at Madras, may be larger than the sum to be received from annuitants in Bengal.

" 23. Another circumstance, therefore, which may occasion the necessity of a larger proportionate contribution from the Company to the new fund upon your establishment is, that as most of the subscribers have already contributed to the old fund, the amount of those contributions will go in reduction of the sum payable upon their becoming annuitants.

" 24. We have not the means of making a prospective calculation of the progress of the new fund at your Presidency, because we are not in possession of the amounts already contributed to the old fund by subscribers to the new fund, which will materially affect the receipts of the latter during the first years of its operation.

" 25. Neither are we informed how frequently existing annuities upon the old fund may be calculated to fall vacant. This consideration will affect the number of annuities expected to become chargeable upon the new fund.

" 26. We desire that you, who have the means of obtaining this and all other requisite information, will cause such a calculation to be made, embracing the period comprised in the prospective calculation included in our despatch to the Government of Bengal, dated the 8th of December, 1824.

" 27. This computation will enable you to judge [386] how far an annual contribution on our part, equal in amount to the contributions of our civil servants, is likely to render the fund adequate to the probable demands upon it. We estimate four per cent. upon their salaries to produce Rs. 1,18,000 per annum. If a contribution of this sum shall be shown to be inadequate, we authorize you to increase it, provided it shall not exceed, for the present, the sum of Rs. 1,50,000.

" 28. You will be enabled to adjust the actual results to the necessities of the fund every five years, as directed in the 62nd paragraph of our despatch to the Bengal Government; so that the Company's contribution from year to year may not materially vary in amount, and may ultimately be fixed and determined at the sum necessary to enable the fund to grant four annuities annually.

" 29. We also authorize you to credit the new fund with interest upon the balances at the rate of six per cent. per annum.

" 30. We shall not object to the new fund being brought into operation from the 1st of May, 1825; that is to say, that the contribution of the service and of the Company shall commence from that date, and that the first set of annuities shall commence from the 1st of May, 1826."

In the year 1838, the rules of the Madras fund, as established in the year 1825, were published in Madras. They provided, in the first place, for the appropriation of the capital of the annuity branch of the civil fund to the payment of the outstanding annuities, and of the annuities remaining to be granted out of that fund.

Rules 4 and 5 were as follows:—

" 4. That those subscribers to the civil fund [387] of 1818 whom circumstances may not permit to take advantage of this plan shall continue their subscriptions at the rate of three and three-quarters per cent., and in their turn, as heretofore, shall succeed to annuities of pounds sterling, six hundred, on the terms prescribed by the annuity fund of 1818.

" 5. That subscribers to the annuity fund of 1818, who may assent to this plan, but may afterwards be precluded by sickness (certified to be of such a nature as to render it improbable that they can return to the service), from qualifying themselves to succeed to annuities according to it, shall be permitted to revert to the annuity fund of 1818, under the terms of the deed, but the refund of any sum in

which the accumulated amount of their subscriptions to this plan may exceed the sum payable for the annuity fund of 1818, shall not be allowed."

The subscribers were to contribute four per cent. of their salaries and public emoluments. The annuities were fixed at £1000 sterling, and were to be tendered to subscribers who had served in the civil service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the gradation list of the service as fixed by the Court of Directors, and the right of preference was not to be barred by refusal in a preceding year.

Rules 13, 14, 15, 16, 17, 22, 23, 30, 31, and 35 were as follows:

"13. The number of annuities offered shall not be more than may complete four (4) per annum from the 1st of May, 1826; these shall be tendered to all the qualified subscribers, according to the gradation list, [388] with the understanding that persons parties to this plan will obtain annuities of pounds sterling, one thousand, on the condition herein specified; and persons who may have adhered to the fund of 1818, will obtain annuities of pounds sterling, six hundred, on the terms of that deed. Civil servants succeeding to an annuity on this plan shall not become chargeable on the annuity branches of the civil funds of 1800, 1814, or 1818.

"14. The actual value of annuities of pounds sterling, one thousand, or pounds sterling, six hundred, as the case may be, tendered and accepted as above, shall be passed to a separate account on the books of the institution, under the head of appropriated funds, and to the debit of this account shall be entered all payments in satisfaction of annuities.

"15. Should any subscriber having resided in India in the civil service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retire from the service before the option of an annuity may devolve on him, he shall be entitled to the same in his proper turn without any payment to the fund, save what may be claimable under the following rule.

"16. Any subscriber who may accept the tender of an annuity of pounds sterling, one thousand, shall be required, to entitle him to such annuity, to pay to the institution previous to the date at which the annuity is to commence, the difference between one-half of the actual value of the annuity on his life, and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former; but should the contributions be in excess, such excess shall be refunded. These values shall be [389] determined as below provided. Such annuity, if required, may be made payable either to the date of decease only, or quarterly and to the date of decease: the first benefit may be secured previous to the date at which the annuity is to commence by payment as fine of the value of half-a-year's annuity of the Company's rupees five thousand, as computed in the subjoined table; the latter by paying, in addition to that fine, the value of an addition of Company's rupees two hundred and twenty-five, as computed in the same table. Subscribers retiring on annuity cannot be allowed to purchase only the benefit of a quarterly payment, but there will be no objection to the other benefit being taken singly.

"17. Any member so choosing may decline paying the difference defined in the foregoing rule, and shall in such case be entitled to an annuity, diminished in proportion to the sum by which the accumulated value of his contributions is less than one-half of the actual value of an annuity on his life.

"22. The affairs of the institution shall be managed by a committee of seven, of whom two shall be *ex officio*: the chief secretary to Government and the accountant-general. The other five shall be subscribers, and elected at a general meeting: the members of the committee shall be also the trustees for the funds of the institution.

"23. The sub-treasurer of the Government of Fort St. George shall, with the permission of the Right Honourable the Governor in Council, be requested to act as treasurer to the institution, and the funds, as well as those set apart for the payment of annuities as those arising from the accumulation of capital, shall be deposited in the public Treasury, [390] subject to the direction and control of the trustees and managers of the fund.

"30. All questions proposed at a general meeting, whether quarterly or special, shall be determined by a majority of the three-fourths of the members who may either be present at such general meetings or vote thereat by proxy, but the concurrent voices of nine members, at least, shall be requisite to determine upon any

question whatever: and upon all general questions involving any increase or diminution of the rate of contributions now fixed or any essential addition to, or alteration in, the original rules and principles of the institution which are now established, all subscribers in India who may not be able to attend the meeting in person, shall be allowed to deliver their sentiments and votes by a written communication, to be signed by them, and addressed to the managers of the fund, accompanied, if they are at Madras, on the day of such meeting, by the certificate of a medical gentleman, stating the inability of the party to attend the meeting in person: providing always, that no decision upon such question shall be valid, or have any effect, until sanctioned and approved by the Court of Directors of the East India Company, to whom all parties considering themselves aggrieved by such decisions shall have a right of appeal, and the decision of the Court of Directors shall, in all cases, be final.

" 34. To determine the accumulated value of the contributions of any subscriber, the accountant shall keep separate accounts of the receipts from each member, and these accounts shall be annually made up with the rate of interest allowed by the Company.

" 35. At the close of each third year, the mana-[391]-gers shall, according to the annexed tables, calculate the actual values of the pending annuities, and shall then compare the total of their values with the assets belonging to the appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society, and be available for the purposes of the institution: on the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter fund to the former."

At the foot of these rules there was a table, showing the value of an annuity of Rs. 10,000, on lives from 30 to 76, and there was a column in this table in which the half value of the annuity was set out.

In the same year 1838, the trustees of the Madras fund forwarded to the Government of Madras calculations which had been made by them in conformity with the requisition contained in the 26th paragraph of the despatch of the 10th of November, 1826; and in a letter from the trustees which accompanied these calculations there were the following passages:—

" 2. These calculations are two-fold: the first exhibiting the prospective assets of the fund established by the Honourable Court, and the income with which it would commence its twenty-fifth year: the second the actual results for the period of ten years, from 1825-26 to 1834-35 inclusive, during which the fund has been in operation.

" 3. As stated in our predecessors' letter to your address under date the 4th of July, 1827, we have experienced some difficulty in framing the required calculations, as we are not aware of the exact data on which they should be made. We have, however, carefully followed the instructions furnished to the [392] Bengal Government; and though we still entertain * doubts regarding the correctness of the data we have adopted, we think it better to submit the calculations, in order that they may be strictly scrutinised by the home authorities, and that the error, if any, may be the sooner pointed out and corrected.

" 7. In the actual operation of the scheme, we have made the adjustment required by the 35th rule, regarding the actual values of pending annuities at the close of every third year. The difference which should be credited to the fund, as directed in paragraph 62 of the despatch, we have not yet applied for, because we are desirous that the calculations should be previously verified and approved by the Honourable Court; but, if verified, we shall make due application for it.

" 8. The Honourable Court will have now an opportunity of viewing the results of two successive quinquennial periods; and, in order to render the information complete, we have caused a separate statement to be prepared, showing the amount of fine paid by each annuitant in the years under consideration, and the age of such annuitants respectively."

" * NOTE.—The balance at the end of thirteenth year in the prospective calculation then begins to diminish, instead of increasing as previously."

These calculations were also accompanied by the accounts on which they proceeded, and in these accounts there were the following items: In the statement of the names of gentlemen who have taken annuities from 1825 to 1836, together with their ages and the fines paid by them, this item: "Mr. C. Harris, £1000 (the amount of the annuity), sixty-five (the age), and £3492 6s. 11d. refunded;" and in [393] another account this item: "Amount repaid Mr. C. Harris, being the overpayment of the fine due by him."

There was also in these accounts an item of £213 6s. 3d. refunded to Mr. William Oliver, on which some reliance was placed on the part of the Appellants, as having been calculated to induce them to believe that these refunds were not in respect of excess of subscriptions, it being admitted that the refund to Mr. William Oliver was not on that account; but it is to be observed that a sum of Rs. 1205. is mentioned in the accounts as having been paid for fine in respect of Mr. William Oliver's annuity, and that there is no mention in the accounts of any sum paid for fine in respect of Harris's annuity.

It appears also that in the year 1838, the Court of Directors detected what they considered to be an error in some of the accounts of the trustees of the fund, arising from their having considered the Madras rupee as equivalent to the sicca rupee, and gave directions by a despatch, dated the 5th of September, 1838, that immediate measures should be taken to correct the error.

In the year 1840, the trustees of the fund claimed to be entitled against the Government to credit for an unappropriated balance of Rs. 434,491, and the letter by which the requisition was made not being signed by the Accountant-General, one of the *ex officio* trustees, he was called upon by the Government to state whether he considered the civil service to be entitled to this credit. His letter in answer, dated the 27th of May, 1840, contains the following passage:—"2nd. In the fifth paragraph of their despatch to the Government of India in the financial [394] department, No. 7, of 1835, dated 27th of May, 1835, the honourable Court of Directors declare that they will be willing to acquiesce in a regulation to the following effect, if adopted by the subscribers, viz., 'that at the close of every year the number of unaccepted annuities be publicly declared, and that two-thirds of them be appropriated to subscribers duly qualified in the order of seniority as respects the applicants within the period of three months from the time of the surplus being declared, and as respects other applicants in the order in which they may apply for annuities, upon payment of one-fourth instead of one-half of the value of the annuity, and that in the event of the accumulated subscriptions, with interest, exceeding the said one-fourth, the balance, with interest, be returned to the subscriber; that the remaining one-third of annuities, together with such of the two-thirds as shall not be claimed within the period of three years from the time of declaring the surplus, shall lapse to the fund.'"

The Government of Madras also in the year 1840, called upon the trustees for a report on all the branches of their fund, and the trustees accordingly furnished these accounts. In the accounts thus furnished the repayment to Mr. Harris again appears, and there appears also this entry: "Amount repaid Mr. N. Webb, being the over-payment of fine due by him, Rs. 9221. 9s. 11d.;" and in the letter of the trustees accompanying these accounts, dated the 15th of April, 1841, there are the following passages:—

"2nd. The enclosed accounts, marked A and B respectively, contain detailed statements of the annuity fund of 1825, since its commencement up to the 30th of April, 1840, or for fifteen complete years [395] since its establishment, divided into its two branches of 'unappropriated' and 'appropriated' respectively, and the statement No. 1, is an abstract of the account A.

"3rd. From that statement it will be perceived, that since the year 1825-26, when the Company's annuity plan commenced, up to last year, 1839-40, during the fifteen years it has been here in operation, there has been contributed to it—

	Rs.	a.	p.
"By the subscriptions of the service	20,85,752	0	2
"By the company	20,85,752	0	2

	Rs.	a.	p.
Brought forward	41,71,504	0	4
" * By the annuitant's balance of fines and penalties, etc., not included in the first item	14,36,966	3	5
" By interest	1,92,448	6	2
" Making a total fund of rupees	58,00,918	9	11
" From which there has been expended, for charges and re-funds	1,04,351	15	3
[396] " Appropriated to annuities already granted, forming what is called the 'Appropriated fund'	52,89,619	8	5
	53,93,974	7	8
" Leaving a balance unappropriated, as stated at the close of account A, of rupees	4,06,944	2	3

" This constitutes what is called the 'Unappropriated fund.' "

" 49th. In conclusion, we have to state that when the subscriptions to the annuity fund of 1818 and 1825, conjointly exceed the fine payable by any individual claiming an annuity from the latter, the excess has been repaid to him in the rare instances noted in the margin.† We notice this merely that the Honourable Court of Directors may render uniform the practice in this respect at all the Presidencies."

In the year 1844, a further correspondence took place between the trustees of the fund and the Madras Government. The trustees applied to the Government for assistance, pointing out that the Company's contributions to the fund fell short of the Rs. 1,50,000 authorized by the Company's despatch of the 10th of November, 1826. The Government required explanations as to the state of the fund, and the trustees, again furnished detailed statements of the accounts, in which the re-funds already mentioned, and a further like re-fund to Mr. Lushington, in the year [397] 1843, appeared. These accounts were forwarded to the Court of Directors, and on the 30th of July, 1845, they sent a despatch to the Madras Government, which contained these passages:—

" 1. We approve your having sanctioned the usual number of four annuities for the Madras civil service for the present year.

" 2. The documents which you have forwarded to us, however, clearly show that the Madras civil service annuity fund is incapable of providing for the continual grant of this number of annuities annually, without further support. Indeed, the capital on the 1st of May, 1845, will amount only to Rs. 2,61,143. 10a. 6p., which sum, after adding to it the fines payable on the four annuities which you have sanctioned, will probably be insufficient to provide for their value to be transferred, in accordance with the regulations, to the unappropriated capital of the fund.

" 3. We were not wholly unprepared for this result. The privileges conceded to the Madras service upon the establishment of the annuity fund of 1825, that previous subscriptions to the old fund should be reckoned in diminution of the fines for annuities from the new fund, and the grant of £600 annuities upon the terms of the old fund, have necessarily had a considerable effect in keeping down the means of the new fund. This possible result we had in view when, in our despatch, dated the 10th of November, 1826 (Public Department), we stated, that if the contribution from the Company of an amount equivalent to that from the service should be shown

" * The statements 2 and 3 show that part of their payments are also included in the first item to the extent of—

Rs.	a.	p.
63,328	9	0 for the reduced annuitants, 14
6,66,796	6	11 full ditto, 46.
7,30,124	15	11

" But these two sums include also interest, or part of the fourth item here."

" † In 1834-35 to Mr. C. Harris 3492 6 11

In 1837-38 to Mr. N. Webb 9211 9 11 "

to be inadequate for the object mentioned, it might be increased 'provided that it shall not exceed, for the present, the sum of Rs. 1,50,000.'"

[398] In the conclusion of this despatch, the Court of Directors authorized the Madras Government to credit the unappropriated branch of the fund with the difference between the full amount of the Rs. 1,50,000, per annum, with interest at six per cent., and the amount which had been actually paid by them; and this credit was given accordingly.

In the year 1847, the fund having become deficient for payment of the annuities, the Court of Directors, by a despatch, dated the 23rd of June 1847, authorized the Madras Government to pay the deficiency to meet the current payments. The 6th paragraph of this despatch was as follows:—"6. We consider it unnecessary to enter into a calculation with a view of estimating the probable amount of a fixed annual contribution that may be required from the Company to enable the fund to grant four annuities annually. It will be sufficient, if the necessary means be provided, as the exigency arises. We, therefore, authorize you to pay to the fund any actual deficiency to meet the current payments that may have existed in 1846-47, after the acceptance of the prescribed number of annuities, and to adopt the same course, when necessary, in future years."

In another despatch of the same date, after a statement of the amount of the charge against them to meet the annuities, there is this passage in paragraph 6: "This forms a serious demand against the Company; but, we nevertheless feel that, under the arrangements which have had our sanction for the benefit of the civil service, we cannot refuse to meet it."

On the 6th of February, 1850, the Court of Directors addressed the following despatch to the Governor-General of India:—

[399] "1. We consider it desirable to direct your attention to an important point of difference in the practice of granting annuities from the civil service annuity funds at Madras and Bombay, as compared with the practice in Bengal, in view to your devising measures to remedy the inconvenient results which we shall now point out.

"2. The point to which we allude, is the system of refunding at Madras and Bombay, to parties on becoming annuitants, the sums which they may have subscribed to the funds in excess of half of the value of their annuities, whilst in Bengal no such refund is allowed.

"3. In the year 1841, the question of a refund came under our consideration from Bengal, to which we replied in paragraph 2 of our despatch, dated the 1st of September in that year, No. 29, as follows:—"With respect to refund of subscriptions we are disposed to meet the views of the majority of the subscribers to the extent of confining refund to the excess which may have been paid beyond the half-value of the annuity, such an arrangement being in accordance with the regulations of the fund."

"4. The Bengal civil service refused to adopt the principle of refunding, by passing a rule to the contrary, whereupon a few members of the service, who had contributed to the fund an amount beyond the half-value of an annuity, appealed to us to obtain a return of the excess." In reply, we stated in our despatch to the Government of Bengal, dated the 20th of September, 1843, No. 29, 'that we cannot interfere in any way to relieve them from the operation of the rules of the civil service annuity fund, and [400] that every annuity taken must be subject to those rules as they may exist at the time.'

"5. The question of refunding to the servants on the Bengal establishment having thus been disposed of, the point for consideration is, whether the same principle should not be adopted at the other Presidencies. We admit, that we have hitherto not objected to the rules which were passed at those Presidencies, allowing the system of a refund; but, we are now of opinion, that the operation of such rules is alike disadvantageous to the service and to Government, by retarding promotion, from the continuance of men in office after their capability for efficient employment has ceased; besides which, the Company have to contribute more largely, particularly to the Madras fund, to supply the regulated number of annuities, than was contemplated at the formation of the general scheme in the year 1825.

"6. The refunding of subscriptions, with accumulations of interest, can scarcely be justified: nor can we consider that the funds at Madras and Bombay have any

claim on the Company for additional contributions to supply the fixed numbers of annuities annually, whilst any refund of subscriptions is allowed.

"7. We, therefore, desire that you will give the subject of this despatch your best consideration, with a view of procuring an alteration in the rules of the civil service annuity funds at Madras and Bombay, in order that the principle of refunding may be abolished, and that the operation of the funds at the several Presidencies may be uniform on the point herein specified.

[401] "8. We shall transmit a copy of this despatch to the Governments of Madras and Bombay, with instructions to them, respectively, to co-operate with you in view to proposing to the subscribers the alterations in the rules which we have indicated."

The Court of Directors, at the same time, sent a copy of this despatch to the Government of Madras, accompanied by the following letter:—

"1. We forward in the packet, copy of a despatch which we have addressed to the Government of India, relative to a discrepancy of some importance between a rule of the civil service annuity fund at your Presidency, which allows of contributions to the fund in excess of half the value of the annuities to be refunded to parties on becoming annuitants, and the rule in Bengal, which precludes a refund.

"2. We have expressed our opinion to the Government of India of the disadvantages attending the refunding system, and we desire that you will adopt such measures, in co-operation with that Government, as may appear best calculated to induce the civil service at your Presidency to abrogate it."

The Governor-General of India, afterwards, on the 30th of March, 1850, in pursuance of the despatch of the 6th of February, 1850, wrote to the Government of Madras, requesting that the views of the Court of Directors should be submitted to the managers of the fund at Madras, with the desire that they would circulate for the consideration and votes of the service, how far they might be willing to accede to the Court's wishes, that the practice of refund hitherto allowed by the rules of the Madras fund, should be abrogated. The despatch of the Court of Directors was accordingly forwarded to the trustees of the fund, and a [402] special meeting of the subscribers to the fund was summoned by them for the purpose of considering the question, whether the practice of refund, hitherto allowed, should be abrogated. This meeting was held on the 26th of September, 1850, when the votes of the subscribers, having been taken upon the proposition, a majority of more than three-fourths were against the abrogation of the practice. This result having been communicated to the Madras Government, and by them to the Court of Directors, the Court, on the 20th of May, 1851, sent the following despatch to the Madras Government:—

"1. The proposition for abrogating the rule of the Madras civil service annuity fund, which provides for refunding to its members, on becoming annuitants, the amount which they may have contributed in excess of half the value of their annuities, having been circulated for the votes of the service, and rejected, we consider it necessary to lay down a principle for regulating the interest to be allowed on such excess when it occurs.

"2. We, therefore, direct that four per cent. annual interest only be allowed on the subscriptions of members in excess of half the value of their annuities, and that their accounts with the fund be adjusted accordingly."

In the year 1851, the period having arrived when, according to the calculations made upon the institution of the fund, there ought to have been an accumulation sufficient to answer the four annuities, the trustees furnished to the Government of Madras, to be laid before the East India Company, accounts containing a review of the fund from its commencement down to that date, from which it appeared that the [403] fund was wholly deficient. In these accounts, the refunds already mentioned, and several others (there were in all nine refunds), appeared. The Court of Directors had before this time, in a despatch dated the 20th of August, 1851, communicated to the Madras Government, and through that Government to the trustees, their determination that refunds of excess of subscriptions were in no case to be made at the expense of the Government; and, after the receipt of the last-mentioned accounts in the month of October, 1852, they addressed another despatch to the Madras Government, dated the 20th of October, 1852, which contained this passage:—

" 19. We must here remark upon the practice which has been allowed at Madras, of refunding to retiring subscribers any balance of subscriptions standing at their credit in excess of the half-value of their annuities. The original rules, as sanctioned by us, made no provision for that purpose. It would appear, however, that in 1838, the trustees inserted, in a new edition of the rules, a clause to the effect that, if the contributions of any subscriber be in excess of the half value, 'such excess shall be refunded.' But this clause, so far as we can ascertain, was never submitted to the subscribers, as required by the rules. It certainly never received our sanction: it was not even reported to us; and yet it has been acted upon as if it had been duly authorized. We observe that, since the institution of the fund of 1825, there have been nine cases in which this refund has been granted, to the aggregate amount of Rs. 1,89,529. 7a., and that in the last year, 1850-51 (which, being the twenty-sixth year of the fund's existence, is not embraced in the present calculations), there was a [404] further repayment allowed to the amount of Rs. 9623. 6a. 10p. The sums refunded have, of course, contributed to swell the deficit of the fund. This deficit has been made up from the Government treasury, upon which, consequently, has fallen exclusively the charge of the refunds. Of the whole number, no less than three, aggregating Rs. 86,749. 7a. 8p., were granted in the year 1849-50, when there was a deficiency (irrespective of the amount refunded) to the extent of Rs. 1,02,654. 1a. 2p. In that year, therefore, when the contribution from the State was augmented to the sum of Rs. 2,52,654, a further burden, which raised that sum to the large total of Rs. 3,39,403,* was thrown on the public, for the improper object of making refunds: an object which, even in the most prosperous condition of the fund, could not be pursued without weakening and ultimately destroying it. In every case in which a refund has been granted, there was a balance of subscriptions to the old fund at the credit of the party before the year 1825. The result is, therefore, that the fund has absolutely paid away as refunds, sums which it never received, and which, moreover, in accordance with the provisions of the deed of the fund of 1818, ought not to have been refunded to any of the subscribers to that fund. We regard with strong feelings of disapprobation the whole of this most irregular [405] proceeding; and we repeat the desire we have recently expressed, that no refunds be upon any account allowed in future."

With this despatch, the Court of Directors also forwarded to the Madras Government proposed new rules for the regulation of the fund, in which the provision for refund, contained in the rules published in 1838, was omitted; the 8th of these rules being as follows:—

" 8. Every subscriber to whom an annuity shall be assigned shall be required, in order to entitle him to the full annuity fixed by Article II., to pay, on or before the date from which the annuity is to commence, the difference between one-half of the value of the annuity and the accumulated amount of his contributions, whenever the latter shall be less than the former."

These rules were taken into consideration at a special general meeting of the subscribers to the fund, which was held on the 17th of June, 1853, and were then adopted by the subscribers, and the differences between the Company and the trustees appear then to have ceased.

The Respondent, Robertson, however, was a subscriber to the fund of 1818, and upon the institution of the fund of 1825 became a subscriber to that fund. In the years 1842, 1843, 1844, 1850, and 1851, he was informed by letters from the Secretary of the fund that annuities were open for acceptance, and was invited to state whether he would accept an annuity of £1000. Each of these letters contained a passage in these words:—

" 4. In order to entitle you to the full annuity of £1000, it is necessary that before the time of the [406] commencement of your annuity, you shall pay the difference between one-half of the value of an annuity of £1000 for your life, and the

	" Company's Rs.
" * Contribution of East India Company	150,000
Deficit	1,02,654
Amount refunded	86,749
Total	3,39,403 "
P.C. viii.	361
	12a

accumulated value of your previous contributions, these values being determined in the manner provided by the rules of the institution. In the event of your not paying that difference, you will only be entitled to an annuity diminished in proportion to the sum by which the accumulated value of your contribution is less than one-half of the actual value of an annuity on your life."

The Respondent does not appear to have taken any notice of these letters, but, on the offer being again made to him in the year 1852, by a letter from the Secretary of the fund, dated the 15th of October, 1852, in the same terms, he wrote to inquire whether, in the event of his accepting the annuity, the trustees would refund to him the excess of his subscriptions beyond the amount payable for the annuity, the amount of his subscriptions having, it appears, equalled the half-value of the annuity in or about the year 1848. In answer to this inquiry, the Respondent was referred by the Secretary to the despatch of 1851, prohibiting the refund of subscriptions unless the existing state of the fund would permit it, which he was informed it would not then do. The Respondent then returned the Secretary's letter of the 15th of October, 1852, with the following memorandum, signed by him, at the foot of it:—

"I agree, on the terms above specified, to accept the annuity conditionally tendered to me, provided that on retirement the excess which may be paid by me, with interest, beyond the half-value of an annuity of £1000, payable to the date of decease, and by [407] quarterly payments, be refunded to me; not otherwise. *Vide* separate letter transmitted with this.

"It is my wish to have the said annuity made payable by quarterly instalments, and to the date of decease. Waltair, November 17, 1852. A. ROBERTSON."

And he at the same time wrote to the Secretary as follows:—

To S. D. Birch, Esquire, Secretary to the Civil Fund, Madras.

"Waltair, November 17, 1852.

"Sir,—I have the honour to acknowledge the receipt of your letter under date the 9th instant, informing me that the despatch of the Honourable the Court of Directors, No. 16 of 1851, prohibits the refund of excess subscriptions, unless the existing state of the annuity fund permit of it, which it does not at present; and transmitting a memorandum exhibiting the probable amount which will have been paid by me on the 1st of May, 1853, beyond the half-value of an annuity of £1000, payable to the date of decease, and by quarterly payments.

"Together with this communication, I transmit my acceptance of one of the four annuities open to the service, on condition of my being allowed the refund of the excess of my subscriptions beyond one-half of the value of an annuity, etc.; and I beg leave to prefer a claim to this on the fundamental principles of the constitution of the fund, as laid down by the Honourable Court.

"I would here observe, with all respect, that when I became a subscriber to the annuity fund, I did not become a party to a joint assurance association, the benefits to be derived from which were contingent on [408] the future prosperity of the fund, but I subscribed to certain terms, the principle of which, as laid down by the Honourable Court, was, that 'all servants, upon becoming annuitants, would have to pay half the value of their respective annuities, and no more.' That the civil annuity fund is exclusively the fund of the Honourable Court, and not of the civil service, was shown in the proceedings on the admission of Mr. Hutt and others to annuities not provided for by the original terms on which the fund was established.

"It is unnecessary to revert to all that has been advanced, and might be advanced again, to show that those who agreed to become parties to the Honourable Court's annuity fund did so on the plain and simple understanding that, under no contingency whatever, were they to pay more than half the value of an annuity, according to age, when entitled to it, after a certain period. It is necessary for me only to observe, that I have fulfilled the agreement, on my part, which entitles me to one of the four annuities now open as guaranteed by the Court. It is upwards of thirty-five years since I arrived in the country (26th June, 1817); my actual residence in the country much exceeds the period required; and my subscriptions to the fund are greatly in excess of half the value of an annuity of £1000.

"Having fulfilled the conditions of the agreement on my side, I respectfully

solicit the fulfilment of them on behalf of the Honourable Court. I now prefer a claim to an annuity of £1000, at half its value, and I ask that I may have it at half its value, and no more, the surplus of interest and subscriptions, appearing at my credit with the fund, being repaid to [409] me on my retirement from the service, between the 1st of May and 1st of July, 1853.

"I seek for this from the known justice of the Honourable Court, and the consideration they evince for their servants in every department. I may assuredly trust that subscribers to the civil service annuity fund will not be regarded in a light less deserving consideration than were subscribers to the Native pension fund, who, when that fund could no longer meet its engagements, received back from the justice of the Court their subscriptions, with interest, the annuities already granted being, at the same time, continued at the expense of Government.

"I would, in conclusion, request that the trustees will do me the favour to submit this letter for the consideration of the Right Honourable the Governor in Council, when reporting the names of those gentlemen to whom annuities may fall this year.—I have the honour to be, Sir, Your most obedient Servant,

"A. ROBERTSON."

The trustees, it appears, sent a copy of this letter to the Government, but nothing appears to have been done upon it: and in September, 1853, the annuity was again offered to the Respondent, with reference to the revised rules of the fund. To this offer the Respondent replied as follows:—

"To the Secretary of the Civil Fund, Madras.

"Waltair, October 11, 1853.

"Sir,—I have the honour to acknowledge the receipt of your letter, tendering for acceptance one of the annuities declared to be available from the 1st of May next.

[410] "Until the receipt of that communication I was under the impression that no change had taken place in the rules already in force, the changes which had been proposed to the service not having been ratified by the Honourable the Court of Directors, as required by rule 30 of the regulations of the fund.

"As introduction of the proposed new rules before the allotment of the annuities at present under offer might be hereafter advanced as a technical objection to my claims, I beg leave to enter my protest against the enforcement of them before they receive the formal sanction of the Honourable Court.

"Under this protest, I request that you will inform the trustees that I am ready to accept one of the annuities now tendered, provided they are prepared to pay to me, on my retiring from the service, the amount which may be at my credit in the accounts of the fund in excess of the half-value of an annuity payable by a civil servant at the age which I shall then have attained. I have, etc.,

"A. ROBERTSON."

The trustees, however, declined to receive a conditional acceptance of the annuity, and upon their refusal to do so, he again wrote to the Secretary in these terms:—

"To the Secretary of the Civil Fund, Madras.

"Waltair, September 25, 1854.

"Sir,—I have the honour to acknowledge the receipt of your letter under date the 19th instant, tendering for my acceptance one of the annuities which will be available on the 1st of May, 1855, and to request that you will inform the trustees of the civil fund that I am quite ready to avail myself of this offer, on the condition of their allowing me the refund [411] of the amount overpaid by me to the fund, together with interest, as formerly allowed to those members of the civil service who obtained a refund of over subscriptions. I do not conceive that any votes of the majority of the civil service for the introduction of new regulations can affect a right acquired and asserted before the recent changes in the civil fund rules were even proposed. I have, etc.,

A. ROBERTSON."

The trustees, however, still declining to accept the conditional offer, he ultimately, on the 17th October, 1854, wrote to them as follows:—

“To the Secretary of the Civil Fund, Madras.

“Waltair, October 17, 1854.

SIR, — I have the honour to acknowledge the receipt of your letter under date the 7th instant, and, in consequence of the trustees again declining to entertain a conditional application for an annuity, to apply for one of the annuities available on the 1st of May, 1855, under protest, and with the full reservation of all my rights.

“It is my desire to secure the full amount of annuity.

“I was born on the 28th of November, 1799. Should this form of application be objected to, which I do not expect, I request that you will send an answer to my address by the 30th instant, under cover to Mr. Will. Arbuthnot, at Madras. I am,
A. ROBERTSON.”

In reply to this letter the Secretary wrote to him thus:—

“To A. Robertson, Esquire.

“SIR, — With reference to your application dated [412] 17th of October, 1854, I am desired by the trustees of the civil fund to acquaint you that an annuity of £1000 has devolved on you by rotation. The statement showing the amount of subscription paid by you, together with the document which will enable you to draw your annuity by quarterly instalments, and to the date of decease from the Honourable the Court of Directors, will be forwarded in due time.

S. D. BIRCH.

“November 8, 1854.”

The Respondent having thus accepted the annuity under protest, and with full reservation of his rights, on the 28th of March, 1857, filed his bill in the Supreme Court of Judicature at Madras, against the Company and the trustees, to recover the excess of his subscriptions beyond the half-value of the annuity, and it is upon this bill, the decree under appeal was made.

Three points arise, and were argued upon the appeal:

First. Whether, according to the original constitution of the Madras civil service annuity fund, as established in 1825, the Respondent was entitled to have refunded to him the excess of his subscriptions to the fund beyond one-half of the value of his annuity?

Secondly. Whether, if the Respondent was not so entitled, according to the original constitution of the fund, he afterwards became so entitled by virtue of any contract, or by reason of any course of dealing or conduct on the part of the East India Company, or of the trustees? And

Thirdly. Whether, if the Respondent was so entitled, either according to the original constitution of [413] the fund, or by virtue of any subsequent contract, course of dealing, or conduct, the right which he thus acquired has been in any manner lost or destroyed?

The first of these questions appears to their Lordships to be open to very serious doubts, and in the view which they have finally taken of the case, it might not be necessary for them to pronounce any opinion upon it; but the point was so fully and ably argued at the Bar, and it is so difficult fairly to estimate the weight which is due to the subsequent transactions, without first considering the position in which the parties originally stood, that their Lordships think it right to state the conclusion at which they have arrived at this part of the case.

The rules and regulations of the Madras civil service annuity fund, as established in the year 1825, were derived from the rules and regulations of the Bengal fund then lately established, modified only so far as was necessary to meet the difficulties arising from the existence at Madras, of the funds created by the deeds of 1800, 1814, and 1818, and from the obligations consequent upon those deeds. The modifications which were introduced to meet these difficulties and obligations, do not appear to their Lordships to affect the question as to the refunding of the excess of subscriptions, otherwise than as they would affect the fund out of which the refund, if any, would be to be made; and the East India Company must, of course,

be taken to have foreseen to what extent the fund would be thus affected. It is, indeed, plain, from the evidence, that they did foresee the effect which the modifications would have upon the fund. In considering this first question, therefore, it appears to their Lordships that these modifications [414] may be laid out of the case, and that the question must depend upon the interpretation to be put upon the despatch of the 8th of December, 1824, and the regulations for the Bengal fund as altered by the Court of Directors: for their Lordships do not agree to the Appellant's argument, that a part only of this despatch is to be looked at. Both the despatch and the regulations were forwarded to the Madras Government, and delivered to the trustees of the then existing Madras funds. Both of them formed the basis of the contract with the Madras subscribers, and each of them must, in their Lordships' opinion, be looked at in its entirety in determining what that contract was.

This despatch, in paragraph 4, notices the fact that, according to the constitution of the then existing funds at Madras, the grantees of annuities either paid in subscription to the fund a certain aggregate sum, or paid the difference between that sum and the amount of their subscriptions.

In paragraph 41, in pointing out the advantages derived from the Company's contributions, the despatch speaks of the civil servant when he retires having, in addition to his own savings, whether accumulated in the shape of contributions to the fund, or in any other mode, an annuity proportional to his share of the Company's contributions to the fund.

In paragraphs 53, 54, 55, in treating of the purchase-money of the annuities, it fixes the amount at the difference of half the value of the annuity and the accumulated value of the subscriber's previous contributions: and in paragraph 57, it states broadly, that according to the mode proposed, all servants upon becoming annuitants would pay half the value [415] of their respective annuities, and no more; and in the same paragraph 57, it refers to the advantages which the subscribers would possess of accumulating a fund for the purchase of the annuity, by gradual deposits, improved at a fixed and favourable rate of interest: and rule 11 of the regulations as altered, provides for subscribers who may accept annuities, paying to the institution the difference between half the value of the annuity, and the accumulated value of their previous contributions, in case the latter quantity shall be less than the former. These provisions certainly point at half the value of the annuity as the sum which each subscriber, on becoming an annuitant, was to pay for the purchase of his annuity, paying it either by contributions, or by making good the deficiency of his subscriptions. But, on the other hand, the expression "no more," in paragraph 57, so much relied on upon the part of the Respondent, may, as was suggested on the part of the Appellants, have meant only that the subscribers were to pay one-half, and not two-thirds, of the value of the annuity, the proportion which in paragraph 54 is mentioned to have been proposed by the Bengal civil servants, although the context does not appear to their Lordships to favour this conclusion; and whatever the meaning of these words "no more" may have been, there is certainly no limit to the payment by subscribers of their annual contributions, and no provision for refunding any excess of those contributions beyond the half of the value of the annuity; and by paragraphs 61 and 63, what the Company are to contribute, is expressed to whatever sum may be required in addition to the contributions of subscribers, to enable the fund to grant such number of [416] annuities as may be accepted under the prescribed regulations, not exceeding nine per annum, and the obligation of the Company is expressed to be a virtual guarantee of the nine annuities, and a contribution limited to the amount necessary for the accomplishment of that object: and all these latter provisions indicate that all the subscribers' contributions whatever the amount of them might be, were to go into and remain in the fund.

It is very difficult to collect from a despatch and from rules thus loosely worded on so important a point, and plainly imperfect in other respects, what the real meaning of the parties was; but it is to be observed that the object which they had in view was, as appears by sections 35, 36, and 42, to provide a fund for the payment of annuities to the civil servants who should retire from the service, and that the payments of each subscriber were not merely for the purpose of purchasing his own annuity, but of providing annuities for the other subscribers. The payments

made by each subscriber were to go into the funds, to be applied for the benefit of all the subscribers; and they were to do so equally, whether the subscriber who made the payment, had or had not paid the half-value of his annuity, or had or had not had the option of an annuity. There cannot, as it seems to their Lordships, be any reasonable doubt, that each subscriber was intended to go on paying his subscription until he had the option of an annuity; and if the option did not reach him before the amount of his subscriptions exceeded the half-value of his annuity, their Lordships find it difficult to suppose that it could have been intended that a refund should be made to him when the amount which he had paid [417] would or might have been applied to the payment of other annuities; and if it was not so intended in the case suggested, their Lordships think it scarcely less difficult to suppose that it could have been so intended when the subscriber had had the option of the annuity, and had refused it, in which case it is to be observed that his refusal would bring upon the fund the charge to which his payment was applicable. If the half-value of the annuity was in all cases to be the limit of the subscriptions, there seems to be no reason why the payment of the subscriptions was to continue after the half-value of the annuity had been paid; for the annuity would, of course, decrease in value as the subscriber advanced in age, and the benefit of accumulation held out to the subscribers in the despatch is confined to accumulation for the purchase of the annuity. It is to be observed, too, that the calculations on which the despatch proceeds, are founded upon the assumption that each subscriber would, after the expiration of the first few years, become entitled to an annuity at the age of forty-five, in which event, according to the calculations, he would in no case have paid half the value of his annuity; and it seems probable, therefore, that it was not thought necessary to provide for the excess of the subscriptions.

In that view the case which has occurred in this instance and in others would be left unprovided for by the contract; and it being clear that the subscription was properly payable into the fund, there would seem to be no ground for taking it out again.

The case does not appear to their Lordships to be one to which the doctrine of resulting trust could be applied.

[418] After weighing all these considerations on the one side and the other, the better opinion appears to their Lordships to be, that if this case was to be decided upon the first point only, the decision ought to be in favour of the Appellants, the East India Company; but their Lordships have not come to this conclusion without great doubt and hesitation, and they very much incline to the opinion that this contract does not provide for the event which has occurred, and that in order to determine the rights of the parties, what has subsequently occurred must be looked at, not, indeed, for the purpose of varying the contract, but for the purpose of supplying what has been left unprovided for by it. They proceed, therefore, to the consideration of the second point: Whether the Respondent became entitled to the refund of his excess of subscriptions by virtue of any subsequent contract, or by reason of any conduct or course of dealing on the part of the East India Company or of the trustees?

It is material in considering this point, in the first place, to observe the position in which the East India Company stood under the contract. By the contract (whatever its effects may have been in other respects), the annuities were to be provided for by the contributions of the subscribers and the contributions of the Company. These contributions were to be received by the trustees, and applied by them to make good the annuities, and the deficiency was to be supplied by the Company. The Company, therefore, had a direct and immediate interest in the application of the funds by the trustees. The trustees were responsible, not merely to the subscribers, but to the Company, for the due application of the funds. [419] The Company, then, being in this position; having the right to call for the accounts of the trustees, and to check and control those accounts, we find, that the practice of refunding to subscribers the excess of subscriptions beyond the half-value of the annuity, commenced as early as the year 1835, for in that year there was a refund to Mr. Harris on this account. We then find, that, in the year 1838, accounts of the trustees in which this refund appeared, were laid before the Government of Madras, and that, in the same year, 1838, the rules of the fund were published at Madras,

and that, by the 16th of those rules, as published, it was expressly stated that the contributions of the subscribers in excess beyond the half-value of their annuities, were to be refunded. We further find that this course of refunding to subscribers the excess of their subscriptions was continued by the trustees in the years 1837, 1843, 1845, and 1848; that accounts of the trustees, showing these refunds, were laid before the Court of Directors, and that no objection was made to them, although on other minor points objections were raised and the accounts were required to be rectified; and although in the year 1841, the attention of the Government was directly called to the point, and in the years 1844 and 1847 they were required to make and did make, additional payments to the fund. We also find, that it was not until the year 1850, that any question was raised as to this practice of refunding, and that the question then raised was not as to the right of the subscribers to the refund, but as to the expediency of continuing the practice; that the Company then, so far from asserting that the subscribers were not entitled to the refund, desired the Madras [420] Government to adopt such measures as might induce the subscribers to abrogate the practice; that, with this view, they submitted the question to the consideration of the subscribers; and that, upon the subscribers adhering to the practice, they did not, in the first instance, persist in objecting to it otherwise than by threatening to reduce the interest upon the excess of the subscriptions: a threat which it appears they did not carry into effect. Ultimately, we find that later in the year 1851, they objected to the refunds being made at their expense, and that in the year 1853, the system of refunding was put an end to by the new rules proposed by them, and adopted by the votes of the subscribers.

Upon these facts, this part of the case appears to their Lordships to present two questions for their consideration: First, whether, assuming the practice of refunding to the subscribers the excess of their subscriptions beyond the half-value of the annuity not to have been warranted by the original rules, there was not such an alteration of those rules as was sufficient to warrant it; and, secondly, whether, even if there was no such alteration of the rules, the Company have not, by their conduct, precluded themselves from disputing the right of the subscribers to the refund.

With respect to the first question, by rule 30 of the Bengal regulations, all questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members; and upon all general questions, involving, amongst other things, any essential addition to or alteration in the original rules and principles of the institution, all subscribers in India were to be allowed [421] to vote, but no decision upon such question was to be valid, or to have any effect, until sanctioned and approved by the Court of Directors of the East India Company, whose decision was in all cases to be final. This rule became part of the original rules of the Madras fund. The rules of that fund, published in 1838, having contained the provision that the excess beyond the half-value of the annuity should be refunded, the question whether that practice should be abrogated was put to the vote at a special general meeting of the subscribers held on the 26th of September, 1850, and it was determined by a majority of more than three-fourths that the practice should not be abrogated. There was here, therefore, upon the assumption that the original rules did not warrant the practice, a clear alteration of those rules, made in conformity with the 30th of the original rules, and this alteration, if sanctioned and approved by the East India Company, was valid and effectual.

Now, how did the Court of Directors deal with this alteration of the rules? They did not repudiate it, but they directed the interest upon the excess of the subscriptions to be reduced; a direction, however, which was not carried into effect. If the case had rested here they might, in the opinion of their Lordships, well be taken to have sanctioned and approved this alteration of the rules; but, it appears that they afterwards in the same year, 1851, protested against any further refunds being made at their expense, and although they did not rest upon this protest, but subsequently, in the year 1853, in some measure treated the alteration as valid by again, in effect, submitting the question to the votes of the subscribers upon the new rules which they at that time proposed, [422] and which were then adopted, they do not appear ever to have withdrawn their protest, and the course which they adopted in proposing the new rules may well be regarded as having been resorted to for the

more conclusive settlement of the question. If the subscribers had not adopted those rules, the Company could not, as their Lordships think, be held, in the face of their protest, to have sanctioned and approved this alteration; and, upon the whole, therefore, their Lordships consider that, whatever effect may be due in other respects to what passed as to the alteration of the rules, it would be going too far to hold that the resolution of the subscribers in 1851 effected such an alteration as rendered it obligatory upon the Company to refund the excess of the subscriptions.

There remains, then, on this second head of the case, the question as to the effect of the course of dealing and conduct on the part of the Company and of the trustees.

Now, it appears to their Lordships, to be put beyond all doubt, by the evidence in this case, that the Company sanctioned the refunds which were made, and sanctioned them, not merely with reference to the individual subscribers to whom they were made, but, generally, as having been made in the due course of practice. The Company's despatch of the 6th of February, 1850, admits this to have been the case. Their course of proceeding, in submitting the question to the votes of the subscribers in that year, involves the same admission; and there is, indeed, hardly a step in all their proceedings, from the time of the institution of the fund in the year 1825, which does not lead to that conclusion. In determining the consequences which are to follow from this conduct on [423] their part, we must again revert to their position, and to that of the trustees. The Company stand in the position of the ultimate beneficiaries of the fund with which we have, in this case, to deal, subject to prior trusts for the benefit of the subscribers.

The fund, as established in 1825, was instituted on their suggestion, and for the purpose of carrying out their views of promoting a more rapid succession among the civil servants of their establishment. The trustees were bound, not to them only, but to the subscribers also, for the due management of the fund, according to the rules. If those rules did not authorize the refunds being made, it was a breach of trust on the part of the trustees to make them, and in that breach of trust the Company were concurring. It was admitted on their part that with respect to the refunds actually made, they had no right to complain; but it was argued that the consequences of their conduct went no further, and that they cannot be held to have sanctioned the right of the subscribers to the refund in other cases. Their Lordships, however, find themselves unable to give their assent to this argument. By the rules of the fund, published in the year 1838, the trustees held out to the subscribers generally that they were to be entitled to the refund of the excess of their subscriptions beyond the half value of the annuity. The Company, as appears from their answer, knew of the publication of these rules very soon after they were published. By allowing the refunds which were made, more especially after their attention had been called to the subject in the year 1840, they must, as their Lordships think, be considered to have authorized the trustees to continue this rule as to refund, as part of their [424] rules. It is to be considered, then, how the subscribers were affected by the publication and continuance of this rule, and it appears to their Lordships that their position was much altered by it.

To take, for instance, the case of this Respondent: He was a subscriber to the fund of 1818, and, according to the rules of that fund, would have been entitled to an annuity of £600 a year after payment of a specified sum. Is he not justly entitled to say that he paid the larger subscription to the fund of 1825, and continued that subscription, upon the faith that he would be entitled to the larger annuity of £1000, and also to the repayment of the excess of his subscriptions beyond the half value of his annuity? And further, is he not also justly entitled to say that had he been aware that the trustees of the Company would resist the repayment of the excess of his subscriptions, he would have accepted his annuity on the first opportunity which offered after he had paid the half of its value, or even before that time, when his interests or his views rendered it advisable or convenient for him to do so; and is not his having been deprived of these opportunities the result of the Company's conduct?

The true result of this case, with reference to the point now under consideration, appears to their Lordships to be, that the ultimate beneficiaries under the trust have authorized the trustees to hold out to the prior beneficiaries advantages which were not warranted by the trust, and have thereby altered the position of the prior bene-

ficiaries; and their Lordships think that, under such circumstances, both the trustees and the ultimate beneficiaries must be liable to make good to the prior beneficiaries the advantages which have been so held out to them.

[425] The case was to some extent argued on the part of the Company as if the question had been simply this: whether the trustees could recover at law against the Company any deficiency of the fund for payment of the annuities occasioned by this practice of refunding: but their Lordships do not take that view of the case; they consider that, whatever might be the case at law, there is, under the circumstances of this case, an equity by which the Company is affected. It was also argued, on the part of the Company, that their conduct, and the conduct of the trustees throughout, proceeded upon a mistaken supposition that the original rules of the fund, resting upon the Bengal rules, required this excess to be refunded, and that they ought not to be bound by conduct resulting from such a mistake.

It would, perhaps, be a sufficient answer to this argument to say that there is no Bill to certify any such supposed mistake; but their Lordships do not desire to rest their judgment upon so narrow a point.

Supposing the case to be entirely open upon this point, could the Company, and could the trustees, under the circumstances of this case, be relieved from the consequences of this alleged mistake? Their Lordships are of opinion that they could not. They think that it would be an answer to such a case of alleged mistake, that when the trustees made the representation as to the refund of the excess which is contained in the rules of 1838, and when the Company sanctioned that representation being made, they had possession of all the documents, and the full means of judging whether the Bengal regulations did or did not give the right of refund; and further that, whether the Bengal regulations did or did not give [426] that right, the Company had the power of determining whether it should or should not be given at Madras; and yet further that the conduct of the Company, and of the trustees, has altered the position of the subscribers. They think also that if this case was at all to be dealt with upon the footing of mistake, it would follow that the contract must be wholly undone, and the parties be restored to their original rights, and that the conduct of the Company has placed the subscribers in a position in which they cannot be restored to those rights. The subscriptions which have been paid beyond what ought to have been paid might, indeed, be refunded, but the parties could not be set right as to the period when they would have taken the annuity. It is hardly necessary to add that the case appears to their Lordships to be more strong against the Company from their having been parties to the contract, and having bound their civil servants by covenant to the observance of it.

Upon this second head of the case, therefore, their Lordships are of opinion, that the Company, though not bound by any positive alteration of the rules, are precluded by their conduct from disputing the right of the Respondent to have the excess of his subscriptions beyond the half value of his annuity refunded to him.

We come then to the third question, whether the right to the refund of the excess of his subscriptions which the Respondent acquired has been in any manner lost or destroyed. It was contended on the part of the Appellants that it had been lost or destroyed, because the revised rules of 1853 did not contain the provision for refund which was contained in the rules of 1838, and the Respondent being a sub-[427]-scriber to the fund was bound by those revised rules; but it does not appear to their Lordships that the revised rules could operate retrospectively to destroy rights which had been acquired before they were passed.

Upon this point, therefore, the question, as their Lordships view it, is, whether the Respondent had or had not, before the revised rules were passed, acquired a title to the refund of the excess of his subscriptions: and their Lordships are of opinion that he had; for in the year 1852, he had accepted the annuity on condition that the excess of his payments should be refunded to him. The trustees, it is true, refused to receive this conditional acceptance; but in their Lordships' judgment, for the reasons already given, it was an error on their part not to have done so, and the Respondent cannot, as their Lordships think, be affected by this erroneous judgment of the trustees. They think, therefore, that the Respondent's title to the refund was complete in 1852, and was consequently unaffected by the revised rules of 1853. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this ap-

peal, and, their judgment agreeing with that of the Court in India, to dismiss it with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice, o. Other Matters*; tit. INDIA, I. ADMINISTRATION AND GOVERNMENT. S.C. 12 Moo. P.C. 400; 7 W.R. 695. See *Secretary of State for India v. Underwood*, 1870, L.R. 4 H.L. 584.]

[428] MOHUN LALL SOOKUL,— *Appellant*; BEBEE DOSS and Others,—
Respondents * [Feb. 16, 1860].

On appeal from the Sudder Dewanny Adawlut, Calcutta.

The amount of the stamp upon the plaint is not conclusive of the value of the subject-matter of the suit.

By the procedure of the Native Courts, the value of the suit for the purpose of the stamp duty is assessed at three times the annual rent payable to Government in respect of the property sued for. Held on an *ex parte* petition for leave to appeal, in a case in which the value was laid in the plaint as being under Rs. 10,000, that as the calculation was estimated with reference to the stamp duty only, leave to appeal would be granted conditionally, upon the production of satisfactory evidence in India by the Petitioner, and transmitted with the transcript, that the real or marked value of the property exceeded Rs. 10,000, otherwise the leave granted to be null and of no effect.

The application in this petition was for special leave to appeal. The petition set forth, that the Petitioner had brought a suit in the Court of the Principal Sudder Ameen of the Zillah of Chittagong against one Ram Doss (since deceased) as mortgagor, under a Bye-bil-wuffa, or deed of conditional mortgage, to recover possession of the mortgaged premises, the value of which was laid in the plaint at Rs. 3522; that the decrees of the Sudder Ameen and Zillah Court on appeal were in his favour, but that the Sudder Dewanny Court at Calcutta had reversed these decisions, and had refused a review of judgment. The petition alleged that, although the real or market [429] value of the land sought to be recovered in the suit exceeded the value of Rs. 10,000, yet the amount laid in the plaint as the value of the subject of the suit was Rs. 3572, only, that amount being assessed for fiscal purposes, namely, three times the amount of one year's jumma or rent; that as the alleged value was under Rs. 10,000, the Petitioner was prevented by the rules of practice of the Sudder Court from obtaining from that Court leave to appeal.

The petition was heard *ex parte*, supported by an affidavit of the Petitioner's agent in England as to the facts.

Mr. Leith, for the Petitioner.—Although the value of the property is stated in the plaint at a sum under Rs. 10,000, the appealable value under the Order in Council of the 10th of April, 1838, yet the real or marked value of the property in question exceeds that amount: the same being worth ten years' purchase. The calculation was made for the purpose of the stamp duty only, Macpherson On civil procedure, pp. 124, 127, and is much below the value.—[Lord Chelmsford: The allegations as to value are very general in the petition and affidavit; you are bound to show that the value is as you represent.]—If leave to appeal is granted, the actual value of the property can be established. The stamp cannot be considered as conclusive of the value of the property sought to be recovered, *Mussumat Ameena Khatoor v. Radhabenod Misser* (*ante* [7 Moo. Ind. App., p. 261]).

The Right Hon. Lord Chelmsford.—Their Lordships will grant leave to appeal; but such leave will not be absolute, being subject to the [430] production of proper

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Lord Chelmsford, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

evidence in India of the actual value of the property sued for. The Order will be drawn up with that view, and the leave now granted will not be of any effect, unless a satisfactory affidavit of the value of the property be furnished by the Petitioner and transmitted with the transcript. Security will have to be lodged with the Registrar for £300.

The following Order in Council was made:—"Leave to appeal granted upon depositing the sum of £300 sterling as security for the costs of the Respondents, in case the appeal should be dismissed, and that Registrar of the Sudder Dewanny Adawlut transmit, together with the record, satisfactory evidence, to be supplied by the Petitioner, that the real or market value of the land in dispute exceeds the sum of Rs. 10,000, otherwise that such leave to appeal be null and of no effect."

[See *Bahoo Lekraj Roy v. Kanhya Singh*, 1871, L.R. 1 Ind. App. 317. For subsequent proceedings, see S.C. 8 Moo. Ind. App. 193, 192, and 10 Moo. Ind. App. 1.]

[431] THOMAS ALEXANDER WISE,—*Appellant*; JUGBUNDOO BOSE and JOSIAH PATRICK WISE,—*Respondents** [July 9, 1859].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Ben. Reg. XIV. of 1829, sec. 2, cl. 1, enacts, that every person being an inhabitant of a foreign territory, shall be required to furnish security for costs; such security to be furnished by a Plaintiff, or Appellant, within six weeks of the date on which his plaint or appeal is filed: and that unless such security be so furnished, the suit of such person, if Plaintiff, should not be proceeded in, or appeal admitted unless he had furnished the necessary security to cover costs in the appeal.

Appeal to the Sudder Court from a decree of the Zillah Court by a party then temporarily absent in England, but having real estates and factories within the jurisdiction of the Court. No security was furnished by the Appellant's Vakeel within six weeks after lodging the appeal. The Respondent in the first instance, put in an answer to the reasons of appeal filed by the Appellant, but afterwards filed a petition for dismissal, for non-compliance with the requirement of Ben. Reg. XIV. 1829, sec. 2, cl. 1, contending that the Appellant was a resident in a foreign territory, and had not furnished security within six weeks as required by that Regulation. The Sudder Court held, that such security ought to have been furnished by the Appellant, who, residing in England, *pendente lite*, was to be considered as resident in a foreign territory within the meaning of the Regulation, and dismissed the appeal.

Such judgment reversed on appeal by the Judicial Committee, and the suit remitted to India for trial, on the ground, that the Sudder Court had not, by Regulation XIV. of 1829, any power *ex mero motu*, to dismiss the appeal. (1) as the Appellant was guilty of no default under that regulation, not having been called upon by the Respondent or the Court to furnish security for costs; (2) or of laches, in not voluntarily offering security. The Regulation providing only, that a suit, or appeal, should not be proceeded with, until security was furnished.

Semble:—The putting-in an answer to the appeal, before objecting to the want of security for costs, operated as a waiver by the Respondent of the want of security for costs, required of Ben. Reg. XIV. of 1829, sec. 2, cl. 1.

Whether Act, No. III. of 1845 repeals Ben. Reg. XIV. of 1829, sec. 2, cl. 1. *Quære?*

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

This was an appeal from a judgment of the Sudder Dewanny Adawlut at Calcutta, which dismissed an appeal brought by the Appellant in that Court from a [432] decree of the Zillah Court of Dacca, on the sole ground that under Ben. Reg. XIV. of 1829, sec. 2, cl. 1 (a), the Appellant (who was at the time of bring-[433]-ing the appeal temporarily residing in England, but had a permanent residence and indigo factories at Dacca, within the Company's territories) was to be deemed an inhabitant of a foreign country, and had omitted to furnish security for costs within six weeks of the date of filing his appeal; though no demand requiring him to do so had been made by the Court, or by the Respondents, and although he had offered by his Vakeel to furnish security, if required by the Court.

The Appellant's petition of appeal to the Sudder Court at Calcutta stated the grounds of the suit, which had been dismissed by the Judge of the Zillah Court of Dacca: it further stated that the Appellant was then resident in England, and prayed that the Respondents might be called upon to appear in the appeal, and that the Appellant would afterwards file his grounds of appeal.

By a proceeding of the Sudder Court, dated the 24th of November, 1851, it was declared that the petition had been received, and that notice had been served on the Respondents; and it was therein also declared that the appeal was admissible, and that notice would be issued to the Appellant, requiring him to file his reasons or grounds of appeal, within six weeks. The grounds of appeal were filed on the 11th of December, 1854. The Respondent, Jugbundoo Bose, alone appeared, and put in a separate answer to these grounds on the 13th of March, 1855. This answer did not refer to the subject of security for the costs of the appeal.

On the 26th of June, 1855, a petition was presented by that Respondent, which was the first notice the Appellant, or his Vakeel, had respecting the [434] objection from want of security for costs. This petition set forth that cl. 1, of sec. 2, Ben. Reg. XIV. of 1829, declared that the Appellant, an inhabitant of a foreign territory, ought to furnish security of costs of Court within six weeks from date of filing appeal, otherwise that his case would be struck off the file of pending cases; that the Appellant had admitted in his petition of appeal, that he was resident in England, but had not furnished the necessary security bond; and prayed that the appeal might be struck off the file. This petition did not contain any demand for such security.

By a proceeding of the Sudder Court of the 20th of July, 1855, that Court held that they must decide, first, whether it was necessary, as urged by the Respondent, in his petition, for the Appellant to furnish security for costs; and, secondly, whether in default of such security the appeal was liable to be struck off the file. And it was also declared by the Court that as the case was ready for hearing, it was proper to make an Order that the papers should be laid before the Judges of the full Bench for trial and decision, and that the petition of the Respondent should be sent along with these papers before the Judges of the full Bench.

On the 21st of August, 1855, the case was accordingly brought up before the full Bench for hearing. The merits were not gone into. On the part of the Appel-

(a) This clause enacts that:—"From and after the promulgation of this Regulation, every person, being an inhabitant of a foreign territory, who may desire to institute or defend an original suit, or to prosecute or defend an appeal in any Zillah, City, or Provincial Court, or in the Sudder Dewanny Adawlut, shall be required to furnish security for all eventual costs of suit which may be adjudged payable by such person, and shall furnish such security by a surety or sureties residing and possessing property within the limits of the Company's territory, and within the jurisdiction of the Company's Court. Such security shall be furnished by a Plaintiff or Appellant within six weeks of the date on which his plaint, or appeal, is filed; and a Defendant or Respondent shall furnish it within six weeks of the date on which the usual summons is served on him: unless such security be so furnished, the suit of such person, if Plaintiff, shall not be proceeded in, if Defendant or Respondent, he shall not be allowed to defend his suit or appeal, but the cause shall be decided *ex parte* on the statements and proofs of his opponent. And no appeal shall be admitted from the party who may have failed to give the required security, until he shall first have made good the whole of the costs demandable from him in the lower Court, and given the necessary security to cover the costs in appeal."

lant, it was contended that he had large factories at Dacca, and that he was subject to the Company's Courts, although then residing in England; and that Ben. Reg. XIV. of 1829, sec. 2, cl. 1, did not provide for dismissing the appeal, even when a default could be clearly ascribed to the Appellant, [435] where he had been required to give security; but that such Regulation only directed that the suit of a Plaintiff, if security had been required, should not be proceeded with until such security was furnished. There were other subordinate questions raised, which involved the consideration of the Acts, No. III. of 1845 (*a*), and XVII. of 1847 (*b*). Under the first of these Acts, it was questioned whether the requiring security for costs upon an appeal was not entirely in the discretion of the Sudder Court; to be decided [436] demandable from the Appellant or not, as that Court should see fit, before calling on the Respondent to answer. Another question also raised before the Sudder Court was, whether, under the Act, No. XVII. of 1847, if the omission to give security in the appeal by the Appellant was to be considered a default, it ought not to have been held by that Court to have been cured by Respondent, Jugbundhoo Bose, having taken steps in the appeal by filing his answer. The necessary security was then offered to be given by the Appellant, if the Court desired it.

The judgment of the Court dismissing the appeal was pronounced by Sir Robert Barlow, on the 21st of August, 1855, and was as follows:—"It has already been ruled, by a majority of the Court (see p. 279 of 'Summary Decisions of Sudder Dewanny Adawlut,' in the case of Campbell, Petitioner, decided on the 29th July, 1852) (S.C. Cal. Sud. Dew. Sum. Decis. 169, Edit. 1855), that Regulation XIV. of 1829, must be held to include all territories beyond the jurisdiction of the Company's Courts within the territories subject to the Presidency of Fort William, and, consequently, security is demandable from a party to a suit in the Company's Court becoming an inhabitant of England, *pendente lite*. Upon this ruling, by which we are bound, we are of opinion that this appeal must be dismissed. The Appellant, on filing his petition of appeal in the Zillah Court, described himself as a resident in England. No security for costs has, to this day, been given. Cl. 1, sec. 2, Reg. XIV. of 1829, sets forth, that security must be furnished by Plaintiff, or Appellant, within six weeks of the date on which his plaint, or appeal, is filed; in default, his suit shall not be proceeded in; and no [437] appeal shall be admitted on failure to furnish the required security, until the whole of the costs demandable from him in the lower Court, and the necessary security to cover costs in appeal, be given. It is urged, that Reg. XIV. of 1829, is, in fact, a penal law, and must be construed strictly, and that the words, 'shall not be proceeded in,' do not, therefore, warrant dismissal of

(*a*) Act, No. III. of 1845 enacts that:—"Whereas it is not now by law necessary within the territories subject to the Presidency of Fort William, in Bengal, to take any security for costs in appeals before the Sudder Courts, and whereas no security for costs is now required by law in appeals from the decisions of Moonsiffs; and whereas it is expedient that appeals from all Courts should be put in this respect upon a uniform footing;

"It is therefore hereby enacted, that within the said territories it shall not be necessary in any Court of appeal of the East India Company to take any security for costs; but it shall be in the discretion of every such Court of appeal to demand security for costs from the Appellant or not, as it shall see fit, before the Respondent is called upon to answer, any law or Regulation to the contrary notwithstanding."

(*b*) Act, No. XVII. of 1847 recites that:—"Whereas inconvenience has resulted from the rule that the discovery of defaults in the prosecution of suits and appeals brought in any Court of the East India Company, within the territories subject to the Presidencies of Bengal and Madras, invalidates all proceedings in such suits and appeals, which may have been had since the occurrence of such default: It is hereby enacted, that in the said Courts every default of a Plaintiff or Appellant, in all suits or appeals now pending or hereafter to be brought, and in all suits which have been decided but are still open to appeal, shall be held to be cured whenever the opposite party, passing over the default, shall have taken any step in the suit or appeal, and whenever the Court shall have passed judgment in the suit or appeal, whether such opposite party shall or shall not have taken any such steps."

appeal. We observe, with reference to Act, No. XXIX. of 1841, that a Plaintiff's suit, or appeal, is to be dismissed on neglect to proceed within six weeks, as of course, without any notice to him, or any proceeding of the Court, and it never could have been intended to place a defaulting party under Act, No. XXIX. of 1841, in a worse position than a defaulter under Regulation XIV. of 1829. A penalty of an *ex parte* decision is the result against a defaulting Defendant or Respondent, by Reg. XIV. of 1829. Would the mere staying of proceedings in the case of the Plaintiff, or Appellant, be a penalty upon the Appellant? Would it not rather be a boon to him? For postponement contemplates prosecution of further proceedings subsequently. We hold that the Regulation can only be read consistently by subjecting both parties to penalty for laches: the Plaintiff to dismissal, and the Defendant to an *ex parte* judgment: such must be the intention and spirit of Reg. XIV. of 1829, when read by the light of more recent enactment. The argument based on the provisions of the Act, No. III. of 1845, and its application to the case before us, is not, we think, good. A discretion is certainly vested in Courts of appeal to demand security for costs from the Appellant, but that the Legislature did not intend to repeal Reg. XIV. of 1829, is clear. It is a special [438] law, not coming within the scope of the Act quoted, and mention of it is altogether omitted in it, and the provisions are not inconsistent with the Act in question. The appeal must be dismissed, with costs."

Messrs. Raikes and Colvin, two other Judges of the Sudder Dewanny Adawlut, also recorded their opinion in these terms:—"We concur in this judgment, except as to there being any analogy between Ben. Reg. XIV. of 1829, and Act, No. XXIX. of 1841. The former is, in our opinion, in no respect affected by the penalty of default prescribed by the latter enactment. Let the Respondent in Court get from Appellant the costs of this Court, as per account made out by the accountant, of costs, together with interest from this day forward to the date of liquidation thereof. Let him apply to the Zillah Court for the Zillah costs. Proper orders will be passed there, in accordance with the Circular Order of the 4th of March, 1836."

A petition for review was presented, which was rejected; and another petition, praying for a further review, was also rejected, with costs.

The present appeal was brought from the judgment of the 21st of August, 1855, dismissing the appeal.

As the Respondents did not appear, the case was heard *ex parte*.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—There has been a denial of justice in this case, and the Sudder Court ought to be ordered to reinstate the appeal and try the case upon the merits, as if the appeal had not been dismissed. It is apparent [439] that the Sudder Court proceeded upon an erroneous construction of Ben. Reg. XIV. of 1829, sec. 2, cl. 1. The Appellant was never called upon by the Respondents, or the Court, in the terms of that Regulation, to furnish security for the costs of the appeal; therefore, he was not guilty of any default, or even laches, in not voluntarily offering security. According to the true construction of that section of the Regulation, the Sudder Court had not the power, even if any default had been committed, which was not the case, to dismiss the appeal upon that ground. All the Regulation really authorizes the Court to do, is to declare that the appeal should not be proceeded with, until security for costs of appeal have been furnished by the Appellant. Again, it is not proved that the Appellant is "an inhabitant of a foreign territory," within the meaning of sec. 2, cl. 1, of that Regulation, nor was it proved as fact that he had ceased to be an inhabitant of The East India Company's territories, or that he was not subject to the jurisdiction of the Sudder Court. On the contrary, it appears by the pleadings, that he still held large indigo factories, though temporarily resident, *pendente lite*, in England, and in such circumstances security was not required, *Roe*, Petitioner (2 Sevestre's Cases, 521). The provision contained in that Regulation in respect to security for costs, is solely for the protection of the Respondents: therefore, supposing the Respondent, Jugbundoo Bose, had been entitled under Regulation XIV. of 1829 to require from the Appellant such security, he was bound to have made his application at the earliest possible time after filing the petition of appeal, for it must be borne in [440] mind that the petition stated the fact of the Appellant's absence in England. The filing of the Respondent's answer to the appeal subsequently ought, therefore, to have been

treated, on general principles of law, as a waiver of his right to the security for costs of appeal. If, therefore, the Appellant had been bound voluntarily to furnish the security, and by omitting to do so, had made a default, still, under the Act, No. XVII. of 1847, such default ought to have been held cured by the Respondent passing over it, and filing his answer. It would be so in England. Daniel's Chan. Prac., Vol. II., p. 365 (Edit. 1840), which shows that a disability is removed by acceptance of the answer. Moreover, the Act, No. III. of 1845, repeals Ben. Reg. XIV. of 1829, sec. 2, cl. 1, as that Act gives a discretion to a Court of appeal to demand from the Appellant, or not, as it should think fit, and before the Respondent is called upon to answer, security for costs, "any law or Regulation to the contrary notwithstanding."

The Right Hon. Lord Kingsdown.—We are all of opinion that this judgment cannot stand, and that the suit must be remitted to India, to be tried on the merits.

By the Order in Council, made on the appeal, it was ordered and directed that the judgment of the Sudder Dewanny Adawlut of the 21st of August, 1855, be reversed, and the suit remitted back to the Sudder Dewanny Adawlut for trial.

[For subsequent proceedings, see 12 Moo. Ind. App. 477.]

[441] The ZEMINDAR OF RAMNAD.—*Appellant*: The ZEMINDAR OF YETTIAPPOORAM,—*Respondent* * [July 11, 12, and 13, 1859].

On appeal from the Sudder Dewanny Adawlut of Madras.

An award made upon an agreement to submit to the arbitration of the Collector of the District, a dispute respecting the boundaries of certain lands lying between two Zemindaries, upheld. The agreement to submit to arbitration having been deliberately entered into, acted upon, and acquiesced in by both parties,

The *Onus Probandi* that the consent of one of the parties to the award was obtained by threats and the undue influence of the Collector, lies upon the party setting up that charge.

The Judicial Committee, in appeals from the native Courts in India, will look to the broad principles of justice, and discourage mere technical objections, which do not affect the merits of the case, and more especially will discountenance the introduction of objections that may have occurred in the course of litigation, but were not raised at the commencement of the suit [7 Moo. Ind. App. 474, 475].

This appeal was brought from two decrees of the Sudder Dewanny Adawlut at Madras, dated the 3rd of May, 1841, and the 28th of April, 1853, whereby an award made in favour of the Appellant's late husband, the Zemindar of Ramnad, was held invalid, and certain lands, the subject in dispute between the Zemindar of Ramnad and the Zemindar of Yettiappooram were decreed to be the property of the latter.

The facts were these:

The Appellant, Ranee Purvatha Nauchear, Zemindar of Ramnad, was the widow of Ramasawmy Setoopaty, the late Zemindar. The Respondent, Jagaveera [442] Rama Coomara Yettappa Naiker, was the Zemindar of Yettiappooram. The Zemindaries of Ramnad and Yettiappooram were adjoining properties, and the lands in question lay between the two Zemindaries, and were claimed by the Appellant as being part of the village of Peroonauli, in the Talook of Paupaneoolam, in the Zemindary of Ramnad, and by the Respondent as being part of the villages of Mauvelivoday, Poodalappooram, and Chinoor attached to the Zemindary of Yettiappooram.

A dispute having in 1813, arisen between the ancestors of the Appellant's late

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Thomas Erskine, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessor.—The Right Hon. Sir Lawrence Peel.

harshad and one Sivagami Nauchiar regarding the Ramnad Zemindary, the latter was placed under Government management, and remained so from that time up to the year 1828. During this interval the inhabitants of the Peroonauli village permitted a vast extent of land of that village (which the Appellant contended, included the lands in dispute) to run to waste; and it was alleged that the then Zemindar of Yettiapooram, the Respondent's father, taking advantage of this circumstance, encroached upon the lands in dispute, and included them within the boundaries of Mauvelivoday, Poodalappooram, and Chinnoor, causing part of them to be brought under cultivation by the inhabitants of those villages, and that he continued encroaching and claimed other portions of them.

In January, 1823, a Punchayet, or native arbitration, was convened by the head men of the above villages of Peroonauli on the one side, and Mauvelivoday, Poodalappooram, and Chinnoor, on the other side, and on the 25th of that month a decision was passed by the members of the Punchayet, directing that four individuals who were the inhabitants of the two vil-[443]-lages of Chinnoor and Mauvelivoday, and who were the principal owners of the boundary lands, should bathe and dress themselves in cloths of yellow colour, sprinkle milk over their heads, and put a blood mark on their forehead; that one of them should bear a new pot of milk in his right hand, and the head of a black sheep in his left hand, and run, pointing out the boundaries of the two villages; and that two of them should follow him, marking the line of the boundary he would so point out. The principal owner of the boundary lands of the village of Poodalappooram was also to run as above mentioned, followed in a like manner by witnesses, to mark the line of the boundary which would be pointed out to them. That soon after the marking of the boundary, the pot of milk and sheep's head should be buried under ground. A dispute, however, arose upon the terms of the Punchayet, whether the pot was to be an unbaked or a new burnt pot, and the ordeal was not carried into effect. A petition to enforce the award of the Punchayet was presented, in 1833, by the Respondent's father to the Board of Revenue, who endorsed on the back thereof that the Punchayet's award could not be carried into effect.

The disputes between the neighbouring villagers still continuing, on the 12th of July, 1833, Government in a letter to the Board of Revenue directed that the Collector of Madura or Tinnevely, as arbitrator, should settle the dispute of boundaries in question, and that a deed of consent should be obtained from both parties. Accordingly, in pursuance of an order of Mr. Eden, the Collector of Tinnevelley, of the 20th of June, 1834, the guardian of the then minor Zemindars of Ramnad, on the 7th [444] of July, 1834, signed an agreement or submission of the dispute to the Collector either of Madura or Tinnevelley.

The following letter, dated the 30th of June, 1834, was also sent by the Collector, Mr. Eden, to the Zemindar of Yettiapooram. "As I have to ask you certain questions regarding the dispute of the boundaries of the village Mauvelivoday, belonging to your Zemindary, and of the village Peroonauli, attached to the Zemindary of Ramnad, you are hereby required to constitute a Vakeel, in whom you have confidence, and employ him to appear on your behalf before me, with your Mooktarnamah." Accordingly, the following Mooktarnamah, dated the 9th of July, 1834, was given by the Zemindar of Yettiapooram, to his Vakeel, Comareto Pillay:—"I hereby authorise you, Comareto Pillay, to answer in my behalf to all the questions that may be asked by the Collector of Tinnevelley, regarding the dispute of the boundaries of the village Mauvelivoday, attached to my Zemindary, and of the village Peroonauli, belonging to Ramnad, and to agree to the settlement that may be made in the matter. I do further bind myself to confirm all you may say before the Collector in the said matter, in the same manner as if I had been personally present and consenting." And, on the 10th of July, 1834, the Vakeel of the Zemindar of Yettiapooram, under the power of attorney from the latter, signed the following submission of the matters in dispute to the Collector of Madura:—"To Mr. Eden, the Collector of Tinnevelley. The agreement given on behalf of the Zemindar of Yettiapooram, in the Zillah of Tinnevelley, by his Vakeel, Comareto Pillay. I shall abide by the decision that may be passed by the Collector of Madura [445] regarding the dispute of the boundaries of the village of Peroonauli, attached to the Zemindary of Ramnad, in the Zillah of Madura; and of the village

of Mauvelivoday, belonging to the Zemindary of the above Yettiapooram, on his coming to the spot, and on his perusing the documents of both the parties. In this wise, I give this agreement with my free will."

The Zemindar of Yettiapooram was apprized by letters from the Collector of Tinnevelley, dated the 16th and 17th of July, 1834, of his Vakeel's consent having been given, and also by a notice from the Collector of Madura, dated the 14th of July, 1834, fixing the time and place of the intended arbitration. He acknowledged the receipt of the above letters and notices, and in a petition to the Collector of Tinnevelley, dated the 19th of July, 1834, stated that he had authorized his Vakeel to appear and plead the cause on his behalf, before the Collector of Madura; and asked particularly for directions whether he should appear personally, or send his Vakeel; to which the Collector answered, that he might adopt whichever course he thought proper.

In accordance with the above deeds of consent, a plaint on the part of the minor Zemindars of Ramnad was filed and presented to Mr. Blackburne, the Collector of Madura, on the 25th of July, 1834, claiming the lands in dispute, which were set out on a plan filed the same day. By the answer of the then Zemindar of Yettiapooram to the plaint, he claimed the lands as part of his Zemindary. On the part of the Zemindars of Ramnad, eighteen documents were given in evidence, and twenty-two witnesses examined. On the part of the Zemindar of Yettiapooram, thirty-five documents were produced, and twenty-two wit-[446]-nesses examined; and on the part of the Government twenty-four witnesses. No objections were offered by the Zemindar of the Yettiapooram, or his Vakeel, either in the pleadings, or *viva voce*, to the regularity of the proceedings or the competency of the arbitrator. On the 23rd of August, 1834, Mr. Blackburne made his award, decreeing the lands, consisting by the then measurement of 4016 coorkuns, to the Zemindars of Ramnad. The boundary stones were fixed and the lands in question delivered over to the Zemindars of Ramnad.

The Zemindar of Yettiapooram being dissatisfied with the award of Mr. Blackburne, petitioned the Board of Revenue for a stay of execution of the award, with a view of appealing from it, but the Board of Revenue declined to admit an appeal, considering that both parties had consented to the arbitration, and had themselves to abide by the decision of the arbitrator, and referred the Zemindar of Yettiapooram to the Civil Courts.

Accordingly, the Zemindar of Yettiapooram filed his plaint in the Zillah Court of Madura on the 19th of August, 1836, against Rancee Mungalaswary Nauchiar and Dura Raja Nauchiar, the minor Zemindars of Ramnad, by their then guardian, Mootooveroy Nauchiar, and against the manager of that Zemindary, for the recovery of 379⁵/₄ ropes of Malgoozary Punja lands, valued at Rs. 3708, and therein stated to be situated in the villages of Mauvelivoday, Poodalapooram, and Chinnoor, and for the recovery of Rs. 792. 1a. 2p., the amount of teerva due for two years from Fuslee 1244 (1834), and also for the removal of two boundary stones newly planted on the northern limit of Poodalapooram, and on the southern limit of [447] Chinnoor. The plaint, after mentioning the proceedings of the Panchayet in 1823 and the circumstances connected with the award of Mr. Blackburne, of the 23rd of August, 1834, complained that the arbitrator had passed an unjust decision without perusing the papers, and upon insufficient grounds, and prayed that the award of the Collector of Madura might be set aside, and that the stones placed at the western boundary of Poodalapooram, and the southern boundary of Chinnoor respectively, which had been placed in accordance with the award of Mr. Blackburne, might be removed. To this plaint the Defendants took a preliminary objection, by petition, that both parties were concluded by the award of Mr. Blackburne, of the 23rd of August, 1834. A counter petition was filed by the Zemindar of Yettiapooram, in which he urged that the Collector was not authorized by any Regulation to make an award.

Upon these petitions, Mr. Thompson, the acting Judge of the Zillah Court of Madura, made an Order, dated the 9th of January 1837, expressing his opinion, that after the deeds of consent to abide by the decision of the Collector, it was not just for the party cast to assert that the award passed by the Collector upon such reference was not right, and that it was not proper for him to solicit a re-investigation of the case by a Civil Court, and held that the cause having been once decided

by a competent authority, was not admissible under sec. 10 of Mad. Reg. II. of 1802. On appeal, the Provincial Court by an Order, dated the 26th June, 1837, concurred with the Zillah Court, and upheld the award; but on a further appeal to the Sudder Dewanny Adawlut, that Court, by an Order dated the 20th November, 1837, observed, that [448] as far as they could understand the Petitioner's statement, the Collector of Madura had not acted under any Regulation, but as an arbitrator to whom differences were referred by mutual consent of the parties concerned; that the Collector's award of the 23rd of August, 1834, was so far valid, that if the suit of 1836 were ordered to be revived, the Court would be bound to pass a decree conformable to that decision, unless the Petitioner could prove that part of his petition which asserted that the reference made to the Collector had not his assent.

A further petition to the Sudder Court was presented by the Zemindar of Yettiappooram, who stated that he was prepared to establish that the reference to Mr. Blackburne was made without his consent, whereupon that Court made an order, dated the 15th of January, 1838, directing the suit of 1836 to be revived, but intimating that the inquiry should in the first instance be confined to the question of the validity of the award, and that unless it was proved by evidence that the Petitioner had not previously consented to refer the matter at issue to the decision of the arbitrator, or that the award involved a matter not expressly referred by mutual consent of the parties to the decision of the arbitrator, the Zillah Court was not to enter upon the merits to try the cause.

The suit was accordingly remitted to the Zillah Court of Madura, and on the 22nd of August, 1838, Mr. Anstruther, the Zillah Judge, recorded the following points for the Plaintiff:—"To prove that as soon as the circumstance of the Kararnamah (or deed of consent) taken by Mr. Eden on the 10th of July, 1834, was made known to the Yettiappooram Zemindar, he at once protested to the proper authorities, or to [449] any authority; and that when directed by order of the Collector of Tinnevelley, or of the principal Collector of Madura, to produce his accounts, documents, etc., to enable the inquiry concerning the disputed land at Peroonauli to proceed, he protested against the inquiry as one never agreed to by him, and of which the Kararnamah had been executed without his or his Vakeel's consent.

In order to establish that he had so objected, the Zemindar of Yettiappooram filed a petition, containing this statement:—"Notwithstanding the Plaintiff was informed by the Enayetnamah (written notice) that the deed of consent was obtained from his Vakeel, who also informed him that it was obtained by compulsion, thereupon the Plaintiff, who is a Zemindar dependent upon the Circar (Government), thought that he could not at once sternly refuse to abide by the deed of consent extorted by the Collector of the District, and addressed an Urzee (memorial) to the Collector, on the 14th July, 1834, requesting that should the Collector of Madura repair to the disputed land he would also come there and pass a just award, and that, if he would not do so, he would send a respectable *employé* in his Cutcherry to the spot at that time to examine the accounts, documents, etc." No further evidence or explanation being offered on the part of the Zemindar of Yettiappooram, Mr. Anstruther made an Order, dated the 11th of September, 1838, as follows:—"The Vakeel of the Zemindar of Yettiappooram has attempted to prove by reference to Urzees and orders, dated on or about the 14th of July, 1834, that he never agreed to the reference to a Punchayet as it was constituted, and that he did all that was proper towards objecting [450] to the forced agreement of his Vakeel. In the face of this, the Court is in possession of the Zemindar's Mooktarnamah to the Vakeel, dated the 9th of July; his Urzee to the Collector of the same date, authenticating the Mooktarnamah; the agreement of the Vakeel, dated the 10th of July, to abide by the decision of the Principal Collector of Madura: from the nearness of dates of which, it is clear that the Zemindar and his Vakeel were close at hand to the Collector's Cutcherry, and consequently able to prevent, or at all events to protest against, any intimidation. On the 19th of July, the Zemindar, acknowledging the propriety of the arrangements, wishes to know whether he in person should attend, or whether he should send a Vakeel to attend the inquiry. It appears, therefore, that the Zemindar empowered a Vakeel, that the Vakeel acted, and that the Zemindar acquiesced in and confirmed his acts, and any attempt now to prove he did not do so would be a waste of time. As it is highly desirable that the rights of the question

should not be considered undetermined longer than is absolutely necessary, and as the Sudder Court have ordered that the suit might be entertained only if the Yettiappooram Zemindar could prove the Vakeel was forced against his will to execute the agreement which is now shown to be impossible, the dispute is ¹⁸ he considered finally at rest." This decision was on appeal affirmed by an Order of the Provincial Court, dated the 11th of February, 1839. The Sudder Court, however, on appeal, passed an Order, dated the 6th of July, 1839, wherein they observed that their Order of the 15th of January, 1838, appeared to have been misunderstood, and, at all events, had not been conformed to, and that the object of that Order was, [451] that in the event of the validity of the award being satisfactorily established, a decree should be passed declaring the award to be valid, without any reference to the merits of the cause, but that it appeared in fact that the suit had not been revived, and that no decree of Court had been passed; the Sudder Court, therefore, directed that the suit of 1836 should be revived, with the view of determining the validity or otherwise of the award of the arbitrator, and should that award be pronounced invalid, and be set aside, the Zillah Judge was to proceed in that case to try and determine the claim of the Zemindar of Yettiappooram on the merits.

The suit of 1836 was again remitted to the Zillah Court of Madura, and the Defendants, the former guardian and the manager, filed a petition for inquiry by evidence into the facts relative to the deed of consent alleged by the Plaintiff to have been obtained by force. But Mr. Elliott, the Zillah Judge, without ascertaining the alleged force by the examination of witnesses, as directed by the Sudder Court, passed an Order on the 11th of November, 1839, to the effect that the Zemindar of Yettiappooram did not consent to have his dispute settled by the decision of Collector of Madura, and in consequence that he was not bound to abide by his award, and that a decree should be passed on the merits of the cause.

The Defendants, by petition, complained to Mr. Elliott, that he had committed the same error which it was said Mr. Austruther, the former Zillah Judge, had fallen into; namely, had decided the question of the validity of the award upon a mere perusal of the proceedings, without calling upon the Plaintiff to examine witnesses to prove the alleged compulsion, and prayed [452] that final orders on this point might be passed only after an examination of the witnesses of both parties.

No attention was paid to this petition, and Mr. Elliott's Order was, on appeal, affirmed by the Provincial Court, and that Order of affirmance was appealed from to the Sudder Court.

Application was made by the Defendants for further time to put in their answer, in consequence of the appeal to the Sudder Court then pending, but extension of time was refused, and the answers not having been filed through the dissensions of the Defendants, the then guardian and the manager of the Zemindary of Ramnad, the Zillah Judge ordered that the suit should be tried *ex parte* as regards the Defendants, and, on the 27th of March, 1840, recorded points for proof of the cause on its merits.

Evidence was entered into by the Plaintiff, but no evidence was entered into by the Defendants.

On the 8th of May, 1840, Mr. Elliott pronounced his judgment on the merits, *ex parte*, in favour of the Zemindar of Yettiappooram, decreeing the lands in question to be restored to him. This decision was given, notwithstanding a petition to Mr. Elliott from the Appellant, on behalf of the minor Zemindar, Dura Raja Nauchiar, stating the dissensions between the guardian and the manager, and praying for a stay of proceedings until a final Order should be passed by the Sudder Court.

A petition of appeal to the Sudder Court was preferred by the Appellant against this decree, also a petition was presented to the Zillah Court of Madura, praying for a re-investigation of the suit, on the ground that the *ex parte* decree of Mr. Elliott had [453] been made in favour of the Plaintiff at a time when the minors were destitute of a guardian, and whilst that office was in dispute. Mr. Babington, the then Judge of the Zillah Court, refused to interfere in the revival of Mr. Elliott's decree, on the ground that a petition of appeal had been presented to the Sudder Court.

On the hearing of the Appellant's petition of appeal, the Sudder Court, by an Order dated the 3rd of May, 1841, agreed with Mr. Elliott, who had set aside the award of Mr. Blackburne on the ground that the Zemindar of Yettiappooram had not

himself signed a board. As to the merits of the case the Court remarked:—"The decree of the acting Zillah Judge subsequently passed on the merits of the case has been founded on the evidence offered before the Principal Collector of Madura during the arbitration, and no evidence whatever was taken by the acting Zillah Judge during the trial of the suit. In this the Court observe that the acting Zillah Judge has erred. He should have received anew all the evidence to be offered by the parties, and should have decided on it, the arbitration of the Collector being a private transaction, not recognized by any Regulation, and the proceedings and examinations held and taken by the Principal Collector not being admissible by the acting Zillah Judge as evidence, as they would have been, supposing them to have been taken before a regularly constituted Court. It also appears that the former and present guardian of the minor Zemindar of Ramnad have taken very different views of this suit, and that neither has yet been fully heard in it on behalf of the minor. It is desirable that the latter, who alone has the legal right to represent her, should [454] now be heard in this suit. On these grounds the Court resolve to set aside the decree, and direct that the suit be re-admitted on the file, and decided *de novo* on the merits, after a full examination of documents and witnesses before the Zillah Court."

The Appellant, as the guardian of the minor Zemindar, felt aggrieved at the last-mentioned decree of the Sudder Court, in regard to the award of Mr. Blackburne, inasmuch as the validity of the award had never been investigated by evidence; and after the examination of witnesses in the cause in a regular manner: but the decree not being a final one, the Appellant was advised that the practice of the Court would admit an appeal to Her Majesty in Council from an interlocutory Order, under the provisions of Mad. Reg. VII. of 1818, but that she might set up the award in the Zillah Court, and reserve the appeal to Her Majesty in Council in respect thereof, until the Sudder Court had pronounced a final judgment in the cause (see upon this point *Maharajah Mokesur Sing v. The Bengal Government*, ante, [7 Moo. Ind. App.] p. 284).

The Zillah Court having been abolished, and its duties devolved upon a subordinate Judge, the suit was placed on the file of the Court of the subordinate Judge of Madura, and a supplemental plaint was filed by the Respondent, on the 9th of July, 1841, against the Appellant as guardian of the minor Zemindar.

A great many interlocutory proceedings took place. On the part of the Plaintiff no fresh documents were filed, but there remained on the file of the Zillah Court the documentary evidence which had been [455] filed. These were copies of some of the documents, the originals of which had been given in evidence before the arbitrator, Mr. Blackburne, and were the same copies which the Sudder Court had, by its Order, dated the 3rd of May, 1841, declared to have been improperly received in evidence by Mr. Elliott. No other evidence was tendered on the part of the Plaintiff. On the part of the Defendants no evidence was tendered, as the documents of the Zemindary of Ramnad were in the possession of the Collector of Madura, as agent for the Court of Wards, who had not been made a Defendant.

Notwithstanding the imperfect state of the suit, and before the title of the Appellant as Zemindar was confirmed, the subordinate Judge, Mr. Limond, proceeded with the cause, and on the 8th of November, 1845, took the opinion of the Pundit of the Zillah Court of Madura, who advised him that in case of there being no neighbours and others who had known the boundary, nor marks to ascertain the same, the contested land should be divided in equal shares between the two disputing villagers. In accordance with this opinion, the subordinate Judge decreed on the 12th of November, 1845, that the disputed land should be equally divided between the litigating parties, and that each party should pay his own costs.

The Appellant appealed from this Order, and a decree, dated the 14th of March, 1849, was passed by the Civil Judge, Mr. Baines, affirming the decree of the subordinate Judge, of the 12th of November, 1845, but intimating an opinion that if the Zemindar of Yettiapooram had appealed, he would have decreed the whole of the disputed lands to him, on the ground that, under the circumstances, the Zemindar of Ram-[456]-nad must be treated in the light of a Plaintiff, and so bound to make out her case, and that as she had tendered no evidence her claim ought to be dismissed.

In consequence of this intimation the Zemindar of Yettiapooram filed a petition for a review of the decree of the Civil Court of the 14th of March, 1849, and on the

4th July, 1849, the Civil Judge applied to the Sudder Court for leave to review his judgment.

In virtue of an authority from the Sudder Court, Mr. Baines pronounced a revised decree, dated the 2nd of August, 1849, adjudging that the Zemindar of Ramnad should restore the whole of the disputed lands to the Respondent.

On the 1st of October, 1849, the Appellant presented an appeal to the Sudder Court against the revised decree of the Civil Judge of the 2nd of August, 1849, on the ground, among others, that the Court had no power to review its decree under the cl. 2, sec. 6, of Mad. Reg. XV. of 1816.

By an Order, dated the 29th of September, 1852, the Sudder Court gave leave to the Appellant to appeal from the revised decree of the Civil Judge for the following reasons:—"Firstly, because the propriety of laying the *onus probandi* on the Defendant is doubtful. Secondly, because, if the *onus probandi* is to rest with the Defendant, it appears necessary for the ends of justice that this should have been previously declared, and points laid down for the Defendant to prove accordingly. Thirdly, because the decrees of the lower Courts are defective, inasmuch as no points were recorded for proof, as required by cl. 3, sec. 10, Mad. Reg. XV. of 1816."

The final decree of the Sudder Court was pronounced on the 28th of April, 1853, whereby the [457] Order of the Zillah Judge, dated the 11th of November, 1839, was upheld, and the appeal of the Appellant was dismissed with costs. The reasons given by the Court, so far as they are material, were these:—First, that the Respondent's father having been long in possession of the disputed land before the award of 1834, the *onus probandi* was on the Appellant, and as she had adduced no proof of her title or possession, except the award of 1834, the decree in favour of the Respondent was right. Secondly, that although the omission on the part of the subordinate Judge to record points was unquestionably a defect in the proceedings, yet the Appellant had not been prejudiced thereby, but had been afforded full opportunity of adducing proof of her title.

As the amount in dispute was under Rs. 10,000, the Appellant did not apply to the Sudder Court for leave to appeal from this decree within six months, the time limited by the Order in Council of the 10th of April, 1836. A petition was afterwards presented to Her Majesty in Council, explaining the grounds of delay, and praying for leave to appeal from the decrees of the 3rd of May, 1841, and the 28th of April, 1853. Special leave to appeal was granted by their Lordships, and the appeal from those decrees now came on for hearing.

Mr. R. Palmer, Q.C., and Mr. W. W. Mackeson, for the Appellant.—The Sudder Court was wrong in affirming the Order of the 11th of November, 1839, made by the Zillah Judge, by which the award of the Collector of Madura, of the [458] 23rd of August, 1834, was set aside. That Court, on the contrary, ought to have reversed such Order, on the ground that there was no evidence before the Zillah Judge to impeach the validity of the award. Moreover we submit the suit was defective, and the whole proceedings taken were vitiated; first, no points were recorded by the subordinate Judge as required by Mad. Reg. XV. of 1816, sec. 10, cl. 3, *Srimut Moottoo Vijaya Raghanaidha Gowery Vallabha Perria Woodia Taver v. Rang Anga Moottoo Nachiar* (3 Moore's Ind. App. Cases, 278), and secondly, in the suit of 1836, the Appellant never had any opportunity of proving her title on the merits. [Dr. Lushington: We think that you must, in the first instance, confine your argument to the validity of the award.] The case of the Appellant upon that head is confined to this: either the award must be upheld, and the lands restored to the Appellant, or there must be a new trial. We contend that the Appellant is entitled to have the award of Mr. Blackburne, of the 23rd of August, 1834, specifically executed. Both parties mutually consented to this arbitration, and to be bound by the award. They produced their deeds and witnesses in support of their respective titles. The merits were fully entered into and discussed before the award was completed, and we submit that such an award so deliberately considered must be held conclusive and binding on the parties. But even if the award be deemed invalid, then, in the alternative, we contend that there has been no trial on the merits. The decree of Mr. Limond, the subordinate Judge, dated the 12th of November, 1845, as well as that of Mr. [459] Baines, the Civil Judge, of the 2nd of August, 1849, was founded on mere *ex parte* evidence, without any opportunity having been offered to the Appellant to

adduce evidence. In consequence of the Appellant having no opportunity of producing evidence, there never were materials before those Judges from which a judgment on the merits of the Appellant's title could be pronounced.

Mr. Rolt, Q.C., Mr. Badeley, and Mr. Jackson, for the Respondent.—The question being narrowed to the validity of the award, we submit that the award of the Principal Collector of Madura, of the 23rd of August, 1834, was not only illegal in itself, as being *de ultra vires*, Mad. Reg. II. of 1803, which Regulation defines and prescribes his powers, but was contrary to the evidence adduced before him as arbitrator, and is, therefore, to be treated as wholly inoperative and invalid as against the Respondent. Neither the award itself nor the reference or proceedings upon which it was founded were ever authorized by the Respondent, or can be deemed legally binding on him, or on any ancestor or predecessor of his, or upon any other person competent to bind him, or prejudice his rights or title, Watson on Awards, p. 2 (2nd edit.). Even if such a consent was given by the Respondent, as is insisted on by the other side, it was under pressure and threats of the Government authorities. Neither could he be aware of the finality of the award. Mad. Reg. VII., sec. 11, of 1816, provides for an appeal from an award of a Panchayet, and the Respondent considered it would also lie in his case. Such award, moreover, having been pronounced illegal and invalid by the [460] Zillah and Sudder Courts, cannot now be considered as of any force or value. Those Courts not only set aside the award, but established the right and title of the Respondent, after a full and careful consideration of the merits of the case, and such title must now be upheld. With regard to the objection that the Appellant was precluded from producing evidence of title, we submit that as the Appellant was invited and required to produce evidence of her title, and by her laches omitted to do so, any further application ought to be finally and conclusively rejected, without allowing any protraction, by a remittal to India, of a suit which has been already litigated for upwards of twenty years.

Their Lordships' judgment was delivered by

The Right Hon. Dr. Lushington (July 20, 1859).—The parties to the present litigation are the Zemindar of Ramnad, the Appellant, and the Zemindar of Yettia-pooram, the Respondent. They are the owners of two Zemindariaries in the vicinity of each other, and the primary question was one of boundary; whether certain disputed lands belonged to the one Zemindary or the other.

A very long litigation ensued, in the course of which several decrees were pronounced by the Courts below; but the important decrees with which we have to deal, are a decree dated the 3rd of May, 1841, and a decree bearing date the 28th of April, 1853. Both these decrees have been appealed from.

On the 23rd of August, 1834, Mr. Blackburne, the Collector of Madura, within whose collectorship the Zemindary of Ramnad was situate, made an award [461] whereby he decreed that all the lands in dispute, amounting to 4016 coorkums, belonged to the Zemindary of Ramnad.

By the decree of the 3rd of May, 1841, the Sudder Court affirmed the Order of Mr. Elliott, dated the 11th of November, 1839, setting aside this award.

As this award and decree embraced the whole property in dispute, it was perfectly obvious that the first consideration was whether the decree of the 3rd of May, 1841, was well founded or not: or, in other words, whether the award was to be deemed valid or not. If the award was valid, all subsequent proceedings necessarily fall to the ground. Their Lordships, therefore, determined, in the first instance, to confine the argument to that question, and to dispose of it.

For the purpose of duly considering the decree of the 3rd of May, 1841, and the validity of the award, it will be necessary to take a short view of the circumstances which gave rise to the dispute between the parties, and which led to the making of that award. It may be that, if any doubt arises as to the meaning of any of the written instruments, their meaning may be more satisfactorily ascertained by reference to the preceding facts and the surrounding circumstances.

It can hardly be necessary for the purpose we have now in view to take into consideration anything which occurred after the decree of the 3rd of May, 1841, for such circumstances can scarcely have even a remote reference to the award itself, or to that decree.

It appears that an early period, whether in 1813, or not, matters little, disputes

had arisen respecting [462] the boundaries of the Zemindaries and the lands in question. In January, 1823, a native Panchayet was convened, with a view of settling the question in dispute. The Panchayet failed to make any arrangement, and the ordeal prescribed by Indian custom was not carried into effect.

Thus things remained until 1833. It is useless to attempt to ascertain the reason why the question remained so stationary. At the time last mentioned, the Zemindar of Yettiapooram petitioned the Board of Revenue to give effect to this native Panchayet, and we think, looking at the nature of the ordeal, it is not surprising that the Board refused its consent.

The dissensions respecting these lands, however, not only continued, but led to broils and bloodshed, so that it became the duty of the Government to interfere. The Government did interfere accordingly, by letter addressed to the Board of Revenue, dated the 12th of July, 1833. That document, as far, at least, as we are able to ascertain, is contained in an extract from the proceedings of the Sudder Adawlut, under date the 3rd of May, 1841; and is there stated thus:—"It is, moreover, shown by the above proceedings, that on the 12th of July, 1833, Government, in a letter addressed to the Board of Revenue, particularly ordered that in the event of the matter being referred to the arbitration of either of the Collectors of Madura or Tinnevelly, the principals should be required to enter into a bond, binding themselves to abide by the decision." And further declared, "the Collector himself not competent to decide the case except on the mutual consent in writing of the litigating parties." That is all, we believe, that can be [463] found of the precise contents of this very important instrument. It is, however, also set forth, to a certain extent, in a petition filed in this suit. It is rather in different terms, but to the same effect.

Now all these facts and circumstances must have been known to both parties. The subject in dispute, the vain attempt to settle it by the native Panchayet, the interference of Government by attachment, and, unless the Collector was wholly regardless of the positive orders of the Government, the parties must have been apprized that no settlement by arbitration could take place without their consent.

We must now inquire into what took place between the Collector of Tinnevelly and the parties to this award, or rather between the Collector and the Zemindar of Yettiapooram; for, no doubt, the guardian of the Zemindar of Rammad gave his consent to the arbitration in adequate terms, and was bound by such consent.

So far as appears, it is probable there were some previous communications; but the first written communication now appearing from Mr. Eden, the Collector of Tinnevelly, was written on the 30th of June, 1834. The letter is to this effect [see same set forth, *ante* [7 Moo. Ind. App.], p. 444.] Perhaps there was some ambiguity in this letter, but, to ascertain exactly what passed, we must look at the whole of the facts of the case. The ambiguity arises from there being no mention of arbitration in express terms. The requirement of a Vakeel was according to usage, and the power of attorney, if not required by the orders of Government, was a proper precaution.

What occurred immediately after the receipt of this letter, we do not accurately know; but it [464] appears that an order was issued by the Collector, or a letter written by him, dated the 4th of July, 1834. Unfortunately, again, we only know the contents of that letter from the petition of the Zemindar, dated the 9th of July, 1834. Now, making due allowances for translation and eastern modes of expression, this petition, or letter, gives the clearest evidence of the course of the transaction. It shows what the Zemindar understood, and what he purported to do. It recites the substance, as we conceive, of the order of July the 4th, namely, that he was to send a Vakeel with power of attorney, not merely to answer questions as to the boundary, but to admit proposals for the settlement of the dispute, and he states that he sends the Vakeel accordingly. That is the substance of that letter, and it is thus recited in the petition:—"In obedience to your order, dated the 4th of July, directing me to send my authorized Vakeel with a Mooktarnamah, to answer in person certain questions put to him regarding the boundary dispute between the village of Mauvelivoday, attached to my Zemindary, and that of the village of Paroonauli, attached to the Zemindary of Rammad, and to admit any proposal which might be made for the settlement of the said dispute."

Looking at all the circumstances, it does not appear to us that any real doubt

can arise as to the meaning of this letter. There is no real ambiguity in the expression, "any proposal which might be made for the settlement." To consent to a mode of arrangement is to consent to an arrangement of the matter in dispute in a particular mode. It would really be absurd to say, I consent to any mode of arrangement you please to point out, but I will not be [465] bound by what is done under it. If there were a shadow of doubt, which we do not think there is, the conclusion to this letter would remove it. The conclusion is in these words:—"Therefore, I request your Honour will be pleased to inquire into my case, and pass a just decision."

The next step in this case is the Mooktarnamah, or power of attorney, which, though apparently dated on the 9th of June, in this part of the proceedings, is manifestly of the date of July the 9th, 1834, the date of the petition, part of which has just been read. This document is to be read, if it be obscure at all, in conjunction with the petition, stating that the Vakeel was appointed for the settlement of the case. The Mooktarnamah states—[see *ante*, p. 444]. We are all of opinion that this power of attorney, though not framed with the precision which ought to be found in every legal instrument, still adequately expresses the intention of the Zemindar; making due allowance for the vagueness which is inherent in most Indian documents. It authorizes the Vakeel, by it appointed, to act on behalf of the Zemindar for the settlement of these very disputes. Provided the Vakeel was duly authorized by his principal, no doubt has been raised, nor could, we think, have been raised, that the deed of consent executed by him on the 10th of July was, to all intents and purposes, sufficient, unless the signature of the principal was indispensable.

The document next to be referred to is the deed of consent, dated the 10th of July, 1834—[see *ante*, p. 444]. This deed of consent mentions a reference to the Collector of Madura. True it is that the correspondence had been carried on between the Zemindar and the Collector, not of [466] Madura but of Tinnevelley, within whose District Yettiapoora was situate; and it is possible that the Zemindar might have expected that Mr. Eden, the Collector of that District, would personally have made the investigation. This might have been so; but this expectation is not of the essence of the transaction. The consent asked was not to an investigation carried on by Mr. Eden personally, but to a settlement in a mode arranged by him; and this was done.

On the 11th of the same month of July, 1834, Mr. Eden writes to the Zemindar this letter:—"Your authorized Vakeel, Comareto Pillay, arrived here, and delivered me your urzee, dated the 9th instant, purporting that you have executed to him a Mooktarnamah, empowering him to admit any proposal which might be made for the settlement of the boundary dispute between the village of Mauvelivooday attached to your Zemindary, and that of Paroonauli attached to the Zemindary of Ramnad, without raising any objections that he must again consult with you on the subject. When I consulted with your Vakeel on the subject of this boundary dispute being one of long standing, of the loss in consequence entailed on the Ryots and others, or those which must be incurred hereafter, if the dispute be not settled, and also of the measures which should be adopted in arranging the matter, so that the people might enjoy peace, I perceived that it would be better for the parties to have the dispute decided by the Zillah authorities, on consideration of the proofs adduced by both parties; moreover, it is also better for them to have their dispute settled by a single authority than to have to do with two; and it is further better for them to have it [467] settled by the Principal Collector of Madura, who is well acquainted with the particulars of your case, because he was last year the Collector of this Zillah; and as he is also able to understand all the particulars of the opponents' (the inhabitants of Ramnad) case, he is, in consequence, well acquainted with the whole particulars of the dispute. I have, therefore, determined that it will be better for you to have the dispute decided by the Principal Collector of Madura than by myself, and have obtained the consent of your Vakeel, Comareto Pillay, to the above-said proposal. I have communicated these particulars to the Principal Collector, who will go to the disputed limits on a day fixed, in order to settle the boundary in dispute, and will instruct you to be present there on that date. You should go personally to the said spot on that date without failure, whatever business you may have, and produce before him the accounts, documents, and witnesses to establish

your case, and await his decision. If you fail to do so, you can expect no redress."

This letter is a translation, which may account for some of the expressions, for it could hardly have been so written in the original. It is a document of very considerable importance, as affecting the present question. It states the arrival of the Vakeel; Mr. Eden's consultation with him; the determination on consideration of all the circumstances, to refer the settlement to the Collector of Madura, as best acquainted with the facts; the consent of the Vakeel thereto; and calls upon the Zemindar to attend the investigation.

Here was ample notice to the Zemindar of what had been arranged; and this was the time to have [468] remonstrated against the proposed settlement, if it appeared to the Zemindar to be unjust, or if his Vakeel had exceeded the powers with which he had been entrusted.

It does not appear that any remonstrance was made, or any dissatisfaction expressed; and surely, when such opportunity offered, this is strong proof that the arrangement was consonant with the original intention of the Zemindar, and was not deemed by him prejudicial to his interests. But if any doubt could possibly be said to have existed upon this point, the subsequent history of the transaction will assist us in coming to a just conclusion.

Proceeding in order of time, the next document in date is from the Collector of Madura to this Zemindar, dated July the 14th, 1834:—"The Collector of Tinnevelly having informed me, through a letter giving cover to the deed of consent executed by you, agreeing to have the boundary dispute between the village of Mauvelivooday attached to your Zemindary, and that of Paroonauli, attached to the Zemindary of Rannad, decided by me, as also the other documents, I will come, on the 25th instant, to the disputed limits, to settle the dispute; consequently you should come on the morning of the abovesaid date to the spot in question, with the accounts and other documents connected with the case."

By this letter, Mr. Blackburne, the Collector of the Madura District, gives to the Zemindar notice of an intended meeting for the investigation and settlement, reciting the consent given by the Vakeel to have the dispute settled by him, the Collector.

This document was forwarded to the Zemindar in [469] a despatch from Mr. Eden, dated July the 17th:—"Mr. Blackburne, the Principal Collector of Madura, has transmitted through me an Enayetnamah to your address, which is herein enclosed, stating that he will on Friday, the 25th instant, proceed to the village of Paroonauli, to settle the boundary dispute between the village of Mauvelivooday, attached to your Zemindary, and that of Paupanucolum, attached to the Zemindary of Rannad. As the Collector will go to the disputed lands and settle the dispute, and as I have ordered Veerabudderupullay, the acting Naib Sheristadar of this Collectorate, to go to the spot on the same date, that he may explain to the Collector all the circumstances regarding your case, I think the whole matter will be justly decided, and you may consult with the said Veerabudderupullay regarding the said dispute as you may think proper. I think it is also better for you to send your authorized Vakeel, who is well acquainted with the matter of this dispute since the time of its commencement, with a Mooktarnamah to the effect that he may speak everything on your behalf, and cause documents and witnesses to be produced before the Collector. Therefore, you should act accordingly." This appears also to be an extract, and the substance of it is to give the Zemindar notice to attend the Collector of Madura by his Vakeel.

Here again, upon the receipt of this despatch of the 17th July, from Mr. Eden, was an opportunity for the Zemindar to pause, and make any representation that he deemed proper. Let us see what he actually did say on the receipt of those documents. It will be found in a letter to Mr. Eden, dated July the 19th. He recites in substance what had occurred, and says, "the case will doubtless be decided justly."

We believe that we have now reviewed all the important evidence bearing upon the question of the consent of the Zemindar of Yettiappooram to the investigation of the case by the Collector of Madura, and the settlement by him.

The next step towards ascertaining the validity of the award, would be to consider how the Collector of Madura fulfilled the duties he had undertaken; but, before

saying a word as to that part of the case, which has scarcely, if at all, been the subject of discussion, we will dispose altogether of the question of consent, to which the main argument on behalf of the Respondent has been addressed.

It has been said that if the Zemindar did give his consent to the arbitration, it was not a willing consent, but was obtained by threats, and through undue influence exerted by persons in authority. Now the *onus probandi* of an averment of this description must necessarily fall on those who make it. Where is the evidence?

True it is that the proposal originates with the Government, who are anxious to put an end to dissensions occasioning riot and bloodshed; but what are the instructions issued by the Government to which I have already referred? They are, that the consent of the parties is indispensable to such a proceeding by arbitration. Consent means a willing consent, not a forced consent, which would be a mere mockery; and so the Collectors must have understood the order. If they used either fraud or force, they disobeyed the Government, and were guilty of a breach of duty. Then, we say, where is [471] the evidence? We cannot presume such gross misconduct.

Now, in searching for evidence on this head, there was but one expression in the letter dated the 11th of July, 1834, which was prominently brought to our notice, and that is to the following effect:—"If you fail to do so (that is, to attend the Collector of Madura for the purpose of settlement), you can expect no redress."

Upon this we observe, first, that this letter was written after the consent had been given, and, therefore, could not affect it. Secondly, that it related not to the consent itself, but to the production of evidence before the arbitrator. Thirdly, that the Zemindar had previously made application to the Government on this subject, and had prayed for the execution of the award of the Panchayet of 1823, and this expression evidently meant, If you will not avail yourself of this opportunity, you can expect no assistance from the Government.

That the Collectors were anxious to fulfil the wishes of the Government, and obtain a settlement of these disputes by arbitration, cannot be doubted; and it may be assumed (though there is no evidence on that point) that they used the influence of their position for that purpose; but their doing so amounted neither to fraud nor coercion. A representation of the mischiefs which resulted from the existing disputes, and the difficulty of a settlement in the ordinary mode, in order to induce the consent of the Zemindar to a termination of the disputes by reference to a Government officer, well acquainted with the local circumstances, is perfectly consistent with justice and equity, and manifestly most beneficial [472] to the parties concerned. Indeed, the mass of documents and evidence, when litigation did commence, present a melancholy contrast to the proceedings which were taken by Mr. Blackburne.

Their Lordships are of opinion that there is no evidence to substantiate the charge of the consent of the Zemindar having been obtained by fraud, undue influence, or coercion. Wherever a strong expression is to be found, it is for the purpose of inducing the Zemindar to follow up his own consent, which had already been given, and to produce the evidence necessary to establish his claim, and protect his own interests. If there had been any evidence that the consent had been obtained under coercion, or by undue influence, we must observe that in the subsequent proceedings the Zemindar had most ample opportunity, over and over again, to have produced before the Court evidence to establish such a charge; but he never attempted to do so. He never made such a charge in his original plaint, filed in 1836.

One other objection remains to be considered. It was insisted that the Zemindar was not aware of the finality of the proceedings. It is somewhat difficult to discover how to consider this objection, for we do not find that it is supported by anything that the Zemindar said or did at the time. What is there in the nature of an arbitration which gives rise to an apprehension that it should not be final? True it is, that, if compared with the proceedings in the Courts of the Company, an arbitration cannot pretend to vie with them in the abundance of intermediate proceedings, the number of decrees, appeals, and reviews; but the very object of acceding to an arbitration was [743] to adopt an alternative by which the question in dispute might be settled, and recourse to the Civil Courts avoided. The Zemindar could hardly

expect that an arbitration would be attended with similar dilatory processes, even if he were enamoured of them, which we can hardly presume.

But then the ingenuity of Counsel has suggested, that by analogy to a Panchayet under Mad. Reg. VII. of 1816, the award might be subject to appeal.

Now, looking at that Regulation, we apprehend that an appeal under that Regulation from an award made by a Panchayet could take place only where there was a flagrant violation of the first principles of justice; and if a similar disregard of those principles had existed in the present case, we cannot doubt that a Court of Justice might set aside the award. We cannot, however, discover any disposition on the part of any of the Judges through whose cognizance this case has since passed, to set aside an award, even upon the slightest pretence. There is nothing, therefore, in these proceedings to sustain that objection.

The next stage would be the execution of the duties of the arbitrator, which will occupy us but a very few moments, for it has not been contended that Mr. Blackburne was guilty either of partiality or negligence. He appears to have taken every means in his power, by the examination of the land in dispute, and by a consideration of all the evidence, oral and documentary, which was brought before him, to arrive at a just conclusion.

It is meet, however, to apply our attention, before we proceed further, to the reasons assigned by the Sudder Dewanny Court for their decision on the 3rd [474] of May, 1841. They state that they agree with the Zillah Judge of Madura in setting aside the award, because the Collector did not obtain an agreement in writing from the Zemindar himself, binding himself to abide by the award. So that they were of opinion that a consent in writing signed by the Vakeel, who had been duly authorized by a power of attorney executed by the Zemindar himself, was not a sufficient authority. They cite no law, no custom, and no principle for this conclusion. It is, we believe, notorious that persons in the position of this Zemindar were in the habit of transacting business through their Vakeels, so that there does not appear anything unusual in the consent being given by a Vakeel. And, in the absence of all positive law to the contrary, we are of opinion that the Zemindar was just as competent to bind himself by a duly authorized agent, as he was to sign the consent with his own hand; and that he did give the authority to the Vakeel is not disputed. We think, therefore, that this objection to the award cannot be maintained.

Some notice is taken of the absence of a bond to abide by the decision. Now, assuming that the Government (for we have merely an extract of the despatch) did direct this to be done, and that they did not mean a written agreement only, how does the absence of a bond affect this case? Why simply that, by means of a bond, there might be an easier mode of enforcing the award.

In the examination of questions like these, their Lordships are of opinion that it is their duty to look to the broad principles of justice and equity; and, whilst they are always willing to pay due de-[475]ference to the Regulations which in part constitute the law of India, to discourage in proceedings of this description mere technical objections which affect not the merits of the case, and more especially to discountenance the invention of new grounds of dispute which have occurred in the course of the litigation, and which were not even mentioned at the commencement of it, as the cause for promoting the suit.

We think that it is satisfactorily proved that the Zemindar gave, in adequate terms, and in a sufficiently formal manner, his assent to the decision by arbitration; that during the whole proceedings he never retracted nor expressed dissatisfaction with the proposed arbitration (indeed, it is stated that he was sometimes personally present); and we deem it contrary to all justice, that if he entertained the objections now urged, he did not declare them at the proper time, but allowed the investigation to proceed, prepared to take advantage if the result was in his favour, and to dispute the arbitration if the decision was against him.

We shall humbly advise Her Majesty that the award of the 23rd of August, 1834, is valid, and ought to be sustained, and that the decree of the Sudder Dewanny Adawult, of the 3rd of May, 1841, ought to be reversed, together with all other decrees that may be inconsistent with the maintenance of the award. And we shall

further advise Her Majesty that the Respondent should be condemned in all the costs incurred in this litigation.

[For subsequent proceedings see 10 Moo. Ind. App. 47.]

[476] THE SECRETARY OF STATE IN COUNCIL OF INDIA,—*Appellant*;
KAMACHEE BOYE SAHABA,—*Respondent* * [July 1, 4, 9, 1859].

On appeal from the Supreme Court at Madras.

Transactions of Independent Sovereign States between each other, are governed by other laws than those which Municipal Courts administer. Such Courts have neither the means of decreeing what is right, or the power of enforcing any decision which they may make.

The Rajah of Tanjore, a native independent Sovereign, but in virtue of Treaties under the protection of the East India Company, died without leaving issue male, when the East India Company, in the exercise of their Sovereign power, and in trust for the British Government, seized the Raj of Tanjore, and the whole of the property of the deceased Rajah, as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir, and that the property of the late Rajah lapsed to the British Government. Held, that as the seizure was made by the British Government, acting as a Sovereign power, through its delegate, the East India Company, it was an act of State, to inquire into the propriety of which a Municipal Court had no jurisdiction.

Seemle.—There is a distinction between the public and private property of a Hindoo Sovereign, as upon his death his private property goes to one set of heirs, and the Raj and the public property to the succeeding Rajah.

The general rule of the Hindoo law of inheritance is partibility. The succession of a single heir, as in the case of a Raj, is the exception.

An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government, held to be equivalent to previous authority.

Ameer Sing, a former Rajah of Tanjore, was in the year 1787, the absolute Sovereign of the fort and country of Tanjore, in the Presidency of Madras. In that and subsequent years three Trea-[477]-ties were entered into between the Rajahs of Tanjore and the East India Company. The first of these Treaties was dated the 10th of April, 1787, and made between Sir Archibald Campbell, then Governor of Madras, and Ameer Sing; but as this Treaty was annulled by the Treaty next mentioned, it is unnecessary to state its provisions. The second Treaty, dated the 11th of June, 1793, was made between Sir Charles Oakley, Bart., then Governor of Madras, and Ameer Sing, which annulled the former Treaty, and the stipulations of which, so far as material here to be stated, were as follows:—"Art. 1. The friends and enemies of either of the contracting parties shall be considered the friends and enemies of both. Art. 2. In order to execute the foregoing Article in its full extent, the East India Company agrees to maintain a military force; and the Rajah of Tanjore agrees to contribute annually a certain sum of money hereinafter mentioned as his share of the expense of the said military force; the said Rajah further agreeing that the disposal of the said sum, together with the arrangement and employment of the troops supported by it, shall be left entirely to the said Company. Art. 3. It is hereby also agreed, that for the further security and defence of the countries belonging and subject to the contracting parties in the Carnatic, etc., that all forts shall be garrisoned by the troops of the said Company. Art. 8. In case the

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

said Rajah shall at any time have occasion for any number of troops for the collection of his revenues, the support of his authority, or the good order and government of his country, the said Company agree to furnish a sufficient number of troops for that purpose, on public representation being made by the said Rajah to the President in [478] Council of Fort St. George, of the necessity for employing such troops, and of the objects to be obtained thereby. Art. 9. The said Rajah shall receive regular information of all negotiations which shall relate to declaring war or making peace, wherein the said Company may engage, and the interests of the Carnatic and its dependencies may be concerned; and the said Rajah shall be considered as an ally of the said Company in all Treaties which shall in any respect affect the Carnatic and countries depending thereon, or belonging to either of the contracting parties contiguous thereto: and the said Rajah agrees that he will not enter into any negotiations or political correspondence with any European or native power without the consent of the said Company."

The third Treaty was dated the 25th October, 1799, and was made between Sevajee, the then Rajah of Tanjore, and Benjamin Tovin, Esq., Resident at Tanjore, acting under powers from the Governor-General, the material provisions of which were as follows:—Art. 2. After reciting that it had become indispensably necessary to establish a regular and permanent system for the better administration of the revenue of the country of Tanjore, stipulates "that all former provisions for securing a partial or temporary interference on the part of the Honourable Company in the government or in the administration of the revenues of the country of Tanjore shall be entirely annulled; and that, in lieu thereof, a permanent system for the collection of the revenue, and for the administration of justice, shall be established in the manner hereafter described." Art. 3. The Honourable Company shall be at liberty, as soon as possible, to ascertain, determine, and establish rights of property, and [479] to fix a reasonable assessment upon the several Soubahs, Pergunnahs, and villages of the country of Tanjore, and to secure a fixed and permanent revenue. Art. 4. A Court, or Courts, shall be established for the due administration of civil and criminal justice, under the sole authority of the English East India Company. The said Courts shall be composed of officers to be appointed by the Governor in Council of Fort St. George for the time being, and shall in no instance whatever be subjected to the control, authority, or interference of the said Rajah: but shall be conducted according to such Ordinances and Regulations (framed with due regard to the existing laws and usages of the country) as shall, from time to time, be enacted and published by the said Governor in Council. Art. 9. It is stipulated and agreed that the Rajah shall be treated on all occasions in his own territories, as well as in those of the Company, with all the attention, respect, and honour which is due to a friend and ally of the British nation. Art. 10. Whereas his Excellency, the Rajah, has had occasion to complain of inconvenience to his Excellency and his servants, from the present mode of garrisoning his Excellency's hereditary fort of Tanjore by a part of the Honourable Company's troops, it is stipulated and agreed, with a view to the accommodation and satisfaction of his Excellency, that the said fort of Tanjore shall be evacuated by the Company's troops entirely, and that his Excellency shall be at full liberty to garrison the said fort in such manner as to him shall seem fit. Art. 12. In complaints brought before any of the Courts of justice in which it shall appear, either by the application of the Rajah or the representation of the Defendant, at or before the time of giving in his [480] or her answer, or by the petition of the Complainant, that both parties are relations, or servants, or dependants of his Excellency, or inhabitants usually resident within the fort of Tanjore, it is stipulated and agreed that such parties shall, in the first instance, be referred for justice to the Rajah, or to any person he may appoint to dispense it. Any complaint against the Rajah's relations, immediate servants, or others, residing in the fort of Tanjore, by persons of a different description, shall, in the first instance, be made to the Company's representative at Tanjore, who shall prefer it to his Excellency. By other articles of this Treaty, provision was made for the collection of the revenue by the Governor in Council, and for the payment of one-fifth part of the same to the Rajah.

Subject to the obligations to the British Government imposed by these Treaties, the reigning Rajah of Tanjore remained Sovereign of the country, and within the

fort of Tanjore his power continued absolute, extending to the power of life and death.

On the 29th of October, 1855, Sevajee died at the fort of Tanjore, without leaving male issue, or son by adoption, or any brother him surviving. Upon the fact of his death being communicated to the Court of Directors of the East India Company, they by a despatch to the Government of India, dated the 16th of April, 1856, in concurrence with the opinion of such Government, and of the Government of Madras, declared the dignity of Rajah of Tanjore to be extinct; and declared the Rajah of Tanjore lapsed to the British Government.

In consequence of the lapse of the Raj, questions with respect to the maintenance of the late Rajah's [481] family, and other matters, came before the Government of Madras for their decision; and on the 10th of July, 1856, the Chief Secretary to that Government addressed a letter from their political department to the Government of India, of which the following is an extract:—"Par. 5. On the demise of the Rajah the Government directed the Resident to continue, until further orders, the payment of all customary pensions, allowances, or wages, to the family, dependants, or servants of the late prince; but that the recipients were clearly to understand that these disbursements had been authorized only temporarily and until the decision of the Honourable Court upon the whole question was received. Par. 6. The investigation of the numerous claims to provision of some kind that will be advanced by the parties referred to in the preceding paragraphs, will of itself be no light task. There are, however, several other important subjects for inquiry, in connection with the late Rajah, besides these claims. Par. 7. First, there are some very valuable Chuttrums, or Choultries, endowed with lands yielding an annual revenue of about a lac and Rs. 20,000. There are large balances outstanding against the holders of these lands, who, aware of the Rajah's objections to seek the aid of the Company's Courts to enforce his just rights, have wilfully withheld their rents. In some cases the lands have been misappropriated or fraudulently alienated, and there are numerous idlers and hangers-on of the palace, servants who hold useless offices in these institutions. These Choultry establishments should be remodelled and freed from all abuses, and the property belonging to them devoted for the purposes for which it was originally granted. Par. 8. [482] Secondly, claims on the part of Pagodas to payments of allowances have to be investigated, and some scheme laid down in respect to the continuance of these endowments, in some cases, either by money grants, or by assignment of lands. Par. 9. Thirdly, there are some valuable villages belonging to the Raj in different parts of the Province, some retained by Sevajee when the country was assumed by the British Government, and some subsequently acquired by purchase. These should be examined, and any claims to or liens upon them considered. Par. 10. Fourthly, some debts due by the late Rajah to private parties, or claims on behalf of members of the family, still remain to be settled. Par. 11. Fifthly, arrangements must be made for the abolition of the Rajah's Courts, and for the disposal of suits already on the file, as well as for the establishment of a Company's Court (probably that of a District Moonsiff) in the fort of Tanjore, which will henceforth be under the jurisdiction of the civil and criminal Courts of the Zillah. Par. 12. Sixthly, there are in the palace state jewels of great value, a valuable library of Oriental works, and an armoury, which have fallen in to Government with the Raj. Par. 13. It appears to this Government, that the several matters above recited cannot be duly inquired into except by an Officer specially deputed for the purpose. The present acting Collector has been but lately appointed: he is new to the District, has had no experience in the intrigues of a Mahratta Court, and even were his acquaintance with them greater, the onerous duties devolving on him as Collector and Magistrate of one of the heaviest Districts under this Presidency, would leave him no leisure for such a task. Par. 14. Under these considerations, I am directed to suggest, that [483] some officer should be specially sent as Commissioner to Tanjore, should be placed in charge of the Residency, and be directed to investigate and report upon the various important questions above enumerated, and any others that may hereafter occur to this Government as demanding inquiry in connection with the general subject. Par. 15. If this be approved, the Government propose to select for the duty, as the officer best qualified for it, Mr. H. Forbes, at present acting as third member of the Board

of Revenue, who has for several years been Resident at Tanjore, as well as Collector and Magistrate of the district, and who possesses an intimate acquaintance with the affairs of the Durbar."

In reply to this letter, the Secretary to the Government of India addressed to a letter to the Chief Secretary to the Government of Madras, dated the 8th of September, 1856, of which the following is an extract:—"Par. 3. In your previous letter, dated the 10th of July last, the Government of Madras have sufficiently shown that the subjects which call for investigation and settlement are so numerous and important, as to require to be dealt with by an officer appointed for that special purpose. The selection of Mr. H. Forbes, late Resident at Tanjore, for this duty, is a very proper one, and is accordingly sanctioned by his Lordships in Council. Par. 4. Of the various questions requiring consideration, those connected with the Choultries, and lands on which balances of revenue are due, the claims for Pagodas, the rights over villages retained by the Rajah when the administration of the country was assumed by the British Government, and the abolition of the Rajah's Courts, the Governor-General in Council leaves for disposal [484] by the Government of Madras. Par. 5. But the mode in which it may be proposed to deal with the Rajah's debts, and with the state jewels, library, and armoury, should be reported to the Government of India before any measures are taken; as also the apportionment of pensions or gratuities to the family and dependants of the Rajah."

Upon the receipt of the above letter from the Government of India, the Madras Government, on the 25th of September, 1856, appointed Mr. Forbes to be Commissioner for the purpose of the matters in question, and furnished him with instructions in regard to the conduct of his duties as such Commissioner. The material portions of those instructions were as follows:—"Par. 2. Under the authority now conveyed from the Supreme Government, the Right Honourable the Governor in Council proceeds to appoint Mr. Forbes to be Commissioner for the purpose of inquiring into and reporting upon the various questions demanding settlement in connection with the extinction of the Raj of Tanjore. Par. 3. These subjects may be divided into two classes: namely, those which have been left for the disposal of this Government, and those which are to be reported to the Government of India before any measures are taken. Par. 4. Under the first head fall—First. The Chuttrums endowed by the Rajah of Tanjore; the arrangements to be made for their future administration, and for placing them upon an improved footing, as well as for the recovery of the rents due to them, and of lands gradually alienated from them. Second. Allowances to Pagodas by assignment of the late Rajah, or his ancestors, their nature, whether terminable with the Raj, or proper to be continued as perpetual endowments, [485] and in the latter case, whether by grants of money or of land. Third. The state of the landed property, villages, or detached lands retained by Sevajee on the cession of the Tanjore country in 1799, or subsequently acquired by him or by the late Rajah, the claims to or liens upon them. Fourth. The abolition of the Rajah's Courts, and provision to be made for the dispensation of civil and criminal justice by Courts of the Honourable Company of some of the classes obtaining in their territory. Par. 5. On all these questions it will be for the Commissioner to report to Government after due inquiry, and the Government will then pass on each such final orders as may appear to be called for. Par. 6. The subjects reserved for the ultimate decision of the Supreme Government are—First. The debts of the late Rajah. Second. The State property, viz.:—jewels, library, armoury, etc. Third. Stipends, pensions, or gratuities to the family, servants, and dependants of the late Rajah. Par. 7. On these matters it will be for Mr. Forbes to report in detail, and to supply all the information that may be necessary to assist the Government of India in their settlement. Par. 8. Lists will of course be taken of all the jewels belonging to the Raj, and passing with it to the Honourable Company, as also of the State armour and weapons, and catalogue of the library. Due means will be adopted for the safe and careful custody of these valuables, until the pleasure of the Government of India be known regarding them."

Acting under this authority Mr. Forbes directed the chief officer of the palace to prepare statements of the lands and other State property of the Raj, and on his arrival at Tanjore, as the statement had not been made out, he addressed a letter, dated the 17th of October, [486] 1856, to that officer, in which were these para

graphs:—" Par. 4. When, on the 15th instant, I communicated to you, to the Durbar generally, and the nephews of the late Rajah, the decision at which the Government had arrived with reference to the Tanjore Raj, and the general principles on which I was instructed to act in resuming the Raj and making provisions for the family and retainers, I informed you that, while all private property would be scrupulously respected, the public property of the State would pass to the British Government: that property the Government have ordered me to place in safe and careful keeping. Par. 5. To enable me to do this, and also to place it in my power to obtain all the information I require about the State property, whether in land, jewels, or otherwise, it is my intention to assume possession, in the name of the British Government, of all the late Rajah's villages and gardens, including endowments to Choultries and Pagodas, of the public property now in the fort of Tanjore, and of all the records connected with the Raj; but while it is necessary that I should do this, I have to assure you, and to beg that you will assure others, that a careful investigation will be made into all claims that may be advanced by institutions or individuals to any part of the property, and that all to which a claim may be substantiated will be restored to its proper owner."

On the 18th of October, 1865, Mr. Forbes took possession of the property within the fort of Tanjore, and of the lands held by the late Rajah, or held by those who held them under Sunnuds of the Rajah.

After taking possession of the property in the manner above mentioned, and while Mr. Forbes was [487] engaged in making lists and catalogues of the articles constituting the different descriptions of the property, and selling part of the property, a Bill was filed by the Respondent on the 18th of November, 1856, on the equity side of the Supreme Court at Madras, against the East India Company. The Bill stated, that Sevajee at the time of his death, was possessed of and entitled to, as of his own right and private property, and distinct from the property belonging to the Raj of Tanjore, large estates, both real and personal, of the value of many lacs of rupees; that on the death of Sevajee, the Respondent, as his eldest widow, according to Hindoo law, became entitled to inherit and possess his private and particular estate, real and personal, and to administer the same; and that, with a full knowledge of the Respondent's rights, the East India Company, by their officers, servants, and agents acting by their orders, and in particular by the Collector and subordinate officers of the Collectorate of Tanjore, and by Mr. Forbes, began to interfere and intermeddle with the private estate and effects of Sevajee, and thereby, and from their power and control over the country, prevented the Respondent from receiving and possessing the same, and had refused to deliver the same to the Respondent, and that the officers and servants and agents of the East India Company had possessed themselves of the whole of the private and particular estate and effects, real and personal, of Sevajee, and had made, or were making, full and particular lists and inventories thereof, and had sold and disposed of and destroyed a considerable part thereof, and had received the proceeds of the sale and disposal thereof, and retained the same in [488] their hands, and threatened and intended, unless restrained by the injunction of the Court, to sell and dispose of the remainder thereof, and to appropriate the proceeds to their own use; and the Bill prayed that the Respondent, as the eldest widow of Sevajee deceased, and the first married among his surviving widows, might be declared by the decree of the Court entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereof of the private debts, if any, of Sevajee, and to any legal claims and demands that might exist against such private and particular estate and effects. That the East India Company might be declared to be trustees for the Respondent for and in respect of the private and particular estate and effects, real and personal, left by Sevajee at the time of his death, and possessed by them, their officers, servants, and agents, as in the Bill mentioned, or which without their wilful neglect or default might have been so possessed. That an account might be taken of the private and particular estate and effects, real and personal, of Sevajee, possessed by the East India Company, their officers, servants, and agents, or which without their wilful neglect or default might have been so possessed, and of the value thereof, distinguishing what shall remain in specie from what shall have been sold or otherwise dis-

posed of. That the East India Company might be directed forthwith to deliver up to the Respondent the private and particular estate and effects of Sevajee which may so remain in specie, and to pay to the Respondent the value of such part thereof, which by their wilful neglect or default [489] might not have been possessed by them, their officers, servants, or agents, as aforesaid, or which may have been sold or otherwise disposed of by them, their officers, servants, or agents, as aforesaid. That the East India Company, their officers, servants, and agents, might be restrained by the injunction of the Court from further interfering, intermeddling with, selling, or disposing of the private and particular estate and effects, real or personal, left by Sevajee at the time of his death, and for a receiver.

The Supreme Court at Madras granted an injunction restraining Mr. Forbes from proceeding with the sale.

The answer of the East India Company stated that Rajah Sevajee was up to and at the time of his death, Rajah and reigning monarch of Tanjore, and was a Sovereign prince entitled to and in the exercise and enjoyment of the rights, privileges, powers, and dignity of an absolute Sovereign within the limits of the hereditary fort of Tanjore, and of certain other Districts and lands adjacent thereto, but subject as to the residue of the country appertaining to the Raj, or kingdom of Tanjore, to certain engagements and relations between himself and the British Government. And the answer further stated, that in entering into the Treaties before mentioned, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company for the purposes of the Government of India in trust for the British Crown; in appointing, through the Government of India, Mr. Forbes as Special Commissioner, and in taking possession of the property of the late Rajah, they acted in their public political capacity, and in exercise of the general powers, privileges, and au-[490]-thorities vested in them by the various Charters and Acts of Parliament, by which the possession and government of the British territories in India, and the powers of making peace and war, and entering into Treaties, had been committed to them in trust for the Crown of Great Britain; and that all the acts and matters set forth in the answer, were acts and matters of State. And by their answer the East India Company insisted, that the question as to their right to take possession of the estate and property which Rajah Sevajee died possessed of and entitled to as Rajah of Tanjore, or of any and what parts of the estate and property, was a question of State arising from the character of the Rajah as a Sovereign, and the political relations between the East India Company, acting in trust for Her Majesty, and the State of Tanjore; and they, therefore, submitted that the matters set forth in the answer, and on which they rested their right to take possession of the property which was of the late Rajah of Tanjore, involved the construction of Treaties and of other acts of State, and were matters which could not be inquired into by the Court, or in any Municipal Court of justice within Her Majesty's dominions. And the answer further stated that, without in any way waiving the right of the East India Company to retain the whole of the property possessed by them and mentioned in the schedules thereto annexed, and without in any way admitting the jurisdiction of the Court to inquire into the grounds on which such right was vested; it had been determined, as an act of State and government, by the East India Company, through their Governor-General of India in Council and their Governor of Fort St. George in Council, that the [491] property and effects specified in certain schedules marked G. H. O. P. and Q. should be dealt with and disposed of as if the same had been the property of Rajah Sevajee as a private individual, regard being had in the first instance to the just debts of and claims upon Rajah Sevajee, which debts the East India Company were desirous should be paid from the estate, they being willing to allow the whole of such estate and property to be delivered over, subject to the debts of and claims upon the late Rajah, to the person or persons who would have been the legal representative or representatives of the Rajah, had he been a private individual, upon such person or persons giving adequate security, to the satisfaction of the East India Company, for the proper administration of the property in payment of the debts and otherwise. And the answer further stated, that the Government had resolved to appropriate the whole of the property mentioned in certain other schedules thereto marked M. and N., and all property similarly circumstanced which belonged to Rajah Sevajee, and not to third persons who might

claim the same, for the payment of any of the debts due by the deceased Rajah which might appear to them to be fair and just, and after such payment to appropriate the residue of such property towards making a provision for the family of the Rajah. And the answer submitted, that, in any point of view, the question whether any and what portions of the property left by Rajah Sevajee were his private property, or were property of the State of Tanjore, was a question involving the construction of a Treaty and relations between the States and the general political powers of the Government of India; and was, therefore, a question not [492] cognizable by any Municipal Court of justice. And the answer further submitted, that the Court had no jurisdiction in respect of the matters aforesaid, being matters concerning the revenues under the management of the Governor and Council. The answer admitted the state of Sevajee's family, at the time of his death, as stated in the Bill, but without admitting that his property was liable to be administered as that of a private individual; and the Defendants submitted whether, on the death of Sevajee, all his surviving widows did not become his joint heiresses and representatives, and would not have inherited his private and particular estate, if any, to the extent of the interest of a Hindoo widow according to Hindoo law. The Defendants set forth in schedules annexed to their answer an account of the property, estate and effects of Sevajee, including the property claimed by third parties, possessed by them, or by their officers or agents on their behalf, and of the value thereof, so far as they were able to form any opinion respecting such value; but without admitting that the Rajah left any property that could be called his private or particular property; and without admitting that the Respondent had any legal claim or right in respect of any property taken possession of by the East India Company or their officers or agents, the answer stated that they did not intend to treat the property of Sevajee in the schedules, marked G. H. O. P. and Q. respectively, as belonging to them for their own use, or in trust as aforesaid, or otherwise, or as forming part of their revenues, or as being applicable to the purposes aforesaid.

Schedule G. of the answer, contained a list of certain property, described as real property acquired since [493] 1799, which from its nature was not essentially public or State property. Schedule H. contained a list of similar property not taken possession of by the East India Company. Schedule O. contained a list of personal property described as acquired since 1799, and which from its nature was not essentially public or State property. Schedules P. and Q. contained a list of personal property of the same nature, not taken possession of by the East India Company. Schedule R. contained a list of the horses, elephants, cattle, carriages, etc., of the late Rajah which had been sold.

The hearing of the cause took place on the 29th and 30th of September, and the 1st of October, 1857, when evidence not material to state was gone into on both sides. The cause stood over until the 11th of December, 1857, for judgment, on which day the Court decreed and declared that the Respondent, as the eldest widow of Sevajee, and the first married among his surviving widows, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereof of the private debts, if any, of Sevajee, and to any legal claims and demands that might exist against such private and particular estate and effects, and that the Defendants were trustees for the Respondent for and in respect of the private and particular estate and effects, real and personal, left by Sevajee at the time of his death and possessed by them, their officers, servants, and agents; and the Court ordered that it should be referred to the Master to take an account of the private and particular estate and effects, [494] real and personal, of Sevajee, possessed by the Defendants.

The following reasons for this decree were transmitted by the Chief Justice, Sir Christopher Rawlinson:—"The Plaintiff by her Bill prays that she may be declared, as senior or first married widow of Sevajee, the late Rajah of Tanjore, who died without male issue, to be entitled to the private and particular estate and effects of her deceased husband, subject to the payment of his debts, etc. She also prays that the Defendants may be declared to be trustees for her of such of the property as may have been taken possession of by them or their servants; also for an account and a Receiver. The Defendants in their answer set up two lines of defence; first, that

the Plaintiff has no case on the merits: and, secondly, that the Court has not any jurisdiction to try the suit. As regards the first, they submit that the late Rajah Sevajee was an independent and absolute Sovereign, and as such was not possessed of any private estate as distinguished from the public or State property: and they further allege, that, according to Hindoo law, all the widows, and not the senior widow alone, are entitled to succeed to the estate of a Mahratta man dying without male issue either natural or adopted. In support of their second line of defence, namely, that the Court has no jurisdiction, they submit that they took and detained the property of the late Rajah in their public and political capacity: that their taking of the property was an act of State, and that the question of what portion is private and what public property involves the construction of a Treaty, and that consequently neither this nor any other Municipal Court in Her Majesty's dominions has any [495] jurisdiction to entertain the question. It was also urged that the Court had no jurisdiction, because the suit has reference 'to a matter concerning the revenue under the management of the Governor and Council.' I will now state what I consider to have been established on the one side and on the other, and how much of the several defences relied on by the Defendants have been made out. I think that all the material facts set out in the Plaintiff's Bill have been clearly proved. I am of opinion also that the Plaintiff, according to Hindoo law, is, as the senior and first married widow of the late Rajah Sevajee, entitled to her late husband's private and particular estate and effects; and that the Defendants have wholly failed to prove or point out to us any law or custom, such as is alleged in their answer, under which all the widows succeed to their deceased husband's estate under circumstances such as have been established in this suit. This ground of defence, it may be observed, goes only to the *quantum* and not to the root of the Plaintiff's claim. I am also satisfied on the evidence that the late Rajah Sevajee, a Hindoo of the Soodra caste, was not a member of an undivided family, and that he was possessed of private and self-acquired property, both real and personal, and that a distinction was observed during his life between his State or Crown jewels and those which he either purchased himself or caused to be made for the use of his numerous wives and their families. An inspection of the schedules attached to the answer, as well as the answer itself, confirms me in my opinion that much of the property detained by the Defendants is of such a nature as cannot allow of its being considered State property. Take, for instance, schedule R., the contents [496] of which have been sold by the Defendants. Can it be believed that all the carriages, including numerous pony carriages and children's carriages, and palanquins, or the cows and horses, ponies, etc., were State or public property, or ever treated as such, or that all the contents of schedule M., including numerous female jewels and trinkets, or, that all the female apparel, clothes, shawls, silks, laces, etc., in schedule O., are State property? It is true that, as regards some of these schedules, G., H., O., P., and Q., the Defendants, in their very cautiously drawn answer (and which, were it not that of a Corporation whose personal knowledge in most instances is necessarily small, might be considered unsatisfactory), admit that the property in the last-named schedule 'is not essentially public,' a somewhat ambiguous phrase; and that as regarded it and some other property, both real and personal, they do not intend treating it in the same way, or on trust, as the property in the other schedules, but are willing to give it up as if it had been private property. I will only observe on this, that I do not exactly see, unless the property referred to is private, how the Defendants can justify treating in any other way than as public property, really public, and which as such has come to their hands in trust. But the learned Counsel for the Defendants contend that the contents of the schedules and the nature of the property are immaterial, as no distinction, they say, can be allowed between the public and private property of an absolute Sovereign, as he can dispose of the whole of it as he may think fit: citing as an authority for this principle the case of *The Advocate-General of Bombay v. Amerchund* (1 Knapp's P.C. Cases, 329 n.), and *The Lord-Advocate v. Lord* [497] *Dunglas* (9 Cl. and Fin. 211). This last case was referred to for the following *dictum* of Lord Brougham's, namely, 'It is only within the last half-century that any private property has been acknowledged to exist in the Crown at all; prior to that, all lands descending on the Crown, even from ancestors or collateral

relatives, were held *jure coronæ*. All the property of the Crown is held for public purposes, and is Crown property, except that which the individual Sovereign has retained a right to deal with in his private and personal capacity.' This *dictum* appears to be confined to landed property, and, whether strictly correct as regards all landed property, is, I think, with every respect to the noble and learned Lord, fairly open to doubt; for, though it is true that according to the Common Law of England the King, being a Corporation, purchases of real property made by him after the assumption of the Crown vest in him in his Sovereign capacity, and descends to his successors, 'still purchases made before the accession to the Crown, or descent from collateral ancestors after the accession of the Crown, vests in a natural capacity' (see Co. Litt. 15 b, note 4), showing that even in England the Monarch could take real as well as personal property in his own right. As was, however, observed by the Bench during the argument, the Statutes of 1 Anne, c. 7, and 39th and 40th Geo. III., c. 88, regulate questions regarding the private property of the British Sovereign; and it is not by the English Statute, or Common law, that the questions in this suit are to be decided, but by the Hindoo law. And even the statement in the case referred to, 1 Knapp's P.C. Cases, 329, namely, that there was no distinction between the public and private property of [498] an absolute Sovereign, must, I think, be taken in connection with the facts of that case, and the point then under the consideration of the Court. In that case, as well as in *Elphinstone v. Bedreechund* (1 Knapp's P.C. Cases, 316), the question arose out of the seizure of an enemy's property; and it was held that on the seizure of the property of a hostile Sovereign, *si non flagrante sed non dum cessante bello*, no distinction could be allowed between his public and private property. Here there is no question as to the seizure of an enemy's property, or as to peace or war, but whether the late Rajah Sevajee possessed any private property, and if so, whether the detention of such property, now belonging to an inhabitant of a territory peaceably become part of the British territories in India, can be justified, and on the grounds set up by the Defendants. But admitting that in the case of an absolute Sovereign, such as was contemplated in the above case, no distinction can be made between his public and private property (and few such, I think, can be found in the present age), can I assume, on the facts before us, that the late Rajah was such an absolute Sovereign as that he could have disposed of his fort or other public buildings or State jewels as he did of his other property, both real and personal? There was no proof before us of his ever having disposed of any of the State property; and as to his being an absolute Sovereign, what evidence had the Court before it of that fact? The evidence, as far as it went, tends, I think, to show that his Sovereignty was little more than nominal; that he exercised no Sovereign powers over the Kingdom of Tanjore; that he resided within the circumscribed limits of the fort of Tanjore (where a resident and officer of the East [499] India Company was always present), enjoying little more than, to use the expression of the Directors of the East India Company, 'a titular Sovereignty,' and certainly not more than, to adopt the words of the Defendants' answer, 'the outward state and dignity of the reigning monarch.' To what even that amounted was not very clearly shown. We had evidence, however, that the late Rajah never did any of the acts that mark Sovereign power; for instance, he did not send or receive Ambassadors, or keep up political relations with any foreign States; he did not coin money; he did not collect or in any way manage the revenues of the Kingdom of Tanjore; but it was shown that he received an annual stipend from the East India Company, some of his receipts for which were put in, for what purpose I hardly know, unless, perhaps, for the last few words, by which the receipt of a certain sum on account of the East India Company was acknowledged 'as part of my lac of star pagodas and one fifth part of the net revenue of my country for the year'; not of any kingdom, be it observed. Upon the whole of the evidence before us I am satisfied that the late Rajah Sevajee was not the absolute Sovereign suggested by the Defendants, and that he had private property, both real and personal, as I have above stated. I am further strengthened in this last conclusion by the fact that, according to Hindoo law and custom, a Hindoo Sovereign may have private property. See Strange's "Hindu Law," vol. i. p. 209, where, after stating that a kingdom is not divisible, it is added, that 'the effects and private estate of a Sovereign, like those of an ordinary individual (Hindoo), are in common, and

distributable amongst his sons.' And 2nd vol., App. [500] 329, is to the same effect. See also 2 Colebrooke's Hindu Law, c. 1, s. 1, *et seq.* My judgment on the above part of the case has been formed without any reference to the Treaty of 1799, put in evidence by the Defendants, possibly for the purpose of supporting one of the points raised by them, namely, that the Court could not take cognizance of the suit, because it involved the construction of a Treaty. Upon this point I would here remark, as well as upon some others equally beyond dispute, but which were much dwelt on by the learned Counsel for the Defendants, that the Court has never entertained any doubt respecting them, though not able to see their applicability to the facts of the present case. I refer to such points as that the construction of Treaties, or the public acts of State between Sovereign powers, or acts relating to peace or war, could not be tried by any Municipal Courts. As little matter of doubt is it that the East India Company, though subjects, have certain Sovereign powers delegated to them, such as those of making peace and war, and of making Treaties with certain of the native powers in Asia, and that concerning such acts as can be included under the above heads neither this nor any other municipal Court has any jurisdiction to inquire. But in the way in which the Plaintiff shapes her case before the Court, I think, that these points do not fairly arise. The Plaintiff sues as a private individual, and as the subject of a country forming part of the British territories in India. Of the annexion of the Raj, of the Defendants taking possession of its revenues, or of the State property of the kingdom, whether consisting of lands, forts, jewels, or munitions of war, she makes no complaint. She sues only for what [501] she alleges to be her property according to the Hindoo law, namely, the private estate and effects of her deceased husband, Rajah Sevajee, the whole of which, she alleges, the Defendants detain from her without any justification. Let us proceed now to the Defendants' second line of defence, namely, that to the jurisdiction of the Court. They say, assuming that there was private property, its seizure and detention cannot be inquired into by this Court: first, because its seizure was an act of State; and, secondly, because the property seized, or a portion of it at least, is revenue. First, then, as to the seizure being 'an act of State' (though many of my arguments will bear on both lines of defence). What is an act of State? It is not every act by a Government, or by those representing the Sovereign in a foreign country, which will be exempted from the jurisdiction of the Municipal Courts. (See *Cameron v. Kyte*, 3 Knapp's P.C. Cases, 332.) But assuming an act of State to be an act of the Sovereign power, in relation to peace or war, or an act done by it as being absolutely necessary for the public safety, or *ne quid detrimenti res publica capiat* (and under this head a benefit or increase to the revenue can hardly be included), or acts of a similar description, have the Defendants brought the acts of seizure and detention of the Plaintiff's property within the principle of the protection they set up? And further, was, in fact, the seizure of the private property an act ordered by any Government at all? Now what are the facts proved which bear on this portion of the case? After the death of the late Rajah Sevajee, which took place in October, 1855, it was determined by the East India Directors that the Raj of Tanjore had lapsed to the East India Company for want of [502] male heirs to Rajah Sevajee. Though this lapse was not immediately publicly announced, the East India Company must, I think, be considered to have become the Sovereign power throughout the kingdom of Tanjore from the death of Rajah Sevajee. No very perceptible change in the government of the country at large would be made, as the territories of Tanjore had long been under the management and control of the East India Company. Such then being the state of things, it is only after a correspondence between the East India Directors and the Government of India and of Madras, that in September, 1856, Mr. Forbes is appointed, under the direction of the Government of India, for the purpose of inquiring into and reporting upon the various questions demanding settlement in connection with the extinction of the Raj of Tanjore. In the letter of the Government of India, of the 8th of September, 1856, authorizing the appointment of an officer on this special duty, I find the following passage:—'But the mode in which it may be proposed to deal with the Rajah's debts, and with the State jewels, library, and armoury, should be reported to the Government of India before any measures are taken.' It might be contended from the concluding words of the above extracts that no authority was given or

intended to be given for the taking possession of even the State jewels, etc., till some further report had been made to the Government of India. Such, however, does not appear to have been the construction put upon it by the Government of Madras, who, on the receipt of the above letter, instructed Mr. Forbes, in a letter of the 25th of September, 1856, 'to take lists of the jewels belonging to the Raj, and passing with it to the Honourable Company, as also [503] of the State armoury and weapons.' Neither of the above letters appear to contemplate, much less to authorize, the seizure or detention of other than State property, or, in other words, of the property of the Raj, passing with it to the East India Company. It was proved, however, I may here remark, that previous to this authority being given, the rents and profits of the villages and lands bought by Sevajee had been received by Mr. Forbes since the Rajah's death. The evidence of Ramachundra Row, uncontradicted, is, that Mr. Forbes had been receiving the rents and profits of those villages since Sevajee's death. The sale also of the contents of schedule R. had taken place early in 1856. On the 18th of October, 1856, it is that Mr. Forbes, having received his new authority, which is relied on for making this seizure an act of State, took possession of the property in the fort of Tanjore. It appears to have been an indiscriminate seizure, both of public and private property: the orders of the two Governments, as I have above pointed out, having been expressly confined to the State property. Assuming then that the taking possession of the public and State property can be considered an act of State, as ordered by the Government of India, and as being a necessary consequence, perhaps, of the assumption of the Raj, how can the seizure and detention of private property (and especially of such portion as consists of rents and the produce of sales made previous to October, 1856) come under the same protection? The seizure of the private property can, I think, be held to be brought within the protection of the act of State plea only on proof either that the property was *bona fide* believed at the time to be all public, or that its seizure was rendered [504] unavoidable from the impossibility of distinguishing the one from the other, or because the public could not possibly have been taken possession of without also seizing the private. This last ground, it should be observed, affords no excuse for the detention. But we had not any evidence of such a state of circumstances existing as I have above suggested; no State property was shown to have been in danger, nor was there any evidence that there existed any difficulty in separating the one from the other, which ordinary care and patience, even after the seizure, might not have overcome. I say even after the seizure, for it should be borne in mind that the gravamen of the Plaintiff's complaint before the Court is the detention of her private property; not the seizure, which of course would have been the subject-matter of an action of trespass on the plea side of the Court; nor had we any proof that there was any *bona fide* belief that all was public property. On the contrary, Mr. Forbes, in his letter of the 17th of October, 1856, written the day before the seizure, shows that he knew there was private property amongst that about to be seized, for he expressly states that all property to which a claim shall be established shall be restored to its owner. It appears then from the above, that an order having been issued to take possession of public property, private property was taken, and is now detained under the circumstances above set out. I am of opinion that such detention cannot be considered an act of State, nor can I consider that the subsequent adoption by the Defendants can make that an act of State which originally was not so. The remaining ground relied on by the Defendants to bar the jurisdiction of the Court is, that the seizure [505] related to a matter of revenue, from inquiry into which the Court is expressly precluded by the 23rd clause of the Charter establishing the Court. In support of this point the learned Counsel cited the Statute, 16th and 17th Vict., c. 95, sec. 27, by which it is enacted 'that all real and personal estate within the said territories, escheating or lapsing for want of an heir or successor, and all property within the said territories devolving as *bona vacantia* for want of a rightful owner, shall (as part of the revenues of India) belong to the East India Company, in trust for Her Majesty for the service of the Government of India.' Looking to the words used in the Charter, and the inconvenience intended to be guarded against, I am inclined to think that a very fair doubt may be entertained as to whether an escheat, or lapso under the above Statute, comes within the words of the Charter as 'revenue

under the management of the Governor (of Fort St. George) and Council, or as revenue collected under Regulations made by him." I think also that the same reasons do not exist for preventing the subjects of the Queen from resorting to Her Courts in the case of such escheats as in cases relating to the collection of the ordinary revenue, made as it is to a great extent in small sums, and under regulations and usages which it might be exceedingly inconvenient to submit to the consideration of the Queen's Court. I think, however, that this line of defence, namely, that the property seized was revenue, may be disposed of on the same grounds as I have considered a sufficient answer to the defence that the seizure was an act of State: for supposing that the seizure of the public property, which had lapsed to the East India Company under the Statute, [506] to have been an act done in the collection of the revenue within the meaning of the Charter, can we extend the same protection over the wilful seizure and detention of private property; an act not ordered either by Government, or justified by any Regulation, or necessitated by any difficulty or unavoidable necessity, as I have above already shown? I think we should not be justified in doing so, being of opinion that the property was seized and has since been detained with the knowledge that some of it was private property. This fact, I think, distinguishes this case from *Spooner v. Juddan* (4 Moore's Ind. App. Cases, 353), which was relied on in support of the revenue defence as well as that of the act of State. In that case a slip had been made; and there can be little doubt, after reading the facts of that case, but that the Defendant *bona fide* believed that he might make the distress for the whole arrears of quit-rent due from the premises, without regard to the question of whose name was mentioned in the warrant. I fully subscribe to the authority of that case, as well as to the large class of cases establishing the rule, that parties *bona fide* believing they are acting in pursuance of a Statute and according to law, are entitled to the special protection which the Legislature may have afforded them, though they have been guilty of an illegal act. But I do not think the principles there laid down applicable to the present case, which is distinguishable not only on account of the want of *bona fides*, but also on the ground that it is not an action of trespass for the seizure, but a suit for the detention of the property of the Plaintiff. I must here observe that though I am now delivering the judgment of the Court, Mr. Justice Davidson, who, owing to his absence, has not [507] had any opportunity of reading this judgment, and consequently is not answerable for the reasons or observations contained in it, fully concurs with me in the facts of the case and in the conclusion at which I have arrived, namely, that the Plaintiff is entitled to a decree, on the ground that, as to part at least of what they have done, the defence set up by the Defendants cannot avail them, because they are unnecessarily and wilfully detaining private property of the late Rajah Sevajee, with full knowledge that it is such private property, and that they have not any title to it whatever. The Defendants having then failed to establish any of their grounds of defence, it remains for me only to declare the Plaintiff entitled to the decree of the Court as prayed:—First, that as senior, or first married widow, she is entitled to the private and particular estate and effects of her deceased husband, the late Rajah Sevajee. Second, that the Defendants may be declared trustees for her for so much of such property as they have possessed themselves of. Third, for an account of all property. The other points (including costs) reserved until after the Master's report, and for further directions."

The present appeal was from the above decree, and was prosecuted by the Secretary of State in Council of India, who came in the place of the East India Company (see Statute, 21st and 22nd Vict., c. 106, for the better Government of India; section 3 declares that the Secretary of State is to have the powers formerly exercised by the East India Company).

Sir Hugh Cairns, Q.C., Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Secretary of State in Council for the affairs in India.

The substantial question is, whether the taking pos-[508]-session of the deceased Rajah's property by the East India Company, in virtue of Treaties authorizing the annexation of the Raj of Tanjore, was not such an act of State and Sovereign authority as cannot be questioned or inquired into by a Municipal Court within the territories of the East India Company. Three questions are involved in this consideration: First, whether by the Charters and Statutes creating and defining the

jurisdiction of the Supreme Court at Madras, the East India Company, as the governing power in India, is amenable to that jurisdiction for acts done by them in their governing and Sovereign character; secondly, whether the acts complained of are not acts of State and Government and of such a nature, that the Government who have done the acts, cannot be made amenable to any Municipal Court whatever; and thirdly, whether, having regard to the fact that the seizure involved the question of a Sovereignty, namely, the Raj of Tanjore, there was any foundation for the distinction taken by the Court below between the public and private property of the late Sovereign the Rajah.

Upon the first point. The Supreme Court of Madras was created by the Charter of 1800. The 21st section of that Charter defines the jurisdiction of the Court, the powers of which are extended by Statute, 4th Geo. IV., c. 71, s. 17. The 23rd section expressly provides that it shall not be competent for the Court to entertain or exercise jurisdiction in any suit or action against the Governor-General or the Governor of Madras for or on account of any order, or other act, matter, or thing done in their public capacity, or acting as Governor-General or [509] Governor and Council. The 30th section directs and points out the mode of suing the East India Company when it is capable of being sued in the Supreme Court. The Calcutta Charter of 1774, and the Statutes, 13th Geo. III., c. 63, sec. 13 and 14, and 21st Geo. III., c. 70, sec. 2, are in *pari materia* with the Madras Charter. The quarrel between Sir Elijah Impey and Warren Hastings respecting the jurisdiction of the Supreme Court of Calcutta, led to the passing of the latter Statute (vol. 4 Mills' Hist. of Brit. India, by Wilson, Book V. ch. 6), which excludes that Court from taking cognizance of the acts of the Governor in Council. It is necessary, therefore, to consider the position of the East India Company at the time the Supreme Court at Madras was created by the Charter of 1800. Under the Statute, 9th and 10th Will. III., c. 44, and the Charter of incorporation of Will. III. of 1693, and Statute, 33rd Geo. III., ch. 52, sec. 1 and 74, the East India Company had a twofold character: first, they were a trading Company; and secondly, they had Sovereign authority, with the power of making peace and war. The Statute, 3rd and 4th Will. IV., c. 85, took away the trading monopoly, but the Sovereign rights were left to the East India Company in trust for the British Government.—[Lord Kingsdown: Does your argument go to this extent, that the East India Company could not be sued at all in the Indian Courts?—No, they were liable to be sued in the Courts in India, as here, for acts done in their trading capacity. They could be sued upon a contract. *The Bank of Bengal v. The United Company* (Bignell's Reps. 127; S.C. 2 Knapp's P.C. Cases, 245). In *Gibson v. The East India Com-* [510] *pany* (5 Bingh. N.C. 273), the Chief Justice Tindal defines the character of the East India Company and their liability to be sued for acts done in their trading capacity. He says, "It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India."—[Sir John Coleridge: *Doe d. Seebkrista v. The East India Company* (6 Moore's Ind. App. Cases, 267), was a case of ejectment brought in the Supreme Court of Calcutta to recover a piece of freehold land which the East India Company claimed to be entitled to.]—The transactions upon which the question in this suit depended were not matters subject to the jurisdiction of the Madras Court, or indeed of any Municipal jurisdiction in India. They were matters of State arising out of a political transaction. The maintenance of such a suit, as is here contended for, would be inconsistent with principles of public policy.—[Dr. Lushington: That very question was decided here in 1827, in the case of *The East India Company v. Syed Ally* (see this case, *post* [7 Moo. Ind. App. 555]), when the Privy Council held that the Supreme Court had no jurisdiction. That was a case of resumption of a Jaghire held as an Altumghah enam under a grant from former Nawabs of the Carnatic, which the East India Company under the Treaties resumed by virtue of their Sovereign power. It was determined that the propriety of the [511] exercise of such Sovereign power could not be questioned by the Supreme Court at Madras;

the very Court from whence the present appeal comes.]—That case has not been reported. It is no doubt most applicable, and is all important to our argument. There is, however, another case, *Dhackerjee Dadajee v. The East India Company*, which is similar in principle, which came before the Supreme Court at Bombay in 1843, a report of which is to be found in Sir Erskine Perry's notes of decided cases (2 Morley's Dig. 307). That was an action of trespass brought against the East India Company, for breaking and entering the Plaintiff's dwelling house by order of the Bombay Government, and it was held by both the Judges of that Court that no action would lie against the East India Company, as it was an act done by the authority of the Governor and Council, and, therefore, an act of State, and for which the East India Company were not answerable. Being an act of State, it was clear that the Supreme Court could not take cognizance of the action. On the first head we submit then, that upon the authorities as well as the principles of international law, the seizure and taking possession of the property of the Rajah of Tanjore, was an act of Government and State, done by the East India Company in their Sovereign character, and by virtue of their Sovereign power; and as such, incapable of being questioned or inquired into by any Municipal Court, more especially the Supreme Court of Madras, created by the Madras Charter of 1800. *The East India Company v. Syed Ally* [7 Moo. Ind. App. 555].

This brings us to the second question involved in the inquiry, namely, whether the acts done were [512] not only acts of State, but done as acts of State; for if so, as already shown, they could not be inquired into by the Supreme Court at Madras. Now, the authority for the seizure emanated from the Government. The despatch of the 16th of April, 1856, declared the dignity of the Raj extinct, and that the Raj had lapsed to the British Government; and the subsequent correspondence from the Government to the Collector, and the appointment of Mr. Forbes as Commissioner, were all acts of the Government exercising the Sovereign authority, and the ultimate seizure and possession of the Raj of Tanjore, and property of the deceased Rajah, by Mr. Forbes, was the seizure of the Government, and an act of State. The judgment of the learned Judge of the Court below admits that the seizure of the public property, as it is there described, was an act of the State, and incapable of being inquired into by the Supreme Court, and limits the remedy to the private property of the Rajah; thereby affirming the jurisdiction of the Supreme Court to adjudicate on the validity of the seizure, by determining what was public and what was private property. Now, that would be to assume authority over the entire transaction. For if the Court has power to sever the acts of Mr. Forbes by adjudicating upon what they thought was an excess of his authority, they must have power to ascertain and declare whether his authority in general has been rightly exercised; and we insist that in this respect it has not. Suppose an action of trespass had been brought against Mr. Forbes for the seizure. Could the supreme Court entertain such action? Certainly not. No person has a *locus standi* to bring such an action, nor could the Court take cognizance [513] of it. The acts of Mr. Forbes were the acts of the Government, and if the Government is not liable to the jurisdiction of the Court, neither is he. But admitting that the authority given to Mr. Forbes was limited, and that he did exceed it, still his acts have been recognized and ratified by the Government, which would cure such defect, *Baron v. Denman* (2 Exch. Rep. 167). The *Caroline* (3 Phillimore on International law, 51). The authority of a Prize Court in time of war, is an illustration of the argument upon this part of the case, that the Supreme Court of Madras had no jurisdiction in a matter entirely of State policy. In the time of war the maxim "*inter arma silent leges*," would apply in a Prize Court. That Court is established by Royal Commission; its authority is special, but as affecting the objects of it, universal: therefore, if a seizure be made of an enemy's ship, though wrongfully, no action can be maintained against the Government, or any of the parties concerned in such seizure, in a Municipal Court; resort must be had to the Prize Court, which is the only Court having authority delegated from the Sovereign power to try such a question. This is distinctly laid down by Lord Mansfield in the cases of *Le Caur v. Eden* (Doug. 594), and *Lindo v. Rodney* (*Ib.* 313, n.), and has been recognized and admitted by this Court in *Elphinstone v. Bedreechund* (1 Knapp's P.C. Cases, 316). As regards the question that no suit will lie against the East India Company for acts done by

them as a Sovereign power in India, the cases of *Moodalay v. The East India Company* (1 Bro. C.C. 169), *The Nabob of Arcot v. The East India [514] Company* (4 Bro. C.C. 180), decided in the Court of Chancery in England, are conclusive. So in *Tandy v. The Earl of Westmoreland* (27 State Trials, 1246), the official acts of the Lord Lieutenant of Ireland were considered acts of State, and not within the cognizance of the Municipal jurisdiction. *The Duke of Brunswick v. The King of Hanover* (6 Beav. 1 S.C. 2 H.L. Cases, 1), is an authority to show that a Sovereign Prince, resident in his kingdom, although a peer of the realm, is exempt from the jurisdiction of the Court of Chancery for acts of State done by him in Hanover. The same policy has been applied to Governors of Colonies. In *Mostyn v. Fabrigas* (Cowp. 161), Lord Mansfield laid it down that no Governor of a Colony could be sued while he is exercising the functions of a Governor. This case, it is true, has been in some degree shaken by the decision in *Hill v. Bigge* (3 Moore's P.C. Cases, 465). That was an action of debt brought upon a contract entered into by the Defendant before he became Governor, and it was held that upon such a contract being utterly unconnected with his political character of Governor he was liable to be sued in the Colony of which he was Governor. *Cameron v. Kyte* (3 Knapp's P.C. Cases, 332), relied upon by the Court below, has nothing to do with the case. There the Governor exceeded the authority conferred upon him by his commission.

Thirdly. The late Rajah was, as regards this suit, an absolute Sovereign, and the decree of the Court below erroneously proceeds on the supposition of there being, in point of law, a distinction between the public and private property of an absolute Sovereign. No such distinction exists. In *The Advocate-General [515] of Bombay v. Amerchund* (1 Knapp's P.C. Cases, 329 n.), Lord Tenterden puts the very question now in dispute. He asks, "What is the distinction between the public and private property of an absolute Sovereign?" and says, "When you are speaking of the property of an absolute Sovereign, there is no pretence for drawing such a distinction: the whole of it belongs to him as Sovereign, and he may dispose of it for his public or private purposes in whatever way he may think proper." Lord Brougham in *The Lord Advocate v. Lord Dunghlas* (9 Cl. and Fin., 211), says, "I must beg to enter my protest against the distinction which has been taken in arguing this case, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property and public property. The prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign, and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the Crown at all. All property of the Crown is held for public purposes, and is Crown property; it is public property which the Crown administers for the maintenance of the State." Comyn's Dig., tit. "Praerogative," D. 64, supports this view. The Rajah of Tanjore was by the Treaties of 1793 and 1799, an absolute Sovereign in the fort of Tanjore; he had there the power of life and death: as absolute Sovereign, he could, therefore, have no private property, distinct from State property. By the Hindoo law in the case of regalties like this Raj, the succession is exempted from the ordinary law of distribution, as the Raj goes to a single heir, Strange's "Hindu Law," vol. i. p. 209; ib. vol. ii., [516] App. p. 328-9 (Edit. 1830). Colebrooke's "Dig. of Hindu Law," vol. i. p. 126; ib. ii. 122. It is asked, then, whether there is any difference between an English Sovereign before the Statute, 39th and 40th Geo. III., c. 88, and a Hindoo Sovereign, as to the right of private property? No evidence is adduced upon this point, and the *onus* undoubtedly lies upon the Respondent to establish that there exists such difference.

Lastly, the decree proceeds on the footing of the Plaintiff, as senior widow, being entitled to administer the private estate of the late Rajah. Now, there is nothing in the relations between the Respondent and the East India Company to sustain a suit in equity. There is no privy of interest between them such as could sustain a suit. The remedy, if any wrong had been committed, would have been at law by an action of trespass, in trover, or detainue. *The East India Company v. Nuthumbadoo Veeraswamy Moodelly* (5 Moore's Ind. App. Cases, 217), *Spooner v. Juddoo* (4 Moore's Ind. App. Cases, 353). Again, the Respondent asks for an account when no complexity of accounts exists. *Foley v. Hill* (2 H.L. Cases, 28), *Fluker v. Taylor* (3 Drewry, 183), establish the proposition that, if the accounts are not complicated they are the subject of an action, not of a Bill in Chancery. If there was

no remedy in law or equity, a petition of right would be the proper course. But if a suit like the present could be sustained, the only proper decree would have been the usual decree for the administration of the estate. There should have been first a reference to the Master to inquire whether the deceased Rajah had any pri[517]-vate property; and secondly, that the East India Company should render an account of the property so found to be private. Such a course has not been pursued in this case. Upon all these grounds, therefore, we submit, this decree cannot be sustained.

The Attorney-General (Sir Richard Bethell) (*a*) and Mr. Ayrton for the Respondent.—It will be necessary in the first place to ascertain the true *status* of the East India Company, in order to see whether they are not amenable to the jurisdiction of the Supreme Court of Madras, and accountable before that Court for the wrongful acts complained of. Our contention is, that the East India Company did not stand in the position of a Sovereign power; they were only a corporation endowed, it is true, with considerable franchises and prerogatives, but by legislative enactments made accountable for their acts. Sovereignty implies the exercise of absolute uncontrollable power, without any qualification. How then could the East India Company be said to possess the Sovereign power if they are compellable to justify their acts, and to show that what they did it was within their power? The acts we complain of were arbitrary acts, and can be brought in question before the ordinary legal Tribunals. They were not done in virtue of Treaties or *jure belli*. The account given by the Defendants in their answer is, that the [518] annexation of the Raj of Tanjore and the taking possession of the property was not an act of State, but that the Raj and property lapsed to the Government; and that, therefore, the East India Company as the *ultimus haeres*, took possession as *bona vacantia*. Now, it can only be upon the hypothesis that the Company has the same right towards the State of Tanjore that the Queen of England has with regard to *hereditas jacens* that they could so claim the private property. Such a pretension however is preposterous. For it is apparent from the letter of Mr. Forbes of the 17th of October, 1856, that the seizure was not intended to include, or was in exercise of any right the East India Company might have over the private property of the Rajah, whatever they might claim to have over the Rajah's State property, for the instruction is that "all private property would be scrupulously respected." Indeed, no authority for such a seizure was ever delegated to Mr. Forbes by the Government. This fact is an admission that the East India Company would not interfere with the rights of the members of the Rajah's family to his private property. The Respondent as the senior widow was the proper party to sue, as well for an account of property of her own, which was unjustly seized and then was in the East India Company's possession, as of her husband's private property. As the East India Company got possession of the property by the unauthorized act of Mr. Forbes, no protection can be claimed by them on the ground of State policy, nor are they exempt from the jurisdiction of the Municipal Courts for the commission of such a wrongful act. *Baron v. Denman* (2 Exch. Rep. 167) does not apply. That was an action for [519] damages by reason of the Defendant, an officer in the English navy, destroying slave baracoons. The English Government, it appeared, adopted his acts as having been done by their authority, which the Court held equivalent to prior instructions; being an act of State, the Crown was alone responsible, and, therefore, no action would lie against the Defendant. So in the case of the *Caroline*. But here there is, in truth, no act of State, but a wrongful seizure by the East India Company, who are bound to submit to an inquiry and to account for their acts. The Nawab of Surat's case (see 5 Moore's Ind. App. Cases, 499) was under a Treaty almost in *ipsissimis verbis* with the Treaties in question. The Government in that case distributed the Nawab's property among his heirs in a certain manner, provided by a special Act of the Legislature of India. No. XVIII. of 1848. It would be an act of injustice to say the Respondent has no remedy. In this country, if the Crown took possession of property, although a Bill could not be filed in the Court of Chancery, yet a petition of right would issue at the instance of the subject aggrieved. The Defendants do not frame their answer as if

(*a*) The Attorney-General (Sir Richard Bethell) had been consulted on behalf of the Respondent before his appointment to the office of Attorney-General, and it was arranged that Sir Hugh Cairns, the late Solicitor-General, should at the hearing, conduct the case of the Appellant.

the seizure had been made in exercise of a Sovereign power, but they justify the taking under an asserted legal title, alleging that the property lapsed to them. Now, we contend, that the East India Company is only a corporation created by Charters and Acts of Parliament, but that they have not the Sovereign power in India. The Sovereign power as exercised in India is alone vested in the Governor-General and Council. The Governor-General we admit is exempted from the jurisdiction of the Queen's Courts in India, for acts done relating to State or [520] public policy, but the East India Company we submit, like any other British subjects, are liable to the jurisdiction of the Court.

It will be necessary to establish this proposition to review the Charters and Acts of Parliament affecting the East India Company. The Charter of King Charles the First, of 1661, authorizes the East India Company to export warlike stores, and make peace and war with native Princes within limits of their trade. The Charter of 1683, confers similar powers; but there the Crown reserves the Sovereign rights over the forts in India, and the power of making peace and war when it shall think fit to interpose the Royal authority. Now, we submit, that the Charter of 1661 was absolutely null and void, as the power of making war and peace are admitted by all Jurists to be an incommunicable prerogative. By the Charter of Will. III., of 1698, the powers of the East India Company are restricted to raising forces to defend the forts; but all Sovereign rights are again reserved, and amongst them the power of establishing Courts of Judicature. The Statute, 13th Geo. III., c. 63, puts the question of the undoubted Sovereignty of the Crown in India beyond all doubt. This is the first legislative enactment that introduced a particular provision for the Sovereign administration of the dominions in the East Indies that had been acquired by the Company. By section 7, such Sovereign rights are vested in the Governor-General in whom all the civil and military power is vested, who is really the only representative of the Crown, in India, and not the East India Company as claimed by the Appellant. His powers are defined in section 9; and section 13, reserves the right of the [521] Crown to erect a Supreme Court of Judicature at Fort William, to whom the Governor-General and Council are made amenable by the 15th section, in cases of treason or felony; and also, by the 39th section for any crime, misdemeanour, or offence, to the Court of King's Bench in England. The Statute, 19th Geo. III., c. 61, sec. 5, renewed the appointment of the Governor-General for five years: this office was continued by the 20th Geo. III., c. 61, sec. 5. Statute, 21st Geo. III., c. 65, sec. 8, for the first time gave the proprietors in the stock a title to share in the Company's territorial acquisitions. If, then, the East India Company had done the act complained of shortly after the passing of this Statute, and, therefore, for the benefit of their proprietors, how could it be said that they did it in virtue of a Sovereign power created by that Act? By the Statute, 33rd Geo. III., c. 52, sec. 9, the Board of Control have power given them to superintend all concerns relating to the civil or military Government or the revenue in the East Indies. Now, we insist that the Board of Control has no greater power than the East India Company, and, therefore, the creation of that Board cannot be said to invest the Company with any new or increased prerogatives. Sections 40 and 41 empowered the Governor-General at Fort-William to superintend the Presidencies of Madras and Bombay, if not repugnant to orders from England; and the 42nd section prohibits the Governor-General in Council from declaring war, except in a case of emergency, without the consent of the Court of Directors and the Board of Control. Statute, 37th Geo. III., c. 142, empowers the Crown to erect Courts of Judicature [522] at Madras and Bombay; and section 10, exempts the Governor or Council of Madras and Bombay from the jurisdiction of the Courts, except for treason or felony. Now, this proviso would be unnecessary if, as claimed by the Appellant, the East India Company had the actual Sovereignty. So again under Statute, 53rd Geo. III., c. 155, sec. 123, provision is made that the general issue may be pleaded in actions or suits brought against the East India Company or their agents for acts committed by them in arresting persons not authorized to reside or traffic in the East Indies. By Statute, 3rd and 4th Will. IV., c. 85, a further arrangement is made with the East India Company for the government of India for a limited period. Section 10 expressly enacts, that the same remedy by proceedings, legal or equitable, is to be had against the East India Company, and their property is to be subject to execution. By section 39 the whole power for the government of India

is vested in "The Governor-General of India in Council." The authorities cited by the Appellant, *Doe d. Seebkristo v. The East India Company* (6 Moore's Ind. App. Cases, 267), *The Bank of Bengal v. The East India Company* (Biggell's Reps. 118), *The East India Company v. Nuthumbadoo Veeraswamy Moodally* (5 Moore's Ind. App. Cases, 217), to sustain their proposition that a Bill in Equity was not the proper remedy, shows that the East India Company are generally liable to the jurisdiction of the Courts in India; and the question, then, is reduced to this simple point, whether what they have done is an act of State? which we contend it was not.

Secondly. In any circumstances, the East India Company, as successors to the deceased Rajah, suc-[523]-ceeded only to the State property attached to the Raj, and not to the private property of the late Rajah. He was at the time of his death entitled, as of his own right by the Hindoo law, to private property, consisting of real estate, cash, jewels, horses, etc., distinct from the rights appertaining to the Raj. He was of the Soodra caste, and had power by the Hindoo law to dispose of his private property, distinct from the Raj. Strange's "Hindu Law," vol. i., p. 209 (Edit. 1830), clearly so treats this point. He lays it down that "the effects and private estate of a Sovereign, like those of any ordinary individual, are in common, and distributable among all the sons." That is an authority that a Hindoo Sovereign can have private property distinct from State property. Allen, "On the Royal Prerogative," p. 143, says that "the ancient Anglo-Saxon Kings had private estates which did not merge in the Crown, but were divisible by Will, gift, or sale." So by international law, as appears from Puffendorf, who, referring to Grotius, points out the distinction, and lays it down that the income may belong to the Sovereign, and be dealt with by him differently from the *corpus* of the property which goes to the State (B. viii. c. 6, sections 22 and 23. Gro. B. iii. c. 9 and 16. See also *The Att. Gen. v. Weeden* (Parker's Rep. 267), where it was determined that choses in action belonging to an enemy are forfeited to the Crown). In modern times the same right has been recognized. *Ryres v. The Duke of Wellington* (9 Beav. 579) was a case in which a legatee filed a Bill against the executor of George the Fourth, claiming under the Will of George the Third, with respect to a bequest made by that Monarch of his private property, and the Court of Chancery repu-[524]-diated the jurisdiction of the Court on the sole ground, that the Will had not been proved in the Prerogative Court. The cases relating to the exemption of a Governor of a Colony, relied upon by the Appellant, do not apply. *Cameron v. Kyte* (3 Knapp's P.C. Cases, 332) was confined to the single point of the power of the Governor of a Colony, and it was held to be fettered by the terms of the Governor's commission from the Crown. *Hall v. Bigge* (3 Moore's P.C. Cases, 465) is in our favour, as it determined that the Civil Court in the Colony had jurisdiction to entertain an action of debt brought against the Governor while in office in the Colony. *Campbell v. Hall* (Cowp. 204) was an action brought against an officer of the Government in Grenada, for the purpose of trying the question whether the King, having promised the inhabitants of Grenada a local Legislature, and having by his commission to the Governor authorized the convocation of an Assembly, could afterwards of his own accord impose taxes. Lastly, The case of *The East India Company v. Syed Ally* [7 Moo. Ind. App. 555] is distinguishable from the present. The resumption of the Jaghire by the Company, as the representative of the Crown, was under the authority of a Treaty made by them in that character with a native Prince. They had, under the Treaty, the same power as the former Nawabs. The resumption related to the revenue, and, being a matter of State policy, the Supreme Court was properly held to have had no jurisdiction.

Sir Hugh Cairns, Q.C., in reply.—The Respondent endeavours to support the decree appealed from, upon grounds which are antagonistic [525] to those relied upon in the judgment of the Court below. It is now urged that the East India Company are mere traders, who have arrogated to themselves the rights of Sovereignty, and that their assumption was a mockery of the rights of the Crown. The argument on the other side goes to this extent, that the East India Company, as a corporation, have certain powers emanating from the Sovereign delegated to them, but that the act complained of is *ultra vires* the East India Company; as the Sovereign power is only vested in the Governor-General of India. Now, the Court below treats the proceedings as being within the authority of the East India Company, but denies what has been done by Mr. Forbes with respect to the alleged private

property to be an act of State. This argument proves too much, as everything which the East India Company did would be wrong: the annexation of the Raj, the seizure of the public property, which are not complained of, would also be wrongful. Nothing, however, can be more fallacious than this argument, as at the time when the acts in question took place, nothing could be done in India in the shape of Government, but through the East India Company, and the Court of Directors under the supervision of the Board of Control. Supposing, for the sake of the argument, it was conceded, that it is in the Governor-General in Council that the Sovereign delegated power exists, we still have then his authoritative sanction, and confirmation of all the proceedings taken by Mr. Forbes. But the true position of the Government of India is this: The East India Company have power given them by Charters and Acts of Parliament for the Government of India, and they delegate those powers to the Governor-General as [526] executive in India. The Statute, 21st Geo. III., c. 63, was passed in consequence of the exorbitant exercise of power claimed by the Chief Justice, Sir Elijah Impey, and that Statute not only exempts the Governor-General from responsibility for anything he may do, but any one acting under his instructions who shall plead such instructions in a suit or action. Here the Governor-General has sanctioned what Mr. Forbes has done, and it must, therefore, be treated as his act. The principle of legislation as to the Governor-General in India is this: Anterior to the creation of that office, or any officer in India as the executive Governor of India, the East India Company, as the executive Government upon the spot, had Sovereign powers conferred on them from the Crown, by Charters and by Acts of Parliament: and, as they could not delegate those powers upon ordinary principles of law to any one else, it became necessary to give large powers to an executive upon the spot, and that was done by parliamentary authority. The first Act creating the Governor-General was the 13th Geo. III., c. 63, and the preamble shows the evil it intended to remedy in the constitution of the governing body of the East India Company at home, and the imperfection of the executive Government in India: the 7th and 8th sections appoint a Governor-General, and define his powers. The Statute relied upon by the Respondent, the 53rd Geo. III., c. 155, sec. 123, obviously contemplates an act which cannot be considered an act of State, done as a Sovereign power, but as traders, and one which the East India Company might be sued for, *Gibson v. The East India Company* (5 Birlgh. N.C. 262). The Statute, 3rd and 4th Will. IV., c. 85, puts this matter still [527] clearer; that Statute took away the exclusive trading rights of the Company, and left them their Sovereign rights only for a limited period. Sovereign powers have, undoubtedly, been conferred upon the East India Company of levying war or making peace, and making Treaties. These powers are shown in the case of *The Nabob of Arcot v. The East India Company* (1 Bro. C.C. 180), where it was decided that the particular acts the Nawab complained of were acts of public policy and State, and that the Court of Chancery had no jurisdiction to take cognizance of those acts. *The East India Company v. Syed Ally* [7 Moo. Ind. App. 555] further illustrates this, and shows that the Sovereign power in the Carnatic has become vested in the East India Company. If a Treaty was made between this country and France, a complaint as to the mode in which it was carried into effect could not be entertained in a Municipal Court. The Respondent argues, that it has not been pleaded that what was done by Mr. Forbes was an act of State, and that the defence set up by the answer is, that the East India Company took the Raj and property by succession. Such is not the fact: the answer clearly treats it as an Act of State, and negatives such assumption that the seizure was a succession at law.

No distinction exists between public and private property of an absolute Sovereign. *The Advocate-General of Bombay v. Amerchund* (Knapp's P.C. Cases, 329, n.) is conclusive upon that point. The argument by analogy to Sovereigns in this country who have made Wills and disposed of their private property does not apply, as it is not the case of an absolute Sovereign, like the Rajah of Tanjore, but of Sovereigns whose powers by the constitution are limited. In this country the [528] hereditary revenues of the Crown have been made over by Act of Parliament to the country, in consideration of a civil list during the life of the Sovereign; and the 39th and 40th Geo. III., c. 88, gave His Majesty, his heirs and successors, full power of disposition by deed, or Will, of certain real and personal property, at the same

time subjecting the private property to the payment of private debts contracted during the Sovereign's lifetime. There is no allegation or evidence that there is a custom in this Raj, or by the Hindoo Law, that upon the death of an absolute Sovereign, no disposition being made by him during his lifetime, there could be a division made among his family of a certain kind of property. Another error in the decree is, that it assumes, without proof, that there was private property of the deceased Rajah.

The case stood over for consideration.

Judgment was now delivered by

The Right Hon. Lord Kingsdown (July 27, 1859). This is an appeal from a decree of the equity side of the Supreme Court of Judicature at Madras, by which it was declared that the Respondent, the Plaintiff in the suit below, as the eldest widow of Sevajee, late Rajah of Tanjore, who had died intestate, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereof of the present debts, if any, of Sevajee, and to any legal claims and demands that might exist against such private and particular estate and effects; and the Court declared that the Defendants, the East [529] India Company, were trustees for the Plaintiff for and in respect of the private and particular estate and effects, real and personal, left by Sevajee at the time of his death, and possessed by them, their officers, servants, and agents, as in the Bill mentioned. The decree also proceeded to direct various accounts and inquiries founded upon these declarations.

In the very able argument addressed to us at the Bar, many objections were made by the Appellant's Counsel to this decree; but the main point taken, and that on which their Lordships think that the case must be decided, was this, that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in India; that the Rajah of Tanjore was an independent Sovereign in India; that on his death, in the year 1855, the East India Company, in the exercise of their Sovereign power, thought fit, from motives of State, to seize the Raj of Tanjore and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no Municipal Court has any jurisdiction.

The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

But it was contended on the part of the Respondent, that this case did not fall within the principle, for the following reasons:—

[530] First. Because, as it was said, the East India Company did not stand in the position of an independent Sovereign; that such powers of Sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. Secondly, that the seizure in this case did not take place by the exercise of a Sovereign power against another independent power; but was a mere succession, by an asserted legal title, to property alleged to have lapsed to the Company. And, thirdly, that there is a distinction between the public and private property of the Rajah, and that the Company never intended to exercise their Sovereign powers as to the latter, whatever they might do with respect to the former: that the Company, therefore, are in possession of property by the unauthorized act of their officers, for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court.

On the first point their Lordships are unable to discover any room for doubt. The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law, as it stood in the year 1839, is accurately stated in the following

passage in the judgment of Chief Justice Tindal in case of *Gibson v. The East India Company* (5 Bingham, N.C. 273), in which, after referring to various legislative enactments, he observes that from these—"It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other: [531] namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India."

That acts done in the execution of these Sovereign powers were not subject to the control of the Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of *The Nabob of Arcot v. The East India Company*, in the Court of Chancery, in the year 1793; and *The East India Company v. Syed Ally* [7 Moo. Ind. App. 555], before the Privy Council in 1827.

The subsequent Statute, 3rd and 4th Will. IV., c. 85, in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of Sovereignty.

The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right, on the part of the East India Company, or of the Crown of Great Britain, to the possession of this Raj, or of any part of the pro-[532]-perty of the Rajah on his death; and, indeed, the seizure was denounced by the Attorney-General (who, from circumstances explained to us at the hearing, appeared as Counsel for the Respondent, and not in his official character for the Appellant), as a most violent and unjustifiable measure. The Rajah was an independent Sovereign of territories undoubtedly small, and bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the Rajah without a son, by any legal title either as an escheat, or as *bona vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds.

Accordingly, the Defendants in their answer, allege that on the death of the late Rajah, "it was determined, as an act of State, by the Defendants and the British Government" that the Raj and dignity of Rajah of Tanjore was extinct, and that the State of Tanjore had thereupon lapsed to the Defendants in trust for Her Majesty; and it was thereupon also determined by the Defendants, as an act of State and Government, that the whole dominions and Sovereignty of the State of Tanjore, together with the property belonging thereto, should be assumed by the Defendants in trust for Her Majesty the Queen, and should become part of the British territories and dominions in India, in trust for Her Majesty. They then allege that the whole of the property which they have seized has been seized by virtue of their Sovereign rights on behalf of Her Majesty, and insist that [533] the Court has no jurisdiction to inquire into the circumstances of the seizure, or its justice with respect to the whole or any part of the seizure.

The facts, as they appear in the evidence, are these:—In November, 1855, the Rajah died. The Government of Madras, within which Presidency Tanjore is situated, communicated the fact of his death to the Governor-General of India, and this fact, with the views of the Government of Madras, and of the Governor-General in Council as to the steps which ought to be taken upon his death in regard to his dominion and property, was communicated to the Court of Directors in England.

The letters in which these views were communicated are not found amongst the papers before us; but it appears from the letter of the Court of Directors, dated the 16th of April, 1856, that these Governments were of opinion, that the dignity of

Rajah of Tanjore was extinct, and that they had taken possession, or were about to take possession, of the dominions and property of the Rajah, and intended to deal with them in such manner as appeared to them to be just.

The answer of the East India Company is to the following effect:— After advertising to a suggestion which had been made, to recognize one of the daughters of the deceased Rajah as his successor, they say: “ 3. By no law or usage, however, has the daughter of a Hindoo Rajah any right of succession to the Raj, and it is entirely out of the question that we should create such a right for the sole purpose of perpetuating a titular Principality at a great cost to the public revenue. 4. We agree in the unanimous opinion of your Government, and the Government of Madras, that the dignity of Rajah of Tanjore is extinct. 5. [534] It only remains to express our cordial approbation of the intentions you express of treating the widow, daughters, and dependants of the late Rajah with kindness and liberality. We shall, doubtless, receive, at an early period, from you or from the Madras Government, a report of the arrangements made for carrying these intentions into effect. 6. The Resident was very properly directed to continue all existing allowances until he could report fully on them to Government; but to inform the recipients that Government were not to be considered as pledged to their continuance.”

It seems obvious from this letter that the East India Company intended to take possession of the dominions and property of the Rajah, as absolute lords and owners of it, and to treat any claims upon it of his widows, and relations, and dependants, not as rights to be dealt with upon legal principles, but as appeals to the consideration and liberality of the Company.

The further proceedings were of the same character.

On the 10th of July, 1856, the Government of Madras wrote to the Governor-General in Council, and after giving an account of different portions of the property of the late Rajah, and pointing out various difficulties and questions which might arise out of it, they suggested that some person should be specially sent as a Commissioner to Tanjore, who should be “ directed to investigate and report upon the various important questions above enumerated, and any others that may hereafter occur, to this Government, as demanding inquiry in connection with the general subject.”

By a letter of the 8th of September, 1856, the [535] Governor-General in Council approves of the suggestion of appointing a Commissioner, and of the selection of Mr. Forbes for the purpose. He points out certain matters; amongst others, the abolition of the Rajah's Courts, which he leaves to the disposal of the Government of Madras. “ But the mode in which it may be proposed to deal with the Rajah's debts, and with the State jewels, library, and armoury, should be reported to the Governor of India, before any measures are taken, as also the apportionment of pensions and gratuities to the family and dependants of the Rajah. Upon the last point it will be necessary to lay down rules by which the Government of Madras should be guided.”

Mr. Forbes was accordingly appointed to discharge this duty, and written instructions for that purpose were given to him by the Government of Madras, on the 25th of September, 1856. He was directed not to make any general announcement of the orders of the Government of India; but to possess the Durbar generally with the purport of those instructions, informing them that it had been decided by the home authorities that the Raj of Tanjore had become extinct, but that all liberality would be shown to the members of the family, servants, and dependants. He was also, should such caution appear called for, to warn them of the consequences that would certainly ensue from any factious opposition to the policy that had been decided on in the case of the Tanjore Raj.

In what manner Mr. Forbes executed the powers conferred upon him, appears in his evidence and by the documents proved in the cause.

On the 29th of September, 1856, he caused an order to be made on the Sirkele, an officer of the late Rajah, directing him to make out a list of the property [536] belonging to the Raj. No attention having been paid to this order, Mr. Forbes soon afterwards went himself to Tanjore, and took up his abode at the Residency, and on the 17th of October, 1856, sent a letter to the Sirkele, in which he informs him of his intention to take possession of the public property of the State for the British

Government, and to place it in safe keeping. He informs the Sirkele that he intends to take charge of the public property within the fort, early the next morning, and to place it in charge of a detachment of the British troops, and he requests that the Sirkele will meet him at the east gate of the fort at half-past 5 o'clock, in company with the Murdeshuns of the Tashackdera, the arsenal, and the various other departments.

On the following morning, accordingly, taking advantage, as he says, of the presence of the 25th Regiment of Infantry, he goes to the palace. He takes possession of the property which is found in it. He has it placed in rooms, sealed with his seal, and stations sentries at the different doors.

It is clear from Mr. Forbes's report to the Madras Government of what took place on the occasion, that though no resistance was offered by the family of the Rajah, or the inhabitants of the fort, to the seizure of the Raj, and of the palace and property of the Rajah, it was regarded on both sides as a mere act of power not resisted, because resistance would have been vain. "Much sorrow," he says, "was expressed, and much grief was shown; but all submitted at once to the authority of the Government, and placed themselves in its hands."

It is by these acts of Mr. Forbes that the East India Company is in possession of whatever property it holds now claimed by the Respondent. The acts of [537] Mr. Forbes were approved by the Governor of Madras by a minute, dated the 21st of October, 1856; and they are adopted and ratified by the East India Company in their answer in this suit.

What property of the Rajah was within the authority given to Mr. Forbes, and what may be the consequence of any seizure in excess of that authority, we will consider under the next head; but that the seizure was an exercise of Sovereign power effected at the arbitrary discretion of the Company, by the aid of military force, can hardly admit of doubt.

But then, it is contended, that there is a distinction between the public and private property of a Hindoo Sovereign, and that although during his life, if he be an absolute Monarch, he may dispose of all alike, yet on his death some portions of his property, termed his private property, will go to one set of heirs, and the Raj with that portion of the property which is called public, will go to the succeeding Rajah.

It is very probable that this may be so: the general rule of Hindoo inheritance is partibility, the succession of one heir, as in the case of a Raj, is the exception. But assuming this, if the Company, in the exercise of their Sovereign power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at Madras? If the Court cannot inquire into the act at all because it is an act of State, how can it inquire into any part of it, or afford relief on the ground that the Sovereign power has been exercised to an extent which Municipal law will not sanction?

It is said, however, that it was not the intention of [538] the East India Company that the private property of the Rajah should be the subject of seizure, and it is observed in the judgment of the Court below, that the letter of Mr. Forbes to the Sirkele of the 17th of October, 1856, shows that he knew there was private property amongst that about to be seized; and that he expressly states that all property to which a claim can be established shall be restored to its owner.

But it appears to their Lordships that in this passage the Chief Justice has not quite accurately collected the meaning of Mr. Forbes's letter; the distinction there made between private and public property seems to apply, not to property of the Rajah, but to property which might be seized by the officers as in the possession of, or apparently belonging to, the Rajah, while in fact it belonged to, or was subject to, the claims of other persons. All claims which might be advanced to any part of the property seized, by institutions or individuals, were to be carefully investigated, and all to which a claim might be substantiated would be restored to the owner.

But, whatever may be the meaning of this letter, it affords no argument in favour of the judgment of the Court: but rather an argument against it. It shows that the Government intended to seize all the property which actually was seized, whether public or private, subject to an assurance that all which, upon in-

vestigation, should be found to have been improperly seized, would be restored. But, even with respect to property not belonging to the Rajah, it is difficult to suppose that the Government intended to give a legal right of redress to those who might think themselves wronged, and to submit the conduct of their officers, in the execution of a political measure, to the judgment of a legal tribunal. They intended only to declare the course which a sense of justice and humanity would induce them to adopt.

With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations and dependants; but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts. In the letter already referred to of the 8th of September, 1856, from the Secretary of the Government in India to the Government of Madras, it is distinctly stated:—"The relations whom the Rajah of Tanjore has left are in this position: they are without any rights of inheritance;" and it then proceeds to enumerate those relations who are thus without any rights of inheritance, and mentions as the first amongst them the Queen Dowager, the Respondent in this appeal; and it proceeds to speak of all those relations as claimants upon the consideration of the Government, and to describe in what manner those claims are to be met. How is it possible, in the face of this declaration, to hold that it was the intention of the Government to recognize the right of inheritance of the Respondent, and to exclude from seizure, and to subject to process of law, any portion of the property of the deceased Sovereign? If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which [540] according to the principle of the decision in *Baron v. Druman*, is equivalent to a previous authority.

The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction.

Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

They must advise Her Majesty to reverse the decree complained of, and to dismiss the Plaintiff's Bill; but they will recommend that no costs should be given of the proceedings either in the Court below or in this appeal.

The following proceedings took place in India upon the receipt of the above judgment, as appeared recorded in the minute by the Honourable the President, Sir Charles E. Trevelyan, dated the 8th of November, 1859.

"1. The Lords of the Committee of the Privy Council, conclude their judgment on the appeal of *The East India Company v. Kamachee Boye Sahaba* as follows:—"The result, in their Lordships' [541] opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate, the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction.

"Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to

say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.'

" 2. While, on the one hand, the Government is left, by this decision, free to take whatever course it considers best; on the other, a serious responsibility has been cast upon it. The Government is declared to be sole arbiter, unrestrained by the ordinary obligations of Municipal law; and it is, therefore, peculiarly incumbent upon us to show that we are prepared to act in the spirit of those principles of equity and liberality which are the foundation of all law.

" 3. The original proceeding by which the Raj of Tanjore was declared to have escheated to the Government of India on the death of the late Raja has often been described as an act of spoliation. I cannot see it in that light. I have always been opposed to what has of late years been called 'The policy of annexation.' It has always appeared to me that well-constituted Native States are an essential element of the [542] Anglo-Indian Empire; and this view has been amply confirmed by the experience acquired during the late convulsion. But Tanjore was not a Native State. The Rajah had neither people nor territory beyond the walls of his palace. He had no duties of Government to perform. He and his numerous dependents were a heavy charge upon the industrious portion of the population, without rendering any return. So far as any political effect was produced, it was decidedly injurious, because the arrangement kept alive pretensions which circumstances might at any time quicken into open hostility, as lately happened at Delhi. The entire community is interested in the growth of a feeling of loyalty to the Sovereign, and there ought to be nothing to interfere with the undivided allegiance of the Queen's own subjects in Her own dominions. It has also been proved by numerous examples, that there is no condition so demoralising as that of a society which, while it is elevated above public opinion, has no appropriate duties to engage in.

" 4. The Rajah had died leaving no legitimate or adopted son. The only claimant is his senior surviving widow. My first twelve years of public service were passed in the Indian Diplomatic department, and I have as extensive a knowledge of the customs and practice of Native Chiefs as most people. I mention this as my justification for offering a confident opinion, that the succession of females forms no part of the constitution of Native States or Chiefships. It may occasionally have taken place, as in the instance of Holkar's widow, Arhalaya Bhai, and the Begum Sumroo, but the special nature of the circumstances in those cases, shows that it was a deviation from an established rule. No well-informed and im-[543]-partial native would maintain the right of succession of a female to a Hindoo Raj.

" 5. I, therefore, consider that, whether regard be had to the customs of the country or to the public good, this is a true escheat. The so-called Tanjore Raj has lapsed to the Government of India. That Government stands in the place of the late Rajah. While we are bound to fulfil his just obligations, it is our duty to secure, on behalf of the public, everything belonging to the Raj nor required for that purpose.

" 6. A great deal of discussion has taken place about what ought to be considered public or private property. This seems to me to proceed upon a mistaken view of the nature of the case. The Raj has merged in the Government of India. Everything which belonged to the late Rajah at the time of his death, therefore, now belongs, by right, to the Government. If, previously to his decease, he had made a *bona fide* alienation of any property acquired out of his savings, that property has passed into the condition of private property. Otherwise, all that he left would have descended to his heir, if he had had one; and not having had one, it has lapsed to the paramount authority representing the general public. We have to pay the late Rajah's debts, and to provide for his numerous relations and dependants as *ultimus haeres*; and we are entitled, in the same character, to all that remained of his property. It would not have been possible for any one except the successor to the Raj to have undertaken these obligations. To any other, the loss would have greatly exceeded the advantage. The view taken in this paragraph is the same which is maintained by the Advocate-Generals at Calcutta and Madras.

[544] "7. Assuming the correctness of these principles, I will consider the several points requiring decision.

"First, the late Rajah's debts must be ascertained with a view to their early liquidation. Experience shows that more than ordinary care should be taken, in such cases, in order to shut out fictitious claims.

"Secondly, the Supreme Government laid down as long ago as the 8th of September, 1856, rules for the grant of pensions to the family and dependants. These are divided into three classes: viz., first, the immediate members of the Rajah's family; secondly, his relations; and thirdly, his servants and pensioners. In the case of the third class, these rules have already been acted on, and the pensions awarded have for some time been paid. The pensions of the chief members of the family only are heritable. In the case of a man, they may pass for two generations, a moiety lapsing on each succession; while, in the case of a woman, they may descend with the same deduction for one generation only. The case of those belonging to the second class, who are not nearly allied to the late Rajah, was considered to be fully met by the grant of a pension for a single life, which may be commuted for a gratuity.

"8. Mr. Phillips, the late Commissioner of Tanjore, proposed to place 103 persons in the first class, as follows:—1 The mother of the late Rajah. 2. His senior widow. 3. His fifteen junior widows. 4. His daughter. 5. His two elder sisters. 6. His niece, her husband and children. 7. His son-in-law. 8. Three nephews and their families. 9. The late Rajah Sevajee's seraglio, in number 59 persons; including, apparently, 6 natural sons and 11 natural daughters of the Rajah. 10. The Rajah Sarabhoji's seraglio, 18 persons. 11. The descendants, four in [545] number, of Tukuji Sahib, fourth Rajah of Tanjore.'

"9. As far as the eighth head, no objection can be made; but I cannot think that the 59 persons belonging to the late Rajah's seraglio, or the persons who claim through former Rajahs, are entitled to heritable pensions. This advantage may, however, be conceded to the natural sons and daughters of the late Rajah.

"10. Not long before his death, the late Rajah married sixteen wives in one day. These ladies and their families came from the Deccan; and every facility should be given, by commuting their pensions, or making the payments elsewhere, for their returning to their original homes.

"11. The pensions should be in full of every personal claim. No establishment should be kept up for any one; and the old system of procuring supplies through the Collector should come to an end. Any additional allowance should be made which may be required to compensate for the loss of these advantages; and the agent should continue to protect the interests of the ladies and assist them by his advice.

"12. Sukharam, the late Rajah's son-in-law, ought not, I think, to be subjected to any deduction of his stipend, on account of his inheriting his late wife's settlement; and the Rajah's only surviving legitimate daughter should be allowed an additional Rs. 6000 a year on her marriage, as proposed by Mr. Phillips. No difference should be made between those who supported and those who stood aloof from the senior widow in the late litigation.

"13. The contents of the library, armoury, and jewel rooms should be carefully examined; and while such articles as were exclusively State property should [546] be held at the disposal of the Government, the most liberal consideration should be given to any claim that may be made on behalf of the Ranee or others connected with the late Rajah.

"14. The only remaining point is the landed property. The bulk was retained by the Rajah, contrary to the provisions of the Treaty by which the Province was ceded to the East India Company in 1779; but, according to my view, as expressed in the early part of this minute, it matters not in what manner property came into the possession of the Rajah. Whatever actually belonged to the Rajah at the time of his death is included in the escheat, and now belongs to the Government.

"15. Fourteen villages are claimed on behalf of the mother of the late Rajah as having been granted to her by her late husband, Rajah Sarabhoji; such a grant is undoubtedly extant, but if her possession was ever more than nominal, it altogether ceased in 1827, after which the Rajah dealt with the property entirely

as his own. Our Advocate-General is, therefore, rightly of opinion that these villages must be considered as belonging to the Raj. Mr. Phillips, while he admits that the Dowager Rancee has no claim, proposes that she should have the enjoyment of these villages during the remainder of her life. I do not concur in this. The aged lady should have a pension allowed her, sufficiently liberal to enable her to spend the remainder of her days with all possible ease and comfort; but more than this is not required; and it is not desirable that she should have the management of villages. There are three villages, the Mirasi rights in which were originally purchased by the widow of Tulasiji, the adoptive father of Sarabhoji. They descended to the late mother of the Rajah's [547] only surviving daughter, to whom they should now be made over, together with the arrears which have accumulated since her father's death. Alienations from the landed property, which are of the nature of Enam, should be dealt with under the Enam rules.

" 16. If my colleagues concur in these views, I propose that Mr. Phillips, who is well acquainted with the whole subject, should be specially appointed as Commissioner, to give effect to the arrangements that may be finally approved by the Supreme Government.

" 17. There is no reason to doubt the correctness of the data upon which Mr. Phillips calculated the pensions proposed by him for the several classes of claimants; but if my views are adopted, some modification will be required in particular cases; and if Mr. Phillips should think, on the review he will now have to take of the subject, that his first proposals should in any other instance be amended, we shall be ready to reconsider them with him.—C. E. Trevelyan."

" Minute by the Honourable the President, dated 23rd of November, 1859.

" On the first point, it must be observed, that the villages were not only managed, but their proceeds were appropriated by the Rajah. In short, they were treated after 1827, entirely as his own property. This has been reported by our Commissioner, and has been argued upon as a fact by the Law Officers.

" As regards the objection to Mr. Phillips on the ground of his connection with the Sudder Court, this case has been expressly declared by the Privy Council to be beyond the limits of any Municipal jurisdiction.

" C. E. Trevelyan."

" Gindi, 23rd November, 1859."

[Mews' Dig. tit. INTERNATIONAL LAW, I. SOVEREIGN STATES, ETC., a.; tit. PRINCIPAL AND AGENT, I. A. 2. *Ratification*. S.C. 13 Moo. P.C. 22; 7 W.R. 722. See *Doss v. Secretary of State for India*, 1875; L.R. 19 Eq. 534; *Grant v. Secretary of State for India*, 1877, 2 C.P.D. 455; *Musgrave v. Pulido*, 1879, 5 A.C. 112; *Cook v. Sprigg* (1899) A.C. 572; *Forester v. Secretary of State for India*, 1871-72, L.R. Ind. App. Supp. 10; *Rajah Salig Ram v. Secretary of State for India*, 1872, L.R. Ind. App. Sup. Vol. 119; *Sirdar Bhagwan Singh v. Secretary of State for India*, 1874, L.R. 2 Ind. App. 38; *Mathusri Umamba Boyi Saiba v. Mathusri Deepamba Boyi Saiba*, 1895, L.R. 23 Ind. App. 28; Report of Transvaal Concessions Commission, 1901, Cd. 623, p. 7.]

[548] BABOO GOPAL LALL THAKOOR.—*Appellant*: TELUK CHUNDER RAI
Respondent * [Feb. 8, 1860].

On petition from the Sudder Dewanny Adawlut at Calcutta.

Five separate suits were brought by the same Plaintiff against the same Defendants, in which the same question of law was raised. The amount involved in each suit was under Rs. 10,000, the appealable value, although in the aggregate the amounts claimed exceeded that sum. Leave to appeal in the five suits granted, upon the undertaking that the parties consented within two months, by a proceeding before the Sudder Dewanny Adawlut, to abide by the decision of the Privy Council in the first appeal, as governing the four other appeals, when the Registrar of the Sudder Dewanny Adawlut was to transmit only the transcript of the first suit; otherwise, the five transcripts to be remitted in the ordinary course.

This was an application for special leave to appeal. Five suits had been instituted between the same parties in India; each suit was in respect to the same Talook, and involved the same question of law.

The petition set forth that the suit was brought by the petitioner in the Court of the Principal Sudder Ameen of the Zillah Backergunge, to have rent or jumma assessed upon a Talook, held at a variable rent. That four other separate suits between the same parties were brought for the purpose of obtaining decrees to assess each of the Talooks. That the amount of the claims involved in the five suits, were respectively as follows: in the first suit, Rs. 3815; in [549] the second, Rs. 1990; the third, Rs. 3799; the fourth, Rs. 945; and in the fifth, Rs. 950. That the pleadings were distinct, but that the same defence was set up by the Defendant in each suit, in respect of the Talook. That on the 20th of January, 1858, one judgment and decree was pronounced in all the suits by the Principal Sudder Ameen. That the Defendant appealed to the Zillah Judge, who pronounced a judgment and decree in the first suit and appeal only, stating, at the same time, that a copy of his decree would be filed with the four other appeals, and that the decree in the first suit governed the four other suits on appeal. That the Appellant appealed to the Sudder Dewanny Adawlut, filing a separate petition of special appeal against that decree, and also a petition in each of the four other appeals, according to the practice of the Court. That, at the hearing of the first of the appeals, the Sudder Court refused to allow a special appeal, which order the Court declared applicable to the four other appeals. And the Petitioner submitted, that though the aggregate amount of the claim in the five suits exceeded Rs. 10,000, the prescribed limit, under which the Sudder Dewanny Adawlut had no power to grant leave to appeal to Her Majesty in Council, yet the amount or value of the claim stated in each of the plaints, was below that sum, being respectively, Rs. 3815, Rs. 1990, Rs. 3799, Rs. 945, and Rs. 950; and that, therefore, the Petitioner did not apply to the Sudder Dewanny Court for leave to appeal, as, according to the practice of that Court, leave to appeal to England could not be granted in any one of the appeals. And the petition prayed for special leave to appeal against the Order of the Sudder Dewanny Adawlut at Calcutta, of [550] the 25th of February, 1859, in all five appeals from the judgment and decree of the Zillah Court, of the 17th of July, 1858, and from the judgment and decree of the Zillah Judge, made in all the five separate appeals.

The petition was *ex parte*.

Mr. Leith in support of the petition.—Important questions of Hindoo law arise in these suits to justify an indulgence, by admitting the appeals, though each suit is under the prescribed appeal value of Rs. 10,000, provided by the Order in Council, of the 10th April, 1838. If, however, leave to appeal be granted in the first suit,

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessor.—The Right Hon. Sir Lawrence Peel.

the decision of your Lordships will govern the other four cases, and it will save expense, if only the first transcript be sent to England, as it will not be necessary to transmit the records of the proceedings in the four other suits. The Respondent cannot be prejudiced by this course, as the decree of the Courts below was in his favour, and no steps can be taken on the other judgments which can interfere with any decision to be pronounced here upon the appeal.

Their Lordships granted the application, upon the terms contained in the following report :—“ That leave ought to be granted to Gopal Lall Thakoor, to enter and prosecute his appeal from the order, judgment or decree of the Sudder Dewanny Adawlut at Calcutta, of the 26th of February, 1859, in all the five special appeals from the judgment, order or decree of the Zillah Judge of the 17th of July, 1858, and also to enter and pro-[551]-secute his appeal from the last-mentioned judgment, order or decree of the Zillah Judge, made in all the five suits in which such special appeals arose, upon depositing in the Registry of the Privy Council the sum of £500 sterling, as security for the costs of the Respondent, in case the appeal should be dismissed, but with liberty to the parties in these suits and appeals respectively to agree and consent, if they should be disposed of by a proceeding in the Sudder Dewanny Adawlut, that the appeal should be entered and prosecuted in the first of such suits for the sum of Rs. 3815 only, and that in the special appeal in that suit only, the parties agreeing and undertaking that the four other suits and of the four other appeals therein respectively, should abide the result of this appeal; that the parties should be bound therein respectively by the judgment, order and decree of Her Majesty in Council, to be hereafter made on this appeal, and in all respects as if such judgment, order and decree had been made and pronounced in each of the four suits and special appeals respectively aforesaid, and, as if an appeal had been entered and prosecuted in respect of each of them; and that the parties should have two calendar months from the date of the filing of Her Majesty's Order on this report in the Sudder Dewanny Adawlut, so to agree and consent as aforesaid. And their Lordships do further report to your Majesty, that the Registrar of the Sudder Dewanny Adawlut ought to be directed to transmit to the Registrar of the Privy Council, without delay, authenticated copies under the seal of the Court of the record, pleadings, proceedings and evidence proper to be laid before Her Majesty on the hearing of this appeal, upon payment by [552] the Appellant of the usual fees for the same, and that if the parties should agree and consent as aforesaid, then that the record and evidence, in or relating to the first suit and appeal therein respectively only, should be transmitted, with the judgments, orders and decrees of the Principal Sudder Ameen, Zillah Judge, and Sudder Dewanny Adawlut, with such other documents and papers as the parties may require to have transmitted to the Registrar of the Privy Council; but that in the event of the parties not agreeing, and consenting in manner and within the time aforesaid, then and in that case that all the records, evidence and papers in each of the suits and appeals respectively in all the Courts below, should be immediately, on the expiration of the two months, or as soon after as possible, transmitted to the Registrar.”

This report was approved by Her Majesty.

[For subsequent proceedings, see 10 Moo. Ind. App. 183. See *Ko Khine v. Snadden*, 1868, 5 Moo. P.C. (N.S.) 67.]

[553] PRANNATH ROY CHOWDRY.—*Appellant*; RANEE SURNOMOYEE,—*Respondent* * [Dec. 7, 1859].

On petition from the Sudder Dewanny Adawlut at Calcutta.

The value of the subject-matter in dispute, though laid in the plaint at a sum

* Present: Members of the Judicial Committee.—The Right Hon. Lord Cranworth, the Right Hon. Lord Kingsdown, the Right Hon. Lord Chelmsford, and the Right Hon. Dr. Lushington. Assessor,—The Right Hon. Sir Lawrence Peel.

exceeding the minimum amount, Rs. 10,000, provided by the Order in Council of the 10th of April, 1836, was reduced on calculation by the Zillah Judge to an amount under that sum, and the finding upon the merits was for the Plaintiff for such reduced sum. Upon a cross appeal, the Sudder Court dismissed the entire claim; and on the ground that the matter in dispute was under the appealable value, refused leave to appeal to England. Upon special petition, leave to appeal allowed, the Appellant claiming to open the question of the value of the subject-matter in question, calculated by the Zillah Judge.

This was a petition for leave to appeal, which had been refused by the Sudder Court at Calcutta, as the amount in suit was under Rs. 10,000, the appealable value prescribed by the Order in Council of the 10th of April, 1836.

The suit was instituted in the Zillah Court of the Twenty-four Pergunnahs by the Petitioner, Prannath Roy Chowdry, the owner of lands held under a Putnee tenure against the Respondent, for the remission of Putnee rents, on account of certain lands resumed by the Government, and paid by him to Government, amounting as alleged in the plaint, with arrears and interest, to Rs. 11,692. 4s. 13p. The Judge of the Twenty-four Pergunnahs by his decree of the 6th of August, 1855, declared the Petitioner entitled to the deductions claimed by him as to the jumma on thirty-five beegahs and ten cottahs, and, as a matter of calculation reduced the claim of the Petitioner to Rs. 5767 for principal, and Rs. 3133 for interest, and then upon the merits allowed the claim for that principal sum, disallowing the Petitioner's claim to interest. Cross appeals were presented by both parties to the Sudder Dewanny Adawlut, and that Court, on the 13th of April, 1858, dismissed the appeal of the Petitioner, and allowed the appeal of the Defendant. Application was made for leave to appeal to England, which the Court refused. The Petitioner now presented a petition for leave to appeal from the Sudder Court's decree and the Order refusing leave to appeal.

Mr. Rolt, Q.C., for the Petitioner.—It was an error on the part of the Zillah Judge in calculating the amount of the claim to make the deduction he did. The Court was bound by the amount laid in the plaint. We seek to reopen the question of value.

Mr. Leith, opposed.—As the Petitioner did not appeal to the Sudder Court from that part of the decree of the Zillah Court which calculated the value, it must be taken for granted that the sum in dispute is conceded to be under Rs. 10,000, the minimum appealable sum. There are no peculiar circumstances to justify the exercise of an indulgence.

The Right Hon. Lord Cranworth.—We think, in the circumstances, liberty to appeal ought to be allowed.

[555] THE EAST INDIA COMPANY,—*Appellant*: SYED ALLY, HABIBOON NISSA BEGUM, SYED AHMED, SYED YAHYAH, and NAGABOON NISSA BEGUM,—*Respondents* (a) [June 23, 1827].

On appeal from the Supreme Court at Madras.

By the Treaty of the 31st of July, 1801, made between the then Nawab of the

(a) This case having been frequently referred to, and not having been reported, the Editor thinks, as it relates to the important questions, first of the power of the Indian Government to resume Jaghires in the Carnatic; and secondly, as to the jurisdiction of the Supreme Court at Madras to entertain a suit impeaching the right of resumption, that a report of it will be acceptable to the Profession. The report has been prepared from the papers in the appeal, and the short-hand writers' notes taken at the hearing before the Council.

Carnatic and the Governor in Council at Madras, the sovereign rights of the Nawab in the Carnatic were vested in the East India Company.

Held, that a resumption by the Madras Government of a Jaghire granted by former Nawabs, as Altanghah enam, before the date of the Treaty, and a regrant by the Madras Government to another for a life estate only, was such an act of Sovereign power by the East India Company, as precluded the Supreme Court at Madras from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption.

The Supreme Court at Madras admitted an appeal to the King in Council after the expiration of six months from an original decree. Held, that the Court was not authorized by the Madras Charter of 1800, creating the Supreme Court, to grant leave to appeal.

Upon a special application to the King in Council, founded upon the fact that the previous uniform practice of the Supreme Court at Madras, though upon an erroneous construction of the Charter, was to admit only appeals upon a final decree; leave to appeal was granted by the Privy Council.

This was an appeal from two decrees of the Supreme Court at Madras bearing date the 22nd of May, 1820, and the 28th of July, 1821, in a suit instituted in that Court by the Respondents as co-heirs, according to the Mahomedan law, of their father, Assim Khan, [556] deceased, against the East India Company, and Kullee Moolah Khan, the eldest son of Assim Khan; Ally Moon Nissa Begum, the widow of Assim Khan; Syed Ahmed; Syed Yahyah; Nagaboon Nissa Begum, the other children of Assim Khan, as Defendants, for obtaining a partition of a Jaghire consisting of lands and villages, with an account of the rents and profits, in the Province of Arcot in the Carnatic, originally granted to Assim Khan by the Nawab Wallajah, and re-granted, on certain conditions, by the Appellants to the Defendant, Kullee Moolah Khan, and of which, previous to such re-grant, the Appellants had taken possession, on their general assumption by the Government of the Carnatic in 1801, followed by a Treaty of cession of the territory from the Nawab of the Carnatic to the Appellants.

The suit arose under the following circumstances:—

Wallajah, the Nawab of the Carnatic, on the 29th of July, 1789, granted to Syed Mahomed Assim Khan Behander Moobaranza Jung, hereinafter called Assim Khan, an officer of high rank in the Nawab's service, and at the date of the grants one of his ministers, a Jaghire, or assignment of the Government share of the produce of the land, comprising one hundred and seventy-three villages of the yearly value of 37,216 pagodas, situate in the Province of Arcot, within the Carnatic.

Assim Khan entered into the possession of the Jaghire under the grant, continued in the receipt and enjoyment of the revenues and profits thereof, until the time of the assumption of the Carnatic by the East India Company.

The Nawab Wallajah died on the 30th of November, 1795, and was succeeded by Omdut ul Omrah, who by another grant under his seal, and dated the 30th of August, 1797, confirmed the grant made by the Wallajah to the Assim Khan and his descendants, in perpetuity.

Omdut ul Omrah died on the 1st of July, 1801, when the Governor-General in Council of Madras, for political considerations, under Treaties of subsidy and alliance previously entered into by the Government with the then Sovereign of the Carnatic, took possession of the territories, and assumed, provisionally, the Government of the Carnatic, until the successors of the Government, then in negotiation, was settled.

On the assumption of the Carnatic by the East India Company, a proclamation was issued by the then Governor in Council, Lord Clive, calling upon the subjects of Arcot to pay obedience to the British Government, and stating that all persons in charge of [557] religious establishments, relations, Jaghiredars, pensioners, and other dependants on the bounty of the deceased Nawab should sustain no injury from the temporary arrangement by the British Government.

A negotiation was immediately opened by the Governor in Council with the succeeding Nawab, Azeem ul Dolah, and on the 31st of July, 1801, a Treaty was concluded between the Nawab of the one part, and the Governor in Council, with the sanction of the Governor-General in India on behalf of the East India Company, on

the other part. By this Treaty it was stipulated and agreed, that the sole and exclusive administration of the civil and military Government of all the territories and dependencies of the Carnatic Payen Ghauts, together with the full and exclusive right to the revenues thereof, with the exception of such portion of the revenues as should be appropriated for the maintenance of the Nawab, and for the support of his dignity, should be for ever vested in the Appellants, who had accordingly possessed the sole power and authority of constituting and appointing, without any interference on the part of the Nawab, all officers for the collection of the revenues, and of establishing Courts for the administration of civil and criminal judicature. The East India Company engaged to pay one-fifth of the revenue of the territory for the support of the Nawab and his family; it was also further stipulated, that the entire defence of the Carnatic against foreign enemies, and the maintenance of the internal tranquillity and policy of the country, being thereby transferred to the British Government, his Highness should not entertain or employ in his service any armed men without the consent of the East India Company; and it was further provided that the Appellants should enter on the exclusive administration of Government on the 31st of July, 1801.

By virtue of this Treaty, the East India Company remained in possession of the Government territory and revenue of the Carnatic, including the revenues of the Jaghire lands; and, in pursuance of the above proclamation, the Governor in Council of Madras, on the 5th of August, 1801, caused a letter to be written to the Board of Revenue, directing the Collectors to prepare a list of the Jaghires actually enjoyed at the period when the territory was transferred to the East India Company, with the names of the original grantees, the actual occupants, and an account of the revenues of each Jaghire accompanying the original sunnuds or grants. The letter stated that Jaghires not being Altamghah, were held by tenures dependant [558] on the pleasure of the governing powers, and that the Governor in Council had, therefore, resolved that all Jaghires held by temporary tenures should be brought under the immediate authority of the East India Company until it should be examined and confirmed, but that it was the intention of the British Government as soon as the necessary information was received, to restore all such Jaghires as had been held by tenures sufficiently valid.

In accordance with the above requirements, Assim Khan, for the purpose of establishing his title to the Jaghire in question, submitted for investigation, the sunnuds or grants under which he held possession of the Jaghire: but before a report had been made by the Board of Revenue to the Governor in Council on the validity of his title, and on the 27th of October, 1801, Assim Khan died, leaving Ally Moon Nissa Begum, his widow, and four sons, Kullee Moolah Khan, Syed Ahmed, the Respondents, Syed Ally and Syed Yahyah, and three daughters, Ariffoon Nissa Begum, the Respondent, Nagaboon Nissa Begum, and Habiboon Nissa Begum, him surviving. Without having been restored to the possession of the Jaghire, and on the 30th of November following, the Board of Revenue reported to the Governor in Council that they had, in pursuance of the Government's orders, examined the Perwannahs or grants in Altamghah before mentioned, made to Assim Khan, deceased, by the two Nawabs, Wallajah and Omdut ul Omrah, and the Board intimated (in the event of the Jaghire being confirmed by the Governor in Council), the resolution of the Government to reserve the Sayer (customs) throughout the country as the exclusive right of the Sovereign.

Previously to this report, and shortly after the death of Assim Khan, Syed Kullee Moolah Khan, his son, made an application to the Board of Revenue, petitioning, as a matter of favour and indulgence, to have the Jaghire granted to him. The Governor in Council, taking into consideration the character of the late Khan, determined that Syed Kullee Moolah Khan was a fit object for a re-grant of the Jaghire; and accordingly, on the 16th of January, 1802, the Governor in Council caused a letter to be sent to the Board of Revenue, stating that the Government was satisfied with the authenticity of the sunnuds granted to Assim Khan by the two Nawabs for the lands held in Jaghire from the Nawab of the Carnatic; but that a tenure of that description differed materially from that of Altamghah, stated in the letter of the Board; that the claim of Assim Khan to the continuance of his Jaghire was not founded on any right independent of the Sovereign of the Car-[559]-natic, but as the

Jaghire had been current for a considerable period of time antecedent to that when the territorial possessions of the Nawab of Arcot became more immediately pledged for the security of His Highness's engagements to the East India Company by the Treaty of 1792, the Governor in Council deemed it expedient, and resolved to restore the lands to Syed Kullee Moolah Khan, to be held in Jaghire, dependent on the British Government. The Governor in Council further resolved that the sumrud of confirmation and investiture should contain specific clauses for that purpose. A Perwannah was accordingly issued, dated 27th of March, 1802, which renewed by that instrument the Jaghire, but without the Sayer, salt or saltpetre duties. And it was by the grant required of Syed Kullee Mollah Khan that, in taking possession of the Jaghire, he should not consider any power or authority whatever over the rights, privileges, liberty, or property of the inhabitants residing within the Jaghire to be thereby conveyed to him, and that he was in like manner, with all the other subjects of the British Government, to be answerable to the jurisdiction and control of the Laws and Regulations existing, or that might be established.

Under this grant, Kullee Moolah Khan entered into possession of the revenues of the Jaghire, and held the same for fourteen years.

In the year 1813, the Respondents commenced litigation in the Courts in India, respecting their father's Will.

On the 24th of July, 1817, the present suit was commenced by a Bill filed in the Supreme Court at Madras by the Respondents, in which the East India Company were, with others, made Defendants. The claim of the Respondents at first rested principally on the ground of alleged fraud and misrepresentation by Kullee Moolah Khan in obtaining the grant from the Governor in Council by concealment of the real state of his father's family. To this Bill the East India Company demurred for the want of equity, and the demurrer came on to be argued on the 26th and 27th days of September, 1817, when the demurrer was overruled. The other Defendants then appeared, and by the answer denied the imputed fraud and concealment alleged by the Bill. The Respondents amended their Bill, renouncing all claim to any benefit under the Perwannah, or re-grant, by the East India Company to Kullee Moolah Khan, which they prayed might be delivered up and cancelled; and afterwards, by their amended Bill, rested their case upon the validity and effect of the original grants by the Nawabs, Wallajah and Omdut [560] ul Omrah, alleging that the late Assim Khan was, at the time of his death, seised of the Jaghire, as held in Altamghali enam to him and his posterity for ever; and the Bill charged, that the grants of the Nawabs not only granted the revenue, or the Government share in the produce of the lands and villages, but also all rights and privileges, powers, advantages, and immunities which the Government had in the lands and villages, upon those lands and villages for the purpose of disposing of, and re-letting, improving and cultivating such lands and villages, or for any other purpose as the Government might have done, saving and excepting the sovereignty thereof, and also saving and excepting the rights and interests the cultivators and inhabitants had or might have by law, in the soil and produce of the lands and villages; and that even if the grants were merely the revenue or Government share, that in that case the Government would not have been justified in the resumption of the lands and villages by reason of any pretended right existing in the Mahomedan Government, for that such grants had always been considered by the Mahomedan Government to be and were treated as perpetual grants, and not resumable at the pleasure of the Government, or on the change of the reigning Sovereign; and that the Government of Fort St. George, on such resumption, used a power which they were not lawfully possessed of, and which had not resided in, or at any time been exercised by, the Mahomedan Government towards their faithful subjects, and which the Government, by the proclamation aforesaid, had disclaimed all intention of exercising. And the Bill prayed, that it might be declared, either that the original Perwannahs, or grants of the Nawabs, Wallajah and Omdut ul Omrah, to Assim Khan were and had been in force ever since the assumption of the civil and military authority of the Carnatic by the East India Company, and that Syed Alley, Bucka Sultan and Habiboon Nissa Begum might be declared entitled to their several and respective shares of the Jaghire lands and villages included under the same, namely, Syed Alley to an equal share with his other brothers, and Bucka Sultan, in right of Habiboon Nissa Begum his wife, to an

equal share with his sisters, which was half the share of the brothers, in the whole of the lands and villages, and that they might be respectively declared entitled to like shares of the rents, issues and profits thereof which had been received by or by the order of the Kullee Mollah Khan since the death of Assim Khan, and for that purpose the usual accounts might be taken, [561] with short rests for the calculating of interest, and that the Perwannah, or regrant of the Jaghire lands and villages made by the East India Company to Kullee Moolah Khan, might be ordered to be delivered up and cancelled, and that the East India Company might be decreed to make and execute a new grant or Perwannah of the Jaghire lands and villages in favour of Respondents and the widow and other children of Assim Khan, according to their several and respective interests as representatives to Assim Khan, according to the Mahomedan law, usages, and customs, in Altumghah or perpetually; or in case the Court should not see cause to maintain the validity of the original Perwannah, then that Kullee Moolah Khan might be decreed, in respect of the several fraudulent proceedings and concealments, to come to a just and particular account of all the profits of the Jaghire lands received by him, or any other person for his use, since the 27th of October, 1801, the day of the death of Assim Khan, and that half yearly and other frequent rests might be made in taking such account, and that the interest found due might be carried forward as principal, and that Kullee Moolah Khan might also be decreed, in respect of such alleged fraudulent proceedings and concealments, to have been and then to be a trustee of the Jaghire lands and villages for the benefit of the Respondents, to the extent of their respective shares in the same, according to the Mahomedan Law, and that the East India Company might be declared to have been, during all the time of the assumption, seised of the lands and villages and the rents and revenues thereof, in trust for Assim Khan during his life, and since his death for the Respondents and his family; and that the East India Company might be decreed to account before the Master for all the rents and revenues thereof, which during the assumption came to their hands, or which they had received since the period of the grant to Kullee Moolah Khan, or which were by them, under and by that grant, received and retained for their own use; and in case that Kullee Moolah Khan should be liable to make good to the Respondents the several amounts which might be found to have come to his hands under and by virtue of the grants, then that the East India Company might be made to make good to the Respondents such deficiencies as might arise or have arisen by reason of any of their acts in the premises, and that Kullee Moolah Khan might also be decreed to account in future with the Respondents, half-yearly or otherwise, as might be most convenient, in respect of their respective shares of the rents and profits.

[562] The East India Company by their answer insisted, that the right of property of Assim Khan in the Jaghire was broken into and upon by the act of assumption by the Government, and that the Jaghire was assumed in their name and behalf, under and by virtue of the terms and stipulations contained in the Treaty made by them with the late Nawab of the Carnatic. And they further stated, that by the Treaty they had the right and power to assume and seize the property of every individual who held the same under the Jaghire grants from the late Nabob Wallajah, and his son, Omdut ul Omrah, and submitted that the Government had not by any act, expressly or otherwise, disclaimed or renounced such right with regard to any Jaghire lands, held under Perwannah from those several Nawabs, whether the same were held under Altumghah enams, or any other description of Perwannahs, and that they were well justified in so doing by reason of the nature of such property, the same being merely revenue, or the Government share in the produce of the villages comprised in the Jaghire grants; and that, according to the Mahomedan Law, and according to the constant usage of the Mahomedan Government, such grants were always resumable at the pleasure of the Government on the death or change of the reigning Government, on whatever terms the grants were expressed, unless the same were afterwards confirmed by the successor, and that, therefore, the Appellants on such resumption as aforesaid, only exercised the same power which had been constantly exercised by the former Mahomedan Governments of the Carnatic. And they submitted, whether the Bill contained any matter of equity whereon the Supreme Court could ground any jurisdiction to pronounce a decree, or give the Respondents relief as against them, as the matters of the suit, so far as they related to the Appel-

lents, were of a political nature, and not cognizable by any Municipal Court of Justice.

On the 22nd of May, 1820, the Supreme Court pronounced a decree, whereby it was declared and decreed that the original Perwannahs, or grants, granted by the Nawabs, Wallajah and Omdut ul Omrah, to Assim Khan and his posterity for ever, of the Jaghire lands and villages were valid and subsisting Perwannahs or grants, and that the same were, and had been, in force ever since the assumption of the Carnatic by the Appellants; and the Respondents were under the same entitled to their several and respective shares in the Jaghire lands and villages, according to the Mahomedan Law; the Respondent, Syed Alley, to an equal [563] share with the brothers, and the Respondent, Bucka Sultan in right of his wife the Respondent, and Habiboon Nissa Begum to an equal share with her sisters. And it was further declared, that the Plaintiffs were also respectively entitled to like shares of the rents, issues and profits of such Jaghire lands and villages. And it was decreed, that the Defendant, Kullee Moolah Khan, should account before the Master touching the Jaghire lands and villages, and the rents and profits, and revenues, and of all arrears of rents and profits thereof which had accrued during the time of the assumption of the Government of Fort St. George, or which had been received by Kullee Moolah Khan since the death of Assim Khan, and that the Master should make half-yearly rents, and compute interest and make just allowances. And the Court further declared that Kullee Moolah Khan had been, and then was, a trustee of the Jaghire lands and villages, and of the rents and profits thereof, for the benefit of the Respondents to the extent of their respective shares and interest in the same, according to the Mahomedan Law; and all further directions and costs were reserved until after the Master should have made his report.

The Master having made his report, the cause came on to be heard on further directions on the 28th of July, 1821, when the Court ordered and decreed that the Defendant, Kullee Moolah Khan, should forthwith pay to the Respondents, Syed Ally, and the other children, their shares in the rents and profits of the Jaghire; and also that Kullee Moolah Khan should pay interest to the respective parties on the several sums of money at the rate of six per cent. per annum, from the 21st day of February, 1821; and the Court further ordered that, until the same should have been fully paid and satisfied, the share and proportion of the Defendant, Kullee Moolah Khan, of and in the Jaghire, should be held and be liable to the payment thereof to the several parties rateably and in proportion, according to the amount due to them respectively; and that the parties were respectively entitled to have and possess the Jaghire and the rents and revenues thereof to themselves and their heirs in perpetuity, the same to be divided amongst them in the shares and proportions authorized by the Mahomedan Law, and that upon applications for that purpose, the parties should be entitled to have a partition thereof accordingly, and to have possession of their several and respective shares, subject to the subsisting rights and interests of the tenants and occupiers thereof.

On the 20th of January, 1822, the East India Company pre-[564]-sented a petition to the Supreme Court, and obtained an order for leave to appeal to His Majesty in Council against the decrees of the 22nd of May, 1820, and the 28th of July, 1821, and afterwards lodged a petition of appeal against both decrees in the Privy Council Office.

The Respondents afterwards presented a petition, praying that the petition of appeal from the above decrees, so far as it sought to reverse the original decree pronounced by the Supreme Court of Madras on the 22nd of May, 1820, might be dismissed, the appeal not having been brought within six months, the time limited by the Madras Charter.

The petition now came on for hearing (Feb. 2, 1825).

Mr. Horne, K.C., Dr. Lushington (Mr. H. Brougham, K.C., and Mr. Teed, with them), for the Respondents, the Petitioners.

This application is founded upon the provisions of the Madras Charter, which provides that no appeal shall be allowed by the Supreme Court unless the petition for that purpose be preferred within six months from the day of pronouncing the judgment or determination complained of, and unless the value of the matter in dispute exceed the sum of one thousand Pagodas. The first decree, now appealed

from, was pronounced by the Supreme Court on the 22nd of May, 1820, and the decree on further directions on the 28th of July, 1821: it was not until the latter decree was pronounced, that the Appellants preferred their petition of appeal to England, which the Supreme Court of Madras allowed. We contend, that it was not in the power of the Supreme Court to admit the East India Company to appeal from the original decree of the 22nd of May, 1820, and in granting them liberty to appeal, they exceeded their jurisdiction. The provisions of the Madras Charter were never complied with, as it is admitted that it was not until after the decree on further directions was pronounced; more than six months, that the Appellants applied for leave to appeal. The Supreme Court of Madras had no power by the Charter under which that Court was constituted, to relax the restriction to the time for appealing contained in that Charter.

The Solicitor-General (Sir Nicholas Tindal), Mr. Serjeant Bosanquet (Mr. Serjeant Spankie with them), for the East India Company.

The appeal from the Supreme Court of Madras was interposed, [565] according to the terms of the Madras Charter, within six months after the 28th of July, 1821, the date of the decree on further directions. The objection now raised for the first time, that the appeal should have been preferred within six months after the original decree of the 22nd of May, 1820, we submit is untenable, inasmuch so much of the matter complained of is comprised in the decree on further directions, which although not equally important to the declaration of rights between the parties to the suit, as in the original decree, nevertheless embraced the fruit growing out of the declaration of such right. It is, moreover, strictly conformable to the practice of the Supreme Court at Madras, in which Court it has been the uniform practice that when a decree is made, which is to be followed up by further directions, to consider the two decrees as a joint and several one, and no appeal was ever allowed to England until the decree on further directions was made. But, assuming that the Appellants are wrong in their construction of the Charter in consequence of their reliance upon the construction put by the Supreme Court at Madras and on the practice there, still power is reserved by the Madras Charter to His Majesty in Council to admit the appeal; for if the Appellants are beyond the time prescribed by the Charter, it arose from following the practice of the Supreme Court, upon that Court's construction of the Charter.

The Master of the Rolls (Lord Gifford).—The petition of appeal has been presented as a matter of course, founded upon the liberty to appeal granted by the Supreme Court of Madras. The objection now is, that although that permission has been granted, yet that with respect to the ground of it, the Court below had no power to grant that permission, and that as to the first decree pronounced in May, 1820, the present Appellants had no right to impeach that decree. The Charter which gives the liberty to appeal against the decision of the Supreme Court has provided that, where the appeal is grounded upon a permission granted by that Court, that the appeal must be made to that Court; and then it provides that no appeal shall be allowed by that Court unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment or determination complained of, and unless the value of the matter in dispute shall exceed the sum of 1000 Pagodas. Now, the first decree in this case is one that was pronounced in May, 1820, and pronounced [566] considerably more than six months before the application for leave to appeal. It has been fairly admitted that it was a judgment against which an appeal might have been fairly brought: it is a decree pronounced upon the rights of the parties directing further proceedings and inquiries, and an account to be taken, but that was to be done as consequential upon the decision of the Court upon the rights of the parties. A reference was made; the Master made his report upon that reference some time in the year 1821, and a further decree upon further directions was pronounced in July 1821, and within six months from that period the East India Company had full power to appeal; they had leave to appeal granted, and if they chose to prosecute their appeal against it, there can be no objection to that; but the question is, whether the Court below had any right to grant the leave to appeal against the first decree; the Board have no doubt in thinking they had no such right.

Then, there is another clause in the Charter, giving power to the King in Council to grant an appeal upon such terms, and under such limitations, restrictions, and regulations as he should think fit: but as it has been urged in argument, there must be a special application, stating a strong case to the Board for permitting that indulgence, and accounting for the negligence in not having appealed in due time. It is unnecessary to say what the opinion of the Board would be upon that application, because it is not before them: the only appeal before them is one stated as a matter of course, founded upon the permission given the Appellants by the Supreme Court: the Board are of opinion, that that permission could only be given to them as to the decree upon further directions, and that so much of the prayer of the petition must be granted as prays to restrict the appeal to the last decree. We pronounce nothing upon the question of costs at present.

(Feb. 1, 1826.) The East India Company, in conformity to the suggestions of the Board, presented a special petition praying for the indulgence of the Board to permit them to appeal from the decree pronounced by the Supreme Court of Madras on the 22nd of May, 1820; and in support of their application filed an affidavit of Sir Thomas Strange, Knt., formerly Recorder of the Supreme Court at Madras, the material parts of which were as follows:—"That he was appointed the first Chief Justice of the Supreme Court at Madras in 1801, and exercised that office from that time until the year 1816, when he resigned; that during the time whilst he so held that office, [567] an established practice existed (founded on a prevailing understanding of the intention and construction of the Letters Patent creating the Court) of granting leave to appeal to His Majesty in Council from judgments or determinations of the Court only on the ultimate conclusion of a suit, when the whole suit and everything regarding it, save only execution, had attained maturity, and when, the party dissatisfied might have the benefit of such right of appeal to the extent of every part of the proceedings on which error might be assignable."

Mr. Serjeant Bosanquet, and Mr. Serjeant Spankie, for the East India Company. We are now in a state to account satisfactorily for not coming before your Lordships in the regular time and manner as provided for by the Madras Charter: although we were wrong in the construction of that Charter, still we were misled by an error founded on the prevailing practice of the Supreme Court of Madras. The affidavit of Sir Thomas Strange shows that no appeal could have been interposed during the progress of the cause: we were governed by the practice of the Supreme Court, which seems to have been settled by a decision pronounced by that Court in the case of *Johnston v. The East India Company* (1 Strange's Madras Cases, 21). In that case a petition was presented for leave to appeal against an interlocutory order, which was refused, the Court being of opinion, upon the construction of the Madras Charter, that there could be no appeal while the suit was in progress, and declaring that the suit must have reached its end, and then, and not before, the party aggrieved might object to any order by which he could show that he had been finally aggrieved. This has been the basis of the practice from that time to the present, and acting upon this authority and construction of the Charter, the East India Company did not present their petition of appeal till the decree on further directions was pronounced.

Mr. Horne, K.C., and Dr. Lushington, for the Respondents, resisted the motion, contending that no general rule of practice in the Supreme Court at Madras could overrule the express words of the Charter, by which they insisted, the Appellants were absolutely precluded from their right to appeal from the original decree pronounced by the Supreme Court on the 20th of May, 1820.

[568] The Master of the Rolls (Lord Gifford).—This is an application to the indulgence of the Board by the Petitioners, the East India Company, who pray that they may be permitted to appeal against a decree made by the Supreme Court of Madras in 1820; and, considering the power and weight of this Company, the Board will look very narrowly into any indulgence they ask. It appears that twelve months ago an appeal having been lodged, as a matter of course, by them, not only against the decree upon further directions, but the original decree, an application was made by the Respondents that that appeal, so far as it regarded the original decree, should be dismissed, inasmuch as the Appellants had not presented it in due time. It appears that a suit was instituted by the Respondents so long ago as the year 1820, against the Company and other parties; and one great question respected the

validity of a certain grant of a Jaghire, made so long ago as the year 1789, which had been confirmed afterwards in the year 1797; and the question between the East India Company and the Plaintiffs in that suit related to the validity of that grant. A decree was pronounced in the year 1820 by the Supreme Court of Madras, and, as I understand the decree, it did declaratively pronounce on the validity of that grant, and thereby pronounced its final decision upon that question in which the East India Company were interested. Having made the declaration which that decree contains, respecting the validity of the grant, the Court went on to direct certain accounts to be rendered by other parties in the cause, and, those accounts having been taken, the cause came on upon the Master's report. An order, upon further directions, was made upon that report, but the East India Company were only affected by the original decree pronounced in 1820, because the other proceedings related to the account between other parties, and did not affect them: they had permission to appeal, not only against the decree upon further directions, but from the original decree. The Board were of opinion that, looking at the terms of the Charter, in which it is provided "that no appeal shall be allowed by the Court unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment or determination complained of, and unless the value of the matter in dispute shall exceed the sum of one thousand Pagodas," that the judgment and determination complained of, was the decree originally pronounced upon the hearing of the cause, the decree pronouncing declaratively upon the great question existing in the cause between the East India Company and the Respondents: [569] and they were of opinion that the East India Company were out of time, so far as regarded that decree, but that they were still in time to appeal against the decree upon further directions. The Appellants have now presented a very long petition to the Board, praying for the indulgence of the Board to admit them to appeal, upon the ground that a certain error has existed in the proceedings of the Supreme Court of Madras since the granting of its Charter in 1800, up to the present period; and they have produced an affidavit of a most eminent Judge of that Court, holding the highest judicial situation for a great number of years, who deposes "that during the whole time whilst he so held and exercised the said office, an established practice existed (founded upon a prevailing understanding of the intention and construction of the said Letters Patent), of granting leave to appeal to His Majesty in Council from judgments or determinations of the said Court of Judicature only on the ultimate conclusion of a suit, when the whole suit and everything regarding it, save only execution, had attained maturity, and when the party dissatisfied might have the benefit of such right of appeal to the extent of every part of the proceeding on which error might be assignable." He states that to have been the practice; and a case has also been produced before us, determined so long ago as the year 1799, before the granting of this Charter, though the words of the Charter that then existed appear to be very similar to those in the present Charter: and upon that occasion the Recorder determined that it was not competent to the party to appeal against an interlocutory judgment, but that he must wait till the final judgment of the cause to appeal. It appears that the Court at Madras has considered that to be the practice by allowing the appeal in this particular case, because no doubt seems to have been felt when the Appellants applied for leave to appeal. Now, under these circumstances, the question is, whether this error, which has prevailed up to the period when this appeal was presented, is such an error as shall induce the Board to grant the Appellants the indulgence they now ask.

It has been urged before us that this case ought to be determined, not as if a powerful body like the East India Company were the parties, but like the case of an humble individual; and we think the Board would perhaps look with still greater jealousy to a case in which a Company so powerful as the East India Company were concerned. We think, however, as an error has existed in the mind of the Supreme Court, it would be too much to shut out the party from the right of appeal: we, therefore, with great reluctance, are [570] disposed to grant the right; but considering that the Company have not been so alert in prosecuting this petition as they ought to have been, because our decision was pronounced on the 2nd of February, and it is not till October that they take any steps to procure the indulgence they ask, and that in the meantime orders have been pronounced by this Board to lodge their case

upon the appeal then laying before the Board, and no notice was taken of those orders, nor any application made for the indulgence they ask; under these circumstances, it is impossible to grant this indulgence, but upon the terms of their paying not only the costs of this application, but any costs that may have been incurred since February, 1825, and which may in the event have been incurred unnecessarily. I mean as to the printing of their cases in the present form, which, I dare say, are directed only to the decree upon further directions, and, therefore, further expense must be incurred in preparing additional cases applicable to this point, which appears of the greatest importance in the case, namely, the validity of the Jaghire. I suppose there can be no question as to the part of the costs they ought to pay; the parties ought to be fully indemnified for all the costs that have been incurred in consequence of the delay that has taken place, and the costs of this application.

The appeal from both decrees being admitted, Appellants, in their case submitted that the same ought to be reversed, and relied upon for the following reasons:—

First.—That the assumption of the Government of the Carnatic in 1801, was entirely a political measure, carried into effect by the Governor in Council of Madras, for enforcing Treaties made with the Nawabs as reigning Sovereigns, by the Appellants, in exercise of the powers of Government delegated to them by Royal Charters and Acts of Legislature; and that the dispossession of Assim Khan, and the other Jaghiredars and grantees of the public revenues of the Carnatic, formed part of such assumption; and they submitted that Assim Khan, under whom the Respondents claimed, never was possessed of the Jaghire after the assumption of the Carnatic by the Governor in Council of Madras; that the acts of resuming the Jaghires of the Carnatic, and of re-granting to Kullee Moolah Khan the Jaghire in question, being political acts, had been sanctioned and confirmed by the department of the British Government expressly appointed by the Legislature for the superintendence and control of all political acts of the Governors in Council of [571] the Appellants in India—namely, the Commissioners for the affairs of India. That by the 53rd Geo. III., c. 155, the British Legislature vested in the East India Company all the territorial acquisitions then under their Government, with the revenues thereof, for a term then unexpired, and thereby confirmed the acquisition and occupation by the East India Company of the Carnatic, and the disposition of the Jaghires of that country made by the Appellants; and that the acts of resumption and re-grant of the Jaghire not being transactions of the Appellants in their character of a commercial Company, but being such political acts as aforesaid, carried into effect by the authorities legally constituted in that behalf, and sanctioned as aforesaid, were matters wholly foreign to the jurisdiction of a Municipal Court, erected for deciding causes between subjects of the British Crown, in cases of ordinary right within its jurisdiction.

Second.—That without examining how far the extensive powers vested in the Appellants, by their Charters from Charles II., William III., and Queen Anne, and recognized by various Acts of Parliaments, were virtually abridged and modified by the enactments of the Statute, 13th Geo. III., c. 63, which Statute commenced a system of Parliamentary regulation of the Government of India, or by the Act of 24th Geo. III., c. 25, and subsequent Acts constituting the Board of Commissioners for the affairs of India, it was beyond question that the power of concluding Treaties with Native Princes on behalf of the Appellants was vested in the Governor in Council of Madras, with the approbation of the Governor-General of India, in the year 1801, when the Governor in Council, with the sanction of the Governor-General at Fort William in Bengal, concluded the Treaty with the Nawab, ceding the Carnatic to the Appellants. That the Treaty of 1801, transferred to the Appellants, without any exception whatever, the sole and exclusive administration of the Government of the Carnatic, together with the full exclusive right to the revenues thereof, subject to a provision of one-fifth for the maintenance of the Nawabs; the Appellants by Article 9, engaging to take into consideration the situation of the families of the late Nawab, and of the principal officers of the Government, and to provide them a suitable maintenance; a stipulation which would have been nugatory if the Jaghires had been considered as private property, or had been intended to be secured to the Jaghiredars. That the treating powers, in concluding the Treaty of 1801, obviously intended to include in its operation the Jaghires of the Carnatic, as would mani-

festly appear from a comparison between the [572] language of that Treaty, and that of former Treaties between the Nawab and the Appellants. That, in the Treaty of 1787, forming the basis of arrangements for the joint defence of the Carnatic, between the Appellants and the Nawab in the event of war, the 9th Article stipulated that the Nawab should pay four-fifths of his revenue to the Appellants, which four-fifths were to be taken after deducting from his whole revenue 2,13,131 pagodas annually, for Jaghires to the family of His Highness, and 21,366 pagodas annually for charities; a deduction evincing that the Jaghires granted to the family were still considered part of the public revenue, and would have entered into the amount thereof, had they not been expressly excepted. And that the next Treaty of 1792, between the Nawab and the Appellants, instead of providing a war subsidy from the Nawab, provided that in the event of war, the Appellants should enter into full authority over the Carnatic, and collect the revenues during the war, except the Jaghires of the Nawab's family of the amount of 2,13,911 pagodas, which on the condition of the good behaviour of the Jaghiredars, and of their fidelity to the Nawab, should be continued to them, subject to the pleasure of the Nawabs. And the Appellants submitted, that the last-mentioned Treaty being made three years subsequently to the Nawab Wallajah's grant to Assim Khan, clearly manifested not only that without the exception, Jaghires of all kinds (including even those of the Nawab's family) would have been subject to the occupation of the Appellants in the event of war; but also, by the limited terms of the exception, it must be inferred that the treating powers never intended to except or protect the Jaghire of Assim Khan, or any other Jaghiredars, except the members of the reigning family. And it was further submitted by the Appellants as manifest, that the cession made by the Treaty of 1801, contained no exception (while the former Treaties contained such exceptions as aforesaid) and was unlimited and unqualified, that the Jaghires of the Carnatic were intended to pass with the general revenues to the Appellants, while the family and the Jaghiredars, and officers of the Nawab, were to look for provisions to the Appellant's engagement under the 9th article of the Treaty.

Third.—That the Supreme Court at Madras, in making the decrees, exceeded its jurisdiction, as the same was prescribed and defined by the Acts of 37th Geo. III., c. 142, and 39th and 40th Geo. III., c. 79, and by the Letters Patent constituting the Court. That the 37th of Geo. III., c. 142, sec. ii., recited in the 39th and 40th Geo. III., c. 79, and Letters Patent, expressly provided [573] that the Recorder's Court of Madras “shall not have or exercise any jurisdiction in any matter concerning the revenue under the management of the Governor in Council respectively, either within or beyond the limits of the said town of Madras, or the forts or factories subordinate thereto, or concerning any act done of the Governor or Council.” That by the Act, 39th and 60th Geo. III., c. 97, sec. 2, His Majesty was empowered to erect the present Supreme Court at Madras, to consist of such persons, and to be invested with such power and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control within Fort St. George, the town of Madras, and factories subordinate thereto, and within the territories which now are, or hereafter may be, subject to, or dependent on, the Government of Madras, as the Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed, or by that Act did consist of, is invested with, or subject to, within Fort William, or the kingdoms or provinces of Bengal, Bahar, and Orissa. That the Act of the 21st Geo. III., c. 70, which was passed for the purpose of amending and explaining the 13th Geo. III., c. 63, under the authority of which the Supreme Court at Fort William was erected, and for regulating the jurisdiction of that Court, contained a clause (sec. 8) similar to the above-mentioned clause of the 37th Geo. III., c. 142, sec. 11, and the Letters Patent of the 26th December (41st Geo. III.), establishing the Supreme Court at Madras, contained a clause precisely in the same words as the last-mentioned clause of the 37th Geo. III., c. 142, regulating the jurisdiction of the Recorder's Court. That neither Assim Khan, nor Kullee Moolah Khan, either under the Government of the Nawab, or of the Appellants, was ever possessed of or entitled to any land whatever by virtue of the Jaghire in question. That the Jaghire consisted of the Government share of the produce of the Jaghire lands, and consequently passed to the Appellants as part of the public revenues of the Carnatic, and

became public revenue of the Appellant's Government, under the management of the Governor in Council of Madras. That the Appellant's grant to Kullee Moolah Khan was a grant of a part of such public revenues to him as Jaghiredar, and the Jaghire remained public revenue in the hands of the grantee, and exempt from all taxes and charges to the State, in the same manner as when the revenue was in the hands of the Government itself. That the Appellants upon the re-grant to Kullee Moolah Khan reserved [574] to themselves their present interest in part of the revenues which had not been excepted in the grants to Assim Khan: namely, the Sayer, salt and saltpetre. That the Appellants by the terms of such re-grant, gave to Kullee Moolah Khan an interest in the Jaghire of an ordinary Jaghiredar only, without any term of perpetuity, and were, therefore, entitled to the terms of such re-grant (whatever might be the construction of the Perwannahs of the Nawabs), to resume such Jaghire as part of the public revenues under all the circumstances in which an ordinary Jaghire is resumable. That the Appellants, therefore, submitted, that the decrees had been made upon matters concerning the revenues under the management of the Governor in Council at Fort St. George, which were expressly excluded from the jurisdiction of that Court, and that the Court had no authority to decree that the Perwannahs of the Nawabs were valid and subsisting after the assumption of the Carnatic, or to decree a partition of the Jaghire, or to appoint a receiver of the rents or profits thereof. That if the Appellants' Government had altogether refused to renew the grant of the Nawabs, either to Assim Khan, or to Kullee Moolah Khan, after his death, it could hardly have been contended that the Appellants would be compellable so to do by a suit in the Supreme Court: and yet the decrees proceeded upon the principle of establishing the Perwannah of the Nawabs as perpetual grants, and of invalidating the limited re-grant of the Appellants. That if the authority of the Supreme Court to make these decrees could be maintained, it might by parity of reasoning be contended, that the whole settlement of the Carnatic, after its assumption by the British Government, might be revised by the Supreme Court, and that suits might be entertained upon the complaints of all the former subjects, or the representatives of former subjects, of the Nawabs, who might be dissatisfied with the arrangements then made, though sanctioned by the executive and controlling authorities appointed by the Legislature. That the field of litigation which would thus be opened upon every accession of territory to the several Presidencies in India, might easily be imagined, but from entering upon which, the Appellants submitted that the Supreme Courts at those Presidencies were equally excluded by principle and the provisions of the Legislature.

Fourth,—That if the Supreme Court at Madras was authorized to take cognizance of the subject-matter in dispute relating to the Jaghire, the case did not justify the decrees which had been made, [575] by which effect and validity have been given to the Perwannahs of the Nawabs, as grants in perpetuity, notwithstanding the transfer of the Carnatic to the Appellants, and their resumption of the Jaghire. That notwithstanding the language of the Perwannahs expressive of perpetuity, such grants according to their general acceptance in India, the known and constant usage and practice of the Carnatic and other Indian States, and also from the nature of the subject-matter granted, were resumable upon a change of sovereignty, and could be deemed perpetual. That although the language of the grants might seem to convey a proprietary interest in the soil, yet the grantees confessedly possessed no such interest, the subject-matter of the grant being a mere Jaghire, or portion of public land revenue, together with the Government powers of collecting the same, and that as Assim Khan never entered into possession of anything beyond such Government portion of revenue, the Ryots or land owners remained in possession as before. That the grants, therefore, being of the nature above mentioned, must, according to the character and usage of the Indian Governments, be determinable, if not at pleasure, at least upon the death of the granting Sovereign, or the change of dynasty. That such grants being in Enam, namely, gratuitous, and not subject to any payment or other render to the State, being the ordinary mode of conferring stipends on the officers and dependants of the native Princes; from their nature could not extend beyond the life of the granting Prince without often leaving his successor deprived of the revenues necessary for the purposes of Government, and without often leaving individuals hostile to the existing Government in posses-

sion of the large portions of its revenues. That when the executive and legislative powers were united in the Sovereign Prince, as they always were in India, there were no means by which the State could be protected from extravagant grants by the reigning Sovereign, and the resumption of such grants by the successor, and the resumable nature of the grants in question further appeared from the actual regrant upon the death of Wallajah, the first granting Nawab, to Assim Khan, by Omdut ul Omrah, the succeeding Sovereign.

Fifth,—That the laws and usages of Mahomedan States respecting grants of Jaghires, the nature of Altumghah grants, the precise estate and interest conveyed by such grants, and the powers of resumption or revocation belonging to the Sovereign grantors, were matters respecting which there was no sufficient evidence on which the Court below could make the decrees appealed against, and that [576] the Court ought to have directed issues, in order to ascertain the facts, and especially the laws and usages of the Carnatic, and ought not to have decided a question of such magnitude and of so much novelty and perplexity without granting such issues. That certain questions relating to the Mahomedan law propounded to persons in Bengal, with the answers of such persons thereto, which had been annexed to the proceedings transmitted by the Supreme Court, formed no part of the proceedings in the suit appealed from, nor were such questions propounded by any party in that suit, nor was any opportunity afforded to the Appellants to discuss, by argument, the effect of the answers thereto; consequently, that nothing contained in those answers ought in any degree to have influenced the judgment of the Court in pronouncing the decrees, nor ought the same to affect the judgment of the Court of appeal.

Sixth,—That the right of the Appellants to object to the decrees of the Court by appeal could not be resisted upon the ground that the Appellants had no interest in the same, and that the question therein merely regarded the relative rights and interests of Kullee Moolah Khan, and his brothers and sisters; since the Appellants' Government, which, previously to the regrant by Kullee Moolah Khan, had actually resumed the Jaghire, and received the revenues thereof for several months from the time of the assumption of the Government, only gave to Kullee Moolah Khan a portion of the subject-matter of the Nawab's grants, reserving to the Appellants the important articles of Sayer, salt and saltpetre duties and also limited the grant of the grantee to the interest of an ordinary Jaghiredar, without any expressions of perpetuity (such as were contained in the Nawab's grants), and also granting such limited interest to Kullee Moolah Khan alone, as the mere object of the Appellants' favour, to the exclusion of the coheirs of Assim Khan; whereas, by the decrees of the Supreme Court, the coheirs were holden, according to the Mahomedan law, to be entitled to shares in the Jaghire, and the Appellants were actually deprived of the Sayer duties reserved to them by the regrant, and of the right of resumption of the Jaghire, either at pleasure or on the decease of Kullee Moolah Khan.

The Respondents contended, that the decree appealed from ought to be affirmed, for the following reasons:—

First,—Because the Supreme Court of Judicature at Madras was a Court of competent jurisdiction to decide the matters in dispute [577] between all the parties to the cause touching their rights to the Jaghire in question.

Second,—Because the grant made by the Nawabs, Wallajah and Omdut ul Omrah, to Assim Khan, were satisfactorily proved by the evidence to be grants in Altumghah enam; and it was established that, according to the law and usage of the Carnatic, such grants conveyed to the grantee an indefeasible interest in perpetuity in the subject of the grant, and that upon his death, it became devisable amongst the members of his family, in the shares and proportions declared by the decree of the 22nd of May, 1820.

The appeal was argued by The Solicitor-General (Sir N. Tindal), Mr. Serjeant Bosanquet, and Mr. Serjeant Spankie, for the Appellants; and by Mr. Horne, K.C., Dr. Lushington, and Mr. H. Brougham, K.C., for the Respondents.

Upon the case being opened the Board directed the argument to be confined to the question of jurisdiction of the Supreme Court at Madras to entertain the suit, independent of the merits.

It was argued upon this point that it was a question upon the construction of

Treaties between two absolute Governments, and not of contract between subjects of two States, and that in such circumstances, a Municipal Court had no jurisdiction; it being a question of international law. That the assumption of the Government of the Carnatic in 1801, by the East India Company, was entirely a political measure, carried into effect by the Governor in Council at Madras, for enforcing Treaties made with the Nawabs of the Carnatic, as reigning Sovereigns, with the East India Company, in exercise of their powers or Government delegated to them by the Charters and Acts of Parliament referred to in the reasons of appeal, and that the act of resumption of the Jaghire by the East India Company was an act of Government not to be questioned in a Municipal Court. The cases of *The Nabob of the Carnatic v. The East India Company* (2 Ves. Jun. 56. S.C. 4 Bro. C.C. 180), *Le Caur v. Eden* (Doug. 594), and *Lindo v. Rodney* (*Ib.* 612, n.) were cited.

The judgment of the Board was delivered by

The Master of the Rolls (Sir John Leach).—Their Lordships are of opinion, that the Treaty in question did [578] vest the rights of Sovereignty in the East India Company, and that the East India Company, in the exercise of what they considered their right of Sovereignty, resumed the Jaghire in question, and granted it to Kullee Moolah Khan, not in the form of the original grant to his father, but in terms totally different, being for life only; and that they reserved to themselves the Sayer and other revenue duties. It is in effect the same thing, as an act of Sovereignty, as if it had been granted to a mere stranger, and no further confirmation of the title of Assim Khan than such a grant had been made. Their Lordships are of opinion, therefore, that the Supreme Court of Madras had no authority to question an act of Sovereignty exercised on the part of the East India Company, and they are confident that the motives as they appear upon the papers here were motives strictly just, and that the effect of the law as it prevailed under the Nawab of the Carnatic, could not be examined into by the Supreme Court: they must, therefore, reverse the judgment complained of (see the case of *Sparrow v. Tanajee Rao Raja Sirke*, 2 Borr. Bom. Cases, 458; and also Gleig's Life of Sir Thomas Monro, vol. ii. p. 314).

[See *Secretary of State for India v. Kamachee Boye Sahaba*, 1859, 7 Moo. Ind. App. 476 and note thereto at p. 547.]

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and the Sudder Dewanny Courts
in the East Indies, 1859-61. By EDMUND
F. MOORE, Barrister-at-Law. Vol. VIII.

SUMBHOO LALL GIRDHURLALL,—*Appellant*: THE COLLECTOR OF SURAT
AND NUSSERWANJEE PESTONJEE,—*Respondents* * [July 13, 16, 19,
and 20, 1859].

On appeal from the Sudder Dewanny Adawlut at Bombay.

Tora gasas, an annual fixed money payment in the nature of black mail, is alienable, and subject to sale or mortgage like other property.

Under an execution sale in satisfaction of a decree, Tora gasas was sold. The purchaser paid the money into Court, which was paid out to the judgment creditor, and the purchaser had a conveyance of the Tora gasas executed by the Court. The Government in the first instance acquiesced in the sale, but afterwards refused to register the name of the purchaser in their books as alienee, on the ground that Tora gasas was, from its nature, and on public policy, inalienable; nevertheless they received and applied the accruing payments to their own use. In a suit brought by the purchaser against the Government and the judgment creditor, the Sudder Court in the first place held the sale illegal, on the ground of the inalienable character of Tora gasas; and secondly, acting upon the maxim, "*caveat emptor*," refused to order the judgment creditor to return the purchase-money. Upon appeal such decree reversed by the Judicial Committee by reason,—

First, that Tora gasas was alienable, and capable of being attached and sold in satisfaction of a decree [8 Moo. Ind. App. 40, 41]; and

Secondly, that the decree was erroneous, as it would be manifestly unjust to deprive the purchaser of the purchase-money in the event of the sale being treated as a nullity [8 Moo. Ind. App. 39].

Although the amount at issue was under Rs. 5000, the appealable value, a special appeal was admitted by the Sudder Dewanny Adawlut from a decree of the Zillah Court. The sitting Judge upon the appeal, acting under the Act, No. III. of 1843, then in force, amended the certificate of the points at issue in the proceedings before the Zillah Judge by adding further points. Upon the proceedings coming before the full Court of the Sudder Dewanny Adawlut

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessor.—The Right Hon. Sir Lawrence Peel.

that Court ordered the certificate to be further amended. After these proceedings had taken place, Act No. XVI. of 1853, was passed, whereby the Act, No. III. of 1813, relating to special appeals, was repealed. By section 3 of the Act No. XVI. of 1853, power was given to the Sudder Dewanny Adawlut to determine appeals without reference to the points certified. Held, that under that Act, the whole subject at issue at the last hearing upon appeal was open to the Sudder Court's consideration.

Decree appealed from reversed with all the costs the purchaser had been put to in the proceedings in India and upon appeal. The costs of the execution creditor ordered to be paid by the purchaser, and charged by him in his costs against the Government.

The purchaser was kept out of the annual payment for upwards of twenty years, the Government being in receipt of the Tora garas. Held further (in the absence of evidence that such annual payments had been paid into Court) that the purchaser was entitled to simple interest at the rate allowed by the Courts in India on the arrears due when the suit was brought, and on each subsequent payment when it accrued due [8 Moo. Ind. App. 42].

In this case the question at issue related to the claim of the Appellant to a certain interest in land in [2]Guzerat in Bombay, called Tora garas huk (*a*), which he had purchased at an execution sale by the Sheriff, [3] made under a decree of Court of Surat: or, in the alternative, if the sale could not be sustained, a further question arose, whether the purchase-money paid by him into Court ought not to be refunded.

The principal points raised in the Court below and at issue in the appeal were, first, whether a Tora garas huk (a species of hereditary local tenure in Bombay) was subject to attachment and sale by the Sheriff, like other species of property, in execution of a decree of a Civil Court; secondly, whether the Government Collector, who received from the villagers and paid to the proprietors of the Tora garas periodically the money in respect thereof, was justified in refusing to register the name of the Appellant as purchaser and transferee, and to pay him the money received: and, thirdly, whether in the event of the first question being decided in the negative, and the second in the affirmative, the Appellant as purchaser at the Sheriff's sale of the Tora garas huk, had any claim for reimbursement against the Respondent, Nusserwanjee Pestonjee, the execution creditor, out of the nett proceeds of the sale paid to him by the Sheriff in satisfaction of the decree passed in his favour in a suit brought by him against the then Grassia.

The facts of the case were as follows:—

The Respondent, Nusserwanjee Pestonjee, having in the year 1839, obtained a decree against one Bharmulsungjee Kooversungjee, in the Court of the [4] Principal Sudder Ameen of Surat, for the sum of Rs. 12,145, applied, pursuant to the provisions of Reg. IV. of 1827, ch. xiv. of the Bombay Code of Procedure, sec. lxiii., clauses 1, 2, for the attachment and sale of certain Tora garas, of the Pergunnah of Orpad, amounting to Rs. 347 13a., which belonged to Bharmulsungjee Kooversungjee. An application was afterwards made to the Court by Bharmulsungjee Kooversungjee

(*a*) In Guzerat, in the Presidency of Bombay, before that Province came, at the beginning of the present century, under the dominion of the British Government in India, predatory marauders were in the habit of plundering the villages; and, as the ruling power was not strong enough to afford protection against such attacks, the villagers entered into agreements with the robbers to pay them a species of black mail, as the price of their refraining from plunder, and also as the purchase of their assistance in case the villages were attacked by other depredators. These payments were called "Tora garas," and the recipients were styled Grassias. Garas is defined in Wilson's Glossary to be "a hereditary claim to a small portion (a mouthful) of the produce of a village or villages by various Rajpoot chiefs, granted them by the local Government in remuneration of military service, and commuted for a pecuniary payment out of the revenue paid by the villagers." A fixed payment made to military and predatory chiefs in Guzerat and Malwa, especially in lieu of lands held by them, or in purchase of their refraining from plunder.

to stay the sale for six months, to enable him to make an arrangement to discharge the decree, but the Court declined to make any order. The property was accordingly attached, and proclamation having been made, without any adverse claim having been preferred, the Tora garas was sold by auction to the Appellant, for the sum of Rs. 3,430, which amount he paid into Court. The Judge of the Court thereupon executed the usual instrument of sale, dated the 23rd of January, 1840, assigning the Tora garas to the Appellant, and the Nazir of the Court paid over the purchase-money to the Respondent, Nusserwanjee Pestonjee, in accordance with the ordinary practice.

The Collector of Surat being in receipt of the revenue of the Pergannah of Orpad, out of which the Tora garas was payable, the Appellant to complete his purchase and enable him to receive the Tora garas, applied to him to order the Maulutdar to enter the Appellant's name as the owner of the Tora garas, and to pay the same to him yearly. Upon this, an order was issued by the Collector as requested; but the Maulutdar having made a report to the Collector that the Tora garas, ought not to have been taken from Bharnulsingjee, the Appellant's [5] name was not entered, as owner, nor was the Tora garas paid over to him, the amount being paid into the Government treasury.

The Appellant, on the 22nd of July, 1840, presented a petition to the Judge of the Zilla Court of Surat, for redress, upon which the Judge ordered a communication to be addressed to the Collector to enter the Appellant's name as the owner thereof, and to pay the same to him accordingly. The Collector, however, reported to the Revenue Commissioners that the Appellant's purchase-money should be refunded to him, with interest, out of the public treasury, and that the Tora garas should be appropriated to Government, or that the Appellant's name should be entered as the owner of it. The Appellant then applied to the Revenue Commissioners, when he was informed, in reply, that a reference had been made to the Government on the subject, and that an answer would be communicated on receipt of the final orders of Government. The Appellant having been at last informed by the Collector of Surat that his remedy was to file a suit to substantiate his claim, appealed to the Sudder Dewanny Adawlut of Bombay for redress; but on the 28th of February, 1843, that Court likewise left it to the Appellant to file a suit on the civil side of the Court to establish his right.

Accordingly, on the 16th of October, 1843, the Appellant filed a plaint in the Zillah Court of Surat, against the Respondents, insisting that Tora garas had been repeatedly sold, and that the purchasers were in the enjoyment of the produce thereof, and praying that the Collector might be ordered to enter the Tora garas purchased by the Appellant, amounting to the yearly sum of Rs. 347 13a., in his [6] name, according to the Bill of sale, and to pay him the arrears accrued for the preceding four years, amounting to Rs. 1,391 4a., or that if it should appear to the Court, that the Respondent, Nusserwanjee Pestonjee, caused the Tora garas to be improperly sold, then that he might be ordered to refund to the Appellant the sum of Rs. 4,821 4a., being the amount of the purchase-money and interest for four years.

The Collector of Surat by his answer alleged, that from the origin of Tora garas, the Grassias people used to levy certain Huks and necessities from the cultivators, in order that they should not oppress the villagers by plundering, etc.; and that it was the pleasure of the cultivators whether they paid the same or not; that they did not receive that Huk by means of an order on the part of Government, or by means of any sunnuds. That after the English Government took the country, an agreement was entered into that the Grassias were to receive the Huk from the Government treasury and not from the villagers, in order that the villagers should not suffer any oppression; and that the custom had hitherto been to pay the Huk to the Grassias alone. That the Government had not agreed to pay the Huk to any one else, for, by so doing, the agreement made by the Government would be broken; because, if the Grassias got nothing to eat, they would again begin to plunder; that the Government would then suffer loss, and the villagers would suffer oppression. That the Government had settled the personal property of the Grassias, and, if that property did not reach them, the claim of the Government to the same existed; that, even if Tora garas had been sold as alleged in the plaint, the right [7] of the

Government was not done away with, because it was agreed to pay the Huk to the Grassias alone.

The Respondent, Nusserwanjee Pestonjee, by his answer admitted the material facts stated in the plaint, and submitted that he was improperly made a party to the suit, and that it was contrary to the Regulations to sue him; for as the Appellant had admitted that the Tora gasas was regularly sold, he should have sued the Collector alone to recover the amount of it which had been paid into the Government treasury.

The Appellant replied to both answers, stating that if any objections to the sale had appeared to the Collector, he should have filed a suit as soon as the property was attached, and have caused the sale to be stayed according to the provisions of the Regulation; and that not having done so, the objection that the Tora gasas was not saleable ought not now to be entertained; and, in answer to the objection of the Respondent, Nusserwanjee Pestonjee, stated that so long as the Appellant's name was not entered in the books of the Collector, the Appellant's claim against the Respondent, Nusserwanjee Pestonjee, was valid, as he had caused the Tora gasas to be sold, and had received the purchase-money, and that when judicial sales were avoided, the Court always directed the purchase-money to be refunded to the purchaser, whereupon the decree, for the satisfaction of which the property was sold, remained in force.

Evidence was adduced on behalf of the Appellant, which established that judicial sales had been made of other Tora gasas in the Pergunnah of Orpad, one of which had been enforced in a suit in the civil Court of Surat, and that other sales had been recognised [8] and ordered by the Collector of Surat. The Court having, at the request of the Respondent, the Collector, transmitted interrogatories to the Collectors of the neighbouring Zillahs of Ahmedabad and Broach, to ascertain the nature of the gasas tenure in those Zillahs, the Collectors replied, that special arrangements had been entered into respecting gasas rights, under which they would not be saleable. It, however, appeared in evidence, from a certificate of Mr. Sutherland, a former Judge of the Court of Surat, dated the 20th of December, 1836, to the Assistant Judge of Broach, in reply to a reference which had been made respecting the nature of Tora gasas in the Zillah of Surat, that there were then very few instances of the attachment and sale of Tora gasas, but that there was no doubt that where such description of property was possessed, a party having a decree against the property might attach and sell in satisfaction thereof Tora gasas, in like manner as any other description of property, and that purchasers had been in enjoyment of the produce, receiving the same as it became due from Government; that Tora gasas, like every other description of gasas, was Wuttun, but was entirely unconnected with hereditary or any other office, and was a money payment of a fixed nature on a village.

The cause was heard on the 19th of September, 1845, when the acting Assistant Judge, Mr. A. B. Warden, by his decree, decided that a Garas Huk could not be enjoyed by any one but by the Grassia himself, for Garas were money payments made to Grassias to purchase the forbearance of plundering parties; therefore, if the Huks were sold and the money paid to the purchaser, then the Government had no hold [9] whatever on the Grassias, in case of their again resorting to acts of violence, and that the Court was not, therefore, justified in ordering the Respondent, the Collector, to enter the name of the Appellant in the Government books, or in causing him to pay the amount claimed by the Appellant; and with regard to the Appellant's claim on the Respondent, Nusserwanjee Pestonjee, the acting Assistant Judge held that the Respondent could not be made responsible, as the Appellant, previous to purchasing the Huk, ought to have made particular inquiries as to whether it was saleable or not.

From this decision the Appellant appealed, and Mr. R. Keays, the acting Judge of the Court of Surat, concurring in the views of Mr. Warden, the Assistant Judge, on the 4th of April, 1846, confirmed that decree.

The matter in dispute being under Rs. 5000, the Appellant on the 15th of June, 1846, presented a petition of special appeal to the Sudder Dewanny Adawlut against the decree of the Zillah Court, alleging that he was entitled to redress under secs. 26 and 30 of Bom. Reg. IV., of 1827. The petition came on to be heard on the 8th of December, 1847, before Mr. Simson, the sitting Judge, who granted, under the

Act, No. III. of 1843, a certificate of admission of a special appeal, and recorded the following judgment:—"This is a very peculiar case: the Appellant, Sumbhoolall, applies for one of two modes of redress, either that the Collector be ordered to instal him in certain Tora garas huks, with arrears for four years, now in the Treasury, or that Nusserwanjee Pestonjee be made to refund the money paid at auction for the Huks, sold by order of the Adawlut, with interest for [10] the use of the money since the sale. The arguments stated in the decrees of the lower Courts against the transfer of such Huks to ordinary individuals seem to the sitting Judge to be conclusive; such Huks cannot be diverted from the purpose of their original institution, namely, remuneration for the maintenance of the public peace of the District; but it seems irreconcilable with equity that Sumbhoolall should be made to lose both the Huks and the money also, paid for them at public auction, held by direction of the Adawlut, and with the sanction of the officer of Government. Either the Huks should be transferred or the money paid for them refunded; but the former course is not practicable. The sitting Judge does not think the maxim '*caveat emptor*' is fairly applied here by the lower Courts. A sale or deed by a Court of Justice, and allowed by the revenue authorities, must be presumed by a purchaser to be proper and legal, and the purchaser must not suffer through the error of the Court in directing the sale, in satisfaction of a decree, of Tora garas huks, which, from their very nature, are not saleable; and on the ground that the Order for the sale was a departure from practice."

On the 24th August, 1849, the special appeal was brought on for hearing before Mr. Le Geyt, the then sitting Judge of the Sudder Dewanny Adawlut, when he made the following Order:—"The point to be tried in this case is not very clearly certified in the proceeding of the sitting Judge, Mr. Simson; and the Court, under the provisions of sect. 8 of the Act, No. III. of 1843, accordingly amend it as follows:—Whether Nusserwanjee Pestonjee, in procuring the sale of certain Tora garas huks, in satisfaction of a decree held by him against the owner of such [11] Huks, and which have been declared to be inalienable and unsaleable, is not liable to the purchaser in the amount of the purchase-money paid by him on the faith of an auction sale by the judicial authorities of the Zillah."

The case was again brought on for hearing before the full Court on the 6th of September, 1849, when the Court, consisting of Mr. John Warden, Mr. Le Geyt, and Mr. Grant, ordered the certificate to be further amended, as follows:—"To determine first, whether Tora garas huks are saleable by the Courts of Adawlut, and if so, to what extent; second, whether the Collector was justified in this case in refusing to register the transfer and act upon the sale; third, whether, in the event of the first question being decided wholly or partially in the negative, and the second wholly or partially in the affirmative, the purchaser has any, and what, claim against the execution creditor, Nusserwanjee Pestonjee."

The Court having remitted the case to be heard before a single Judge, it came on again to be heard before Mr. Le Geyt, but that Judge not being prepared to confirm the decision of the Zillah Court, referred the case back to the full Court, which Court, on the 19th of December, 1849, having heard the appeal, the Judges recorded their opinions separately; that of Mr. Bell was as follows:—"The points on which we are required to decide are, first, whether Tora garas huks are saleable by the Courts of Adawlut, and if so, to what extent; second, whether the Collector was justified in this case in refusing to register the transfer and act upon the sale; third, whether, in the event of the first question being decided wholly or partially in the negative, [12] and the second wholly or partially in the affirmative, the purchaser has any, and what, claim against the execution creditor, Nusserwanjee Pestonjee. I would answer the first query wholly in the negative, and the two last in the affirmative. I concur with the Zillah Judge, that Tora garas is a Chakreat huk, having been originally given as black mail to the Grassias, to abstain from pillaged and other acts of violence to the Ryots, and receiving such Huks as Wuttun. I am of opinion they can only be alienated to the extent of the life interest of the party in possession of the same, in accordance with the spirit of the Court's interpretation, dated the 23rd of February, 1831, on sec. 20, of Reg. XVI. of 1827, but which are not saleable; and, under the above view, I hold that the Collector was fully justified in refusing to register the transfer; and, as the other Respondent, Nusser-

wanjee Pestonjee, was the means of the illegal sale taking place, he must be held responsible for the claim preferred by the Appellant, namely, the purchase-money, together with interest thereon at 9 per cent., and the whole of the costs incurred in all the Courts, with the exception of the Collector's, who, having made no objection within the term of the proclamation, should bear his own costs. Having given my opinion on the amended certificate, for I find the certificate has been amended, both before the single Judge and also the full Court, I beg to record my dissent against the procedure adopted, the same being opposed to sec. 8 of Act, No. III. of 1843, which declares, that in amending a certificate it is not lawful for the Court to receive or add any new point or points. This has, however, been done in the present instance. As the admitting authority, Mr. [13] Simson entertained no doubt in regard to the Huks in question being not saleable: this point, consequently, should not have been entered in the extract."

Mr. Warden's opinion was as follows:—"I concur in the view taken in this case by Mr. Le Geyt. When the British Government succeeded to this country, the local officers addressed themselves to the task of obtaining information on the distinctive character of each of the tenures of the country. In this way we have reached definitions of 'Ehant,' 'Surinjam,' 'Meeras,' etc., in the Deccan, which are generally acknowledged to be correct; and in like manner it may be presumed that the nature of the Tora garas possession was made the subject of inquiry before it was included in the 'List of tenures' which the law recognized, and particularly specified as tenures recognized by the custom of the country; and so far from its having been shown that there is any peculiarity in this tenure, divesting it of the usual incidents of property, the weight of evidence on the record, supported by the published opinions of such men as Mr. Elphinstone and Sir John Malcolm, is, as it appears to me, against the decisions of the lower Courts, that this tenure is not saleable. I am of opinion, therefore, that the decree of the lower Court should be set aside."

Mr. Le Geyt also recorded his opinion in these terms:—"In respect to the first point, whether Tora garas are saleable or not, I am of opinion, that there is no evidence on the record to show that the Tora garas property, the subject-matter of this suit, is held on any tenure which takes it out of the nature of private property. There is evidence to show that such property has been sold. Unless it can be clearly shown that property is held on a tenure in which [14] the alienation by the holder is guarded against by a special provision, I think no Court of Justice can declare such property not alienable for the purpose of paying the debts of the holder, on the principle that as the possession gave him a credit, so it would be manifestly unjust, without sufficient cause and undoubted authority, to declare it not so available. The authorities cited, in support of the property being in the nature of private and prohibited property, are opinions of Mr. Elphinstone, 'Parliamentary Papers Review,' 1832, pp. 605, 625 and 627; Sir John Malcolm's 'Central India,' vol. 1, pp. 508 and 509, and Mr. Sutherland (*vide* Letter recorded, Nos. 89, 65), which must be regarded with the utmost respect. The Collector has cited neither a decision of Court, nor any authority of more than ordinary weight, than the official opinions of the neighbouring Collectors in support of his position. Therefore, I consider, that in this case it has not been proved that the Tora garas of Bharmulsungjee is exempt from the process of attachment to which all personal and real property, is liable. I, therefore, do not consider the Collector justified in refusing to register the transfer, which he should be directed to do; nor do I consider that any claim can be sustained against Nusserwanjee Pestonjee. All costs are to be borne by the Respondent, the Collector of Surat."

In accordance with the opinion of the majority of the Judges, a decree was made reversing the decisions of the Zillah Court, with costs in all the Courts, which were directed to be borne by the Respondent, the Collector of Surat.

On the 17th of October, 1851, the Judges of the Sudder Court having been changed, the Collector of Surat presented a petition of review to [15] the Sudder Adawlut, when a review was granted, without any reasons for so doing being recorded by the Court.

After some further proceedings, the Sudder Court, on the 20th of April, 1853, recorded the following resolution:—"The point referred to the full Court, on the 24th of August, 1849, was, whether the rule '*caveat emptor*' was to be applied in

all strictness to Sumbhoolall's purchase. The full Court were of opinion that they could not decide that point until it was decided whether Tora garas was alienable or not; and they, therefore, amended the certificate, and added that question as another point for decision. This they had no power to do, under sec. 8 of Act, No. III. of 1843. Moreover, the very essence of the point referred showed that it had already been decided by competent authority, that Tora garas was inalienable. The decision of the Sudder Dewanny Adawlut, of the 19th of December, 1849, is therefore, annulled, and the case is returned to a full Court, to determine the point referred to them by Mr. Le Geyt, on the 24th of August, 1849. All costs incurred by the Collector of Surat are to be borne by the original Appellant, Sumbhoolall Girdhurlall. The remainder of the costs are to be awarded on final decision."

The appeal was reheard on the 16th of February, 1857, when the Sudder Court, consisting of Mr. W. E. Frere, Mr. J. D. Inverarity, and Mr. H. Hebbert, recorded the following resolution:—"The Court is of opinion, and decide that Tora garas is not alienable, and that, therefore, Sumbhoolall took nothing by his purchase, and that his claim against the Collector must be thrown out. That Nusserwanjee Pestonjee guaranteed nothing, and, therefore, Sumbhoolall cannot come upon [16] him to be reimbursed the amount of his purchase-money, and that his claim against Nusserwanjee Pestonjee must also be rejected. The appeal is, therefore, dismissed, with all costs on Appellant."

(Nov. 26, 1857.*) The value of the subject matter in dispute being under Rs. 10,000, the prescribed appealable value, a petition was presented to Her Majesty in Council by the Appellant for special leave to appeal. The Appellant submitted, that the proceedings and decisions of the Sudder Dewanny Adawlut, on the 20th of April, 1853, and the 16th of February, 1857, were contrary to law, as the certificate admitting the appeal in the first instance did not embrace the question, whether the Tora garas was saleable, and that the amendment made in the first instance in the certificate admitting the appeal was erroneous; that the amendment subsequently made was not only correct, but was necessary to raise the only points involved in the appeal; that the Sudder Adawlut, in ultimately deciding, in 1857, not on the question stated in the certificate as originally granted, but on that stated in the first amended certificate, recognised the right of the Judge to amend his certificate admitting a special appeal, and that, therefore, the mere fact of a second amendment being made, afforded no ground for reversing the judgment of the full Court after such amendment; and the Appellant submitted, that it was competent to the Sudder Court to decide upon any question of law necessarily involved in the appeal; [17] but that, if it were not competent to the Sudder Court to decide on hearing the cause on the 19th of December, 1847, that Tora garas was alienable, neither was it competent to the Sudder Court to decide on the hearing of the cause on the 10th of February, 1857, that the Tora garas was not alienable, and that the Appellant took nothing by his purchase. And it was further submitted, that the last-mentioned decision was contrary to the evidence, and the law and usage respecting Tora garas tenure.

Mr. Ayrton, in support of the petition.—Although the subject-matter in dispute, the Tora garas huk, is under Rs. 10,000, the sum limited by the Order in Council of the 10th of April, 1838, yet the suit raises a question of great public importance in Bombay, respecting the right of alienation of Tora garas, which entitles the Petitioner to indulgence. *Spooner v. Juddoo* (4 Moore's Ind. App. Cases, 353). Another suit is also pending respecting the purchase of the other Huk, which will be governed by this appeal.

Mr. Wigram, Q.C., and Mr. W. H. Melvill, for the Respondent, the Collector of Surat, resisted the application.

No question of a public character arises, special leave, therefore, ought not to be granted. Upon this principle the Court acted in the cases of *Re Harvey* (3 Moore's P.C. Cases, 148) and *Re Sherwin* (4 Moore's P.C. Cases, 311).

The application was granted upon the terms embodied in the following report of their Lordships. That leave be granted to the Appellant to enter and [18] prosecute

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

his appeal against the Order of the Assistant Judge of the Zillah Court of Surat, dated the 17th of September, 1845, and against the Order of the Zillah Judge of the Court of Surat, of the 8th of April, 1846, and against the Orders and certificates of the Judge of the Sudder Dewanny Adawlut of Bombay, of the 8th of December, 1847, and of the 24th of August, 1849; and against the Orders of the Sudder Dewanny Adawlut, made on the 20th of April, 1853, and on the 16th of February, 1857, upon depositing, within four months from the date of the report, in the Registry of the Privy Council, the sum of £500, sterling, to meet the costs of the Respondents in the appeal, and to abide Her Majesty's decision in the cause; and the Appellant was directed to serve notice of the appeal on the Collector of Surat, and on Nusserwanjee Pestonjee, the Respondents; but their Lordships were of opinion, that the leave to appeal granted to the Appellant by Her Majesty on the above terms, was to be without prejudice to any question, whether the Orders and the certificates of the 17th of September, 1845, and the 8th of April, 1846, and the 8th of December, 1847, and the 24th of August, 1849, or any of them, were to be deemed and taken as final.

The above conditions having been complied with, the appeal now came on for hearing.

Mr. R. Palmer, Q.C., and Mr. Ayrton, for the Appellant.—It is impossible to maintain the decree of the Sudder Court as it now stands, as it would be contrary to the fundamental principles of justice to hold, that if Tora gasas is a tenure of such a nature as not to be saleable, the Appellant is to be deprived of [19] his purchase by treating the sale as a nullity, yet that he is not to be reimbursed the amount of his purchase-money, with interest, by the Respondent, Nusserwanjee Pestonjee. We submit, that the decree of the Court ought to have directed the Collector of Surat to enter the name of the Appellant as the owner of the Tora gasas huk in question, and to pay him the arrears: or, in the alternative, if the Court was of opinion that the Tora gasas huk was inalienable, then that the Respondent, Nusserwanjee Pestonjee, ought to have been decreed to refund the purchase-money with interest. In the first place, we contend, that a Tora gasas huk is alienable like other emoluments issuing out of land, Act, No. IV., of 1837, and, therefore, liable to be attached and sold in execution of a decree. Reg. V. of 1827, sec. 1, Bombay Code of Procedure, ch. I. Tora gasas is a species of quit-rent or annual payment made to Grassias. The nature of this tenure was fully investigated in the case of *The Collector of Surat v. Pestonjee Ruttonjee* (2 Morris's Bom. Sud. Dew. Reps. 291), where Mr. W. E. Frere, the then Zillah Judge of Surat, in his judgment, expresses his clear opinion, that Tora gasas is not a service huk, but was alienable and could be sold, and that so long as Government collected the gasas from a village it was obligatory on Government to pay it to the alienee (*ib.* 305).

Secondly, we submit, that the Appellant's special appeal to the Sudder Dewanny Adawlut at Bombay was admissible under the Bombay Code, irrespective of the Act, No. III. of 1843. Even if it be determined that the provisions of the Code in that respect were repealed by the Act, No. III. of 1843, still it was competent to the Court, under the Act, No. XVI. of 1853, after having admitted the special appeal, to amend the [20] certificate of the Judge, so as to raise the real points involved in the appeal. But further, we contend that, in no circumstances, can the legislative Acts of the Government of India limit or restrain the power of the Queen in Council specially to admit an appeal from a decree and proceedings of the Sudder Dewanny, or Zillah Courts. Statutes, 3rd and 4th Will. IV., c. 41, 7th and 8th Vict., c. 69, sec. 1. *Spooner v. Juddoo* (4 Moore's Ind. App. Cases, 353), as the Acts, No. III., of 1843 and No. XVI. of 1853 are only binding on the Courts in India. In the present instance leave has been specially granted.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Respondent, the Collector of Surat.—As the Tora gasas huk purchased by the Appellant is not, as we contend, alienable, no obligation existed on the Collector to enter the purchaser's name as owner in the Government books, or to pay him the rent in question. This is apparent from the very nature of the tenure, Tora gasas being in its origin a kind of black mail, or forced contribution, to induce the Grassias to abstain from plundering the Ryots. It is very similar in its character to what formerly existed in Scotland. Bell's Dict. of the Law of Scotland, tit. "Black Mail," and authorities there collected. Report of General Wade. Misc. of the Spalding Club, p. 37. The origin of Tora

garas and its illegal nature is explained in the minute of Mr. Elphinstone, dated the 15th of August, 1821 (Par. Papers, 1832, E. I. Co.'s affairs rev. Vol. 2, pp. 605, 625, 7); and also by Sir John Malcolm, in his work on Central India, vol. 1, pp. 508-9. Wilson's Glossary, voce "Grassa," and the case of *The Collector of Surat v. Pestonjee Rutoonjee* (2 Morris' Bom. Sud. Dew. Reps. pp. 291, 319, 334, 5), where, [21] as in this case, the Sudder Court at Bombay held Tora garas to be inalienable, on the ground that there is an implied condition of the tenure that services should be rendered, if required, as well also as to abstain from plundering. It is admitted to be hereditary. Now, considering the nature of the tenure and its origin, it would be manifestly contrary to public policy to permit such a tax as constitutes Tora garas to be sold in satisfaction of a judgment debt, or even to be alienated. Lord Kingsdown: In the case of *Raja Lalanund Sing v. The Government of Bengal* (6 Moore's Ind. App. Cases, 101), a Gwatwally tenure, or guarding the Ghats or passes, was upheld.—Yes; but that case essentially differed from the present. No question there arose, as in this case, as to alienation. It was confined to a question of the right of descent to a male heir, as Gwatwal. But the sale must be treated as being founded upon an illegal consideration, and would, therefore, on that ground be void, *ab initio*, at common law. *Collins v. Blantern* (2 Wils. 341; and see 1 Smith's Leading Cases 154 (2nd Edit.) So by the Civil law. Just. Inst. lib. iii. tit. 20, sec. 23, "*De turpi causa*." Again, as the tenure involved military and public services to be performed, and the holder could be called upon to perform them, a Tora garas huk was clearly not assignable. It is similar to the retiring pension of a military officer, or compensation granted to a public civil officer. *Wells v. Foster* (8 Mee. and Wels. 149), *Gibson v. The East India Company* (5 Bingham N.C. 262; S.C. 7 Scott, 74), *Lidderdale v. Duke of Montrose* (4 Term. Rep. 248).

Next, we submit, that as far as this is an appeal [22] from the Orders and certificates of the Sudder Court, the certificate of Mr. Simson, of the 8th of December, 1847, as amended by Mr. Le Geyt on the 24th of August, 1849, was final and conclusive, and excluded from the grounds of special appeal any question affecting the liability of this Respondent. The effect of the certificate of Mr. Simson was to reject the appeal as against him, and to confine the ground of appeal to the claim for a refund of the purchase money as against the Respondent, Nusserwanjee Pestonjee. Now, the Act, No. XVI. of 1853, does not give the Sudder Court power to entertain the question of his liability. Neither had the Sudder Court, under Bom Reg. IV. of 1827, power to make a second revision of the decree of the 19th of December, 1849: the former revision having expressly excluded all question of this Respondent's liability. The Act, No. XVI. of 1853, did not alter the rights of this Respondent on a special appeal, as, owing to the effect of the certificate as amended by Mr. Le Geyt, there was no question of his liability before the Sudder Court, which Court had in fact no power to entertain any question as against him.

Mr. Gifford, Q.C., and Mr. Leith, for the Respondent, Nusserwanjee Pestonjee, the execution creditor.—According to the rules and procedure of the native Courts in Bombay, this Respondent, as execution creditor, has been improperly made a party to the suit. No privity exists between the Appellant and this Respondent. No fraud has been alleged against him to justify the Appellant joining him with the Collector of Surat as a Defendant. So far as regarded this Respondent, as execution creditor, it is immaterial [23] whether the Tora garas huk is or is not, liable to attachment and sale by the Sheriff, or whether any property passed to the Appellant by that sale, there being nothing in the facts, or by law, to distinguish the case of the Appellant from that of an ordinary purchaser at a Sheriff's sale. He virtually purchased only the right and interest of the Defendant in the original suit in the Tora garas, the subject of the attachment and sale. If a party buys, whether it is real estate, a chattel, or a chose in action, Courts of law and equity recognise the maxim "*caveat emptor*." There is no fraud in the case, nor even an implied warranty of title. *Early v. Garrett* (9 Bar. and Cr. 928), *Cripps v. Reade* (6 Term. Rep. 606), *Thomas v. Powell* (2 Cox. 394), *Morley v. Attenborough* (3 Exch. Rep. 500), *Chapman v. Speller* (14 Q. Ben. Rep. 621). When the Appellant paid his money and got his conveyance there was an end of the matter so far as affects this Respondent, and the decree of the Sudder Court was, therefore, right in deciding that the Appellant had no legal claim on this Respondent in respect of the money

received by him through the Court at Surat in satisfaction of his decree, even if the Tora garas be held inalienable. Another ground we insist upon is, that the Appellant ought to have appealed direct to England against the decree of the Sudder Dewanny Adawlut of the 20th of April, 1853, which annulled the former decree of the same Court, dated the 19th of December, 1849, and that it is now too late to question it.

Mr. R. Palmer, Q.C., was heard in reply.

The case stood over for consideration.

[24] Their Lordships' judgment was now pronounced by

The Right Hon. Lord Kingsdown (Feb. 8, 1860).—This is an appeal from a decree of the Sudder Dewanny Adawlut of Bombay, by which it has been decided that a certain annual payment called a Tora garas huk, is not by law capable of alienation, and that the purchaser of this interest at a judicial sale is not entitled either to have the sale enforced, or to have his purchase-money refunded to him by the individual who has received it.

The case is one, in many respects, of a remarkable character, and it appears to their Lordships to be advisable to state the circumstances in some detail.

Tora garas huks, whatever may have been their origin, are payments which, for many years before the period of the transactions which have given rise to the present suit, had been made by the Bombay Government through their Collectors in the different Zillahs of Guzerat. The names of the persons receiving such payments, with the amount to be paid to them, were entered in the books of the Collector, and the payments were made according to the entries in such books out of the moneys received by the Collectors.

Amongst other such entries in the books of the Collector of Surat, was a sum of Rs. 347. 13a., payable out of the Pergunnah of Orpad, and which in the year 1839, was payable, and had for some years been paid to a person named Bharmulsungjee. This annual sum is the subject of the present suit; Bharmulsungjee was also in the receipt of another Tora garas, payable out of another Pergunnah within [25] the same Collectorate, of Rs. 883. It appears that these two Huks had previously belonged to a person named Koonsurwanjee; that he had died, leaving two widows named Kasooba and Omedba, who had succeeded to this property; that these ladies had adopted Bharmulsungjee as their son, and that thereupon these Huks had been transferred into his name in the books of the Collector.

In the year 1839, a suit was instituted in the Court of the Sudder Ameen of Surat by the Respondent, Nusserwanjee against Bharmulsungjee, and against Kasooba and Omedba, in order to recover a debt due from these parties to that Respondent, and which debt was secured by a mortgage of the two sums of Tora garas standing in the name of Bharmulsungjee.

Pending the proceedings in this suit, Nusserwanjee caused a sequestration to be laid on these Tora garas huks in the office of the Collector of Surat, the nature and object of which could not be known to the Collector.

On the 23rd of July, 1839, Nusserwanjee obtained a decree in his suit for the sum of Rs. 12,745. with interest, against the mortgaged property, and against the Defendants personally. Regulation IV. of 1827 of the Bombay Code of procedure directs the mode in which the attachment and sale of any of the immoveable property of the debtor against whom a decree has been obtained are to be effected. It is thereby provided, that on a petition for such sale, the property shall be distinctly specified, with the probable value thereof; that the Court, on hearing the application, shall issue such order as may be requisite towards the enforcement of the decree; that whenever a sale takes place under a decree, it shall be by public auction, after public notice, by a proclamation [26] in a specified form, intimating that the property will be sold on a day named, unless the sale shall be objected to by another claimant, who, within fifteen days after the date of the proclamation, shall establish, to the satisfaction of the creditor, or of the Court, a right or interest in the property under attachment, or shall enter into an engagement to prosecute his claim within a limited time.

In order to recover the amount awarded to him by the decree in the manner pointed out in this Regulation, Nusserwanjee, on the 21st of September, 1839, pre-

sented a petition to the Judge of the Zillah Court, and thereby, after stating the decree which he had obtained, and the sequestration which he had issued, he prayed that the Sheriff might be ordered to attach and sell the produce of the undermentioned Tora gas belonging to the Defendant, according to the usual custom.

The Tora gas (which included the particular sum now in dispute) was thus described:—"The Defendants, Kasooba and Omedba, used to receive the produce of the Tora gas haks, belonging to their husband, Koowursungjee, payable from the Tannahs of the Pergunnah of Orpad and the Talook of Koorsaid. In the Sunyut year 1887, the said Defendants, Kasooba and Omedba, adopted the Defendant, Bharmedsungjee, as their son. From that day forward, the amount of the produce from the said Pergunnahs has been received by the Defendant, Bharmedsungjee. The value thereof is about Rs. 11,000."

On the same day, the 21st of September, 1839, an order was issued by Mr. Herbert, the Assistant Judge of the Court, to the Sheriff, directing him to proceed according to the usual practice, and to make a return in thirty-five days.

[27] Under this order the Tora gas in question was attached by the Sheriff: proclamations of sale were issued, and the sale was fixed for the 19th of October.

Before, however, the day fixed for the sale, Bharmulsungjee presented a petition to the Court, praying that the sale might be delayed for six months, in order to give him an opportunity of satisfying the Plaintiff's demand, which he promised to do within six months.

The sale accordingly was stayed by an Order of the Court, till Nusserwanjee Pestonjee should have answered the petition. He objected to any further delay, and on the 14th of November, 1839, applied to the Court that the sale might be completed; that fresh proclamations might be issued, and that, as the property was likely to sell better at Surat than in the village in which it was situated, the sale might be made at Surat.

On the same day the Judge made an order directing the Sheriff to enter into an investigation of the proceedings which had already taken place in this matter, and to make a report, and to inquire whether there was any objection or not to selling the property in Surat. The Sheriff made his report, stating the proceedings which had already taken place, and that there appeared to be no objection to the sale being made in Surat.

On the 27th of November, 1839, Mr. Elliott made an order upon this report, that the Sheriff should sell the Tora gas of the Defendant in Surat, but that he should give notice of the sale of this Tora gas to the inhabitants of the Zillah in which the Tora gas was, as also to the inhabitants of the city of Surat, and should take care that no fraud or mistake was permitted to take place in the sale.

[28] Proclamation was accordingly issued for sale of this Tora gas in Surat, on the 24th of December, 1839. The proclamation required any person making any claim to the property to come in and object to the sale.

No objection was made, and on the 24th of December, 1839, the property was accordingly put up for sale, and the Appellant in this case was the highest bidder, and he became the purchaser of the Tora gas now in dispute, for the sum of Rs. 3430. He paid his purchase-money into Court, and the amount, after deducting the expenses, was paid to Nusserwanjee; and on the 23rd of January, 1840, Mr. Elliott, the Judge of the Court of Adawlut, executed a bill of sale of the Tora gas to the Appellant. This instrument, after reciting the facts already stated, concluded in these words:—"Now, as you have paid that amount (Rs. 3430) into Government, you have become the owner of the Tora gas huk belonging to the above-mentioned Defendant, Bharmulsungjee, and the right to receive the amount of the Tora gas huk from the Tannah has been vested in you. Therefore the Defendant's right to the Tora gas huk (Rs. 347. 13a.) has been sold for Rs. 3430, by the Government Adawlut, through the medium of the Nazir, in conformity with the usual custom in sales by auction, in this matter, viz.: You may continue to take every year, according to the rules of the Pergunnah, the amount of the aforesaid allowance of Tora gas belonging to the above-mentioned Defendant, Bharmulsungjee, from the Tannah of Orpad. In so doing, there shall be no objection."

We have thought it desirable to go into this detail, because it shows very distinctly that the Bombay Government, through its officers, had abundant notice of [29] what was taking place with respect to this sale, and had ample opportunity, if it

meant to object to the alienability of property of this description, to interpose to prevent it; or, at all events, to give public notice that, as far as the Government was concerned, the validity of the sale would not be recognised.

But the Government did nothing of the sort; it made no objection to the attachment of the property which its officer was to pay; and it permitted the Respondent, Nusserwanjee Pestonjee, to sell, and the Appellant to purchase, and the one to pay, and the other to receive, the purchase-money, without giving the least intimation to either that any obstacle would be raised to the enjoyment by the purchaser of what he had bought.

The Appellant having thus completed his purchase, applied to the Collector of Surat to have his name substituted for that of Bharmulsungjee in the Collector's books, and to have the Tora garas regularly paid to him accordingly. With this application the Collector seems at first to have been disposed to comply. He afterwards, however, declined to enter the Appellant's name in his book, and order that the name of Bharmulsungjee should be retained, but that the money should every year be paid to the Appellant.

The Appellant was not satisfied with this order; and on the 22nd of July, 1840, presented a petition to the Court in which the sale had been made, in which he alleged that other Tora garas haks had been sold by order of the Court, and that the names of the purchasers had been duly inscribed in the Collector's books; that all property sold through the instrumentality of the Adawlut is caused to be given into the possession of the purchaser, through the assistance [30] of the Adawlut, and he, therefore, prayed that the Judge would address a letter to the Principal Collector, directing him to erase the name of this Grasia from the records, and to enter the Tora garas in the Appellant's name in the records, and to continue to pay him the amount of the Tora garas every year, as mentioned in the bill of sale.

On the 27th of July, 1840, the Judge made an Order in which, after reciting that the Appellant was the owner of the Huk, and that of this fact the Court had no doubt, he ordered the Sheriff to write a letter to the Principal Collector, directing that gentleman to enter the Petitioner's name in the Garas huk of Bharmulsungjee, which the Petitioner had purchased, and to continue to pay the amount of the Huk to the Petitioner.

Such a letter was accordingly sent, and, thereupon, the Collector seems to have communicated with the Revenue Commissioner, and to have reported his opinion, either that the Tora garas should be appropriated by the Government, and the purchase-money repaid, with interest, to the Appellant, or that his name should be entered in the Collector's books.

The matter, however, was referred to the Bombay Government, and the Appellant was informed that as soon as any decision was come to a communication would be made to him. No communication having been made, the Appellant in the year 1842, again applied to the Revenue Commissioner praying that his name might be entered in the books of the Collector, or that, at all events, the three years' arrears then in the hands of the Collector might be paid to him in order that he might not suffer loss in interest and compound interest. The answer returned to him was, that his name would not be [31] entered, neither would the money be paid; but that if he instituted a suit in the Adawlut, the money would be sent there during the lifetime of the Grasia, and that if he had any claim he should file a suit.

The Appellant seems to have entertained a very natural reluctance to adopt a course attended with so much expense and delay, and the Revenue Commissioner having been soon after changed, he attempted once more to obtain redress by a petition to the new Revenue Commissioner, but without any success.

On the 21st of November, 1842, the Appellant presented his petition to the Judges of the Sudder Adawlut, stating the facts of the case, and praying either that the Collector might be ordered to enter the Appellant's name in his books, and to pay him the Huk regularly, or that the purchase-money which he had paid into the Adawlut of Surat might be refunded to him with interest.

This case seems to have been several times under the consideration of the Court. At length on the 28th of February, 1843, an Order was made by which the Petitioner was left to file a suit in the civil side of the Court.

It was under these circumstances that the Appellant filed his plaint in the Court of the Assistant Judge of Surat on the 16th of October, 1843. This suit was instituted against the Collector of Surat, and also against the Respondent, Nusserwanjee Pestonjee. As against the Collector it prayed that the Tora garas in question might be entered in the name of the Appellant, and that the Collector might be ordered to pay him the four years' arrears then due, amounting to Rs. 1391. 4a. As against Nusserwanjee Pestonjee, [32] it prayed that if it should appear to the Court that Nusserwanjee Pestonjee had caused the Tora garas to be improperly sold, he might be ordered to refund the purchase-money with the profits for four years.

The Collector was authorized to defend the suit on the part of the Bombay Government, and he filed his answer on the 19th of February, 1844. He did not dispute any of the facts stated by the Appellant in his plaint. The substance of his answer was, that Bharmulsungjee, to whom this Tora garas huk had belonged, was a Grasia; that, before the English Government took possession of the country, the Grasia people used to levy certain Huks and necessities from the villagers as the price of their abstaining from plundering the villages; that, after the English Government took possession, an agreement was entered into with these people that they should receive this Huk from the Government treasury, and not from the villagers, in order that thereby the villagers should not suffer any oppression; that the custom had always obtained to pay this Huk to the Grasias only; that the Government had never agreed to pay this Huk to outsiders; that if the payment were made to other persons than Grasias, the agreement would be broken, because if the Grasias got nothing to eat, they would begin to plunder; that Government would then suffer loss, and the villagers would suffer oppression. Then followed this sentence, which we confess ourselves unable to understand: "The Government have settled the personal property of the Grasias, and if this property does not reach them, the claim of the Government to the same is going on."

With respect to the Appellant's allegation, that Tora garas had been previously sold by the Courts [33] without any objection, the answer stated, that if this had happened, it had happened without investigation, and that the right of the Government was not done away with, because it was agreed to pay this Huk to the Grasias alone.

The Defendant, Nusserwanjee Pestonjee, put in an answer, insisting that his proceedings had been entirely regular, and that he was under no circumstances liable to any demand on the part of the Appellant. But the view which their Lordships take of this case makes it unnecessary for them to go into the particulars of his defence.

On the 14th of September, 1844, the Appellant filed his replication, in which he insisted, that if the Government had any objection to make to this sale, the Collector might and ought to have interposed to stop it, and to remove the attachment which had been previously laid upon the property, and that he was bound to adopt this course by the effect of the Regulation under which the sale had been made, and of the proclamation which had been issued in pursuance of it; that the tax of the Huks of the Grasias and of the Moguls used to be levied from the villages in the same way as the Government Revenue; that these Huks were incorporated in the revenue, and that the Tora was fixed by the Government; that many Tora huks, and other Huks, had been sold by the Government Adawlut, and by the Collector; and that the names of the purchasers had been entered by the late Collector in the Government records, and the money for the same had been paid by the late Collectors, and was paid by the Defendant, the then Collector, up to this day.

There does not appear to have been any rejoinder, [34] and upon this state of the record the parties went into evidence.

The Appellant proved the several proceedings which had taken place previous to the institution of the suit which have already been detailed: he proved some instances, and one in the Pergunnah of Orpad in which Tora garas had been the subject of sale, and the purchaser had been put into possession of the property, and was then in possession; and he specified several other instances in which, as he stated, the same thing had been done with respect to Tara garas, and other Garas huks, and of which he alleged that entries had been made in the books of the Defendant, the Collector, and he required the production of these books, and

summoned witnesses, who were record-keepers in the office of the Collector, to attend and produce these documents.

It is with great regret that their Lordships are compelled to observe that on looking at the depositions of two of these witnesses, it appears that these documents were not produced, and that it is impossible to avoid the inference that they were purposely withheld by the agents of the Government defending the suit on its behalf. It is, however, in the opinion of their Lordships, sufficiently established that up to the period of this sale these Huks had been the subject of sale, and had been considered and treated by the Courts of Justice and by the Government, in this Collectorate at least, as liable to be dealt with like any other species of property. That this had been done without investigation, as the Collector in his answer alleges, is certainly not the fact.

For many years before 1839, inquiries into this subject had been made by different officers of the [35] Indian Government. The origin and character of these payments; the question whether the Government was bound to continue them, even to Grasiyas, or was at liberty to resume them at its pleasure; the expediency of exercising that right if it existed; the question whether the Grasiyas, if he had any right to receive them, enjoyed more than a life interest, and whether such interest as he had was capable of alienation; whether the collection of these payments by the Government was voluntary on their part, and could be discontinued at pleasure, or whether they were charges on the revenue, which the Government receiving the revenue was bound to pay;—all these questions appear to have excited the attention of the Government; many of them as early as the year 1817, and to have been the subject of discussion and consideration for many years subsequently.

It further appears that in 1836, the liability of these Huks to sale, under the process of the Court, had come under the consideration of Mr. Lumsden, then Acting Assistant-Judge at Broach, another Zillah in this Province; that he had consulted Mr. Sutherland, a very high authority, who was then or had been Assistant-Judge at Surat, and that he received from that gentleman the following answer, dated the 29th of December, 1836:—"Sir,—In regard to your letter of the 19th instant, I have the honour to inform you there are very few instances of the attachment and sale of Tora garas; but there is no doubt when such description of property is possessed, a party having a decree against the property may attach and sell, in satisfaction thereof, Tora garas in like manner as any other description of property. Tora garas, like every other description of garas, is [36] Wuttun, but is entirely unconnected with hereditary or other office, and is consequently distinct from the Regulations and Orders you have quoted. Tora garas is money-payment of a fixed nature on a village jumpa, and being usually the most secure description of garas, would be, no doubt, of the highest value in the market."

The Collector put in evidence, on the part of the Government, the certificates which had been returned by various Collectors as to the practice in their Collectorates, and the opinions entertained by them of the nature of these Garas huks; and two agreements, one entered into by Captain Robertson with the Grasiyas of the Pergunnah of Atrolea in the year 1818, and the other by Mr. Crawford with the Thakoors of Dehejaun in the year 1825; but with respect to the origin of the particular Tora garas in dispute, or of Huks of the same description in the same Pergunnah, no evidence was offered. The proceedings which had taken place in some suits after the institution of the present, were also put in evidence.

The case came for hearing before two Judges of the Zillah Court in succession, who were both of opinion that the Tora garas in question could not be enjoyed by any but Grasiyas; and that no decree could be made, either against the Collector or against Nusserwanjee Pestonjee.

It was then brought by appeal before the Sudder Dewanny Adawlut of Bombay, and after various proceedings which their Lordships do not think it necessary to go through in detail, a decree was pronounced by the Sudder Court on the 19th of December, 1849, by which the decree of the Court below was reversed, and a decree pronounced in favour of the [37] Appellant against the Collector, by whom all costs were ordered to be paid.

In October, 1851, the then Collector applied for a review of the decree: first, on the ground that according to the course of procedure then in force the question of the

non-alienability of the Tora garas was not properly open to the consideration of the Sudder Court, but had been conclusively settled by the judgment of the Zillah; and secondly, that if such question was open, it had been erroneously decided.

This review appears to have been granted as a matter of course, without argument or reasons assigned by the Court; but nothing was done upon it till the month of April, 1853. At this time all the Judges of the Court who had heard the case argued, had been changed.

It is impossible to view, without jealousy, such a proceeding as this. The Government, which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the Court for a review of the judgment, and two more years elapse before the cause is brought on for rehearing before a new set of Judges.

Upon the matter being brought before them, these Judges were of opinion that the only question open to the Court was, whether, assuming the Tora garas not to be alienable, which they held to have been concluded by the decree of the Zillah Court, any demand could be made against Nusserwanjee Pestonjee to refund the purchase-money. The decision of the Sudder Court of 1849 was reversed [38] by an Order of the 20th of April, 1853, and the case was returned to the full Court to decide the last point.

Before, however, the cause came on again for hearing, an alteration was made in the law of special appeals by an Act of the Indian Legislative Council, which, in the opinion of the Judges, left the consideration of both questions open to them, and accordingly both questions were argued; and on the 16th of February, 1857, the Court pronounced the following decree:—"The Court are of opinion and decide, that Tora garas is not alienable, and that, therefore, Sumbhoolall took nothing by his purchase; and that his claim against the Collector must be thrown out; that Nusserwanjee Pestonjee guaranteed nothing, and, therefore, Sumbhoolall cannot come upon him to be reimbursed the amount of his purchase money, and, therefore, that his claim against Nusserwanjee Pestonjee must also be rejected. The appeal is, therefore, dismissed, with all costs against the Appellant."

The propriety of this decree we have now to consider.

Whatever may be the nature of the payments called Tora garas, and the right of the Bombay Government to refuse to treat them in ordinary cases as the subject of sale or mortgage, like other species of property, their Lordships cannot but entertain serious doubts whether it is consistent with justice to permit the Government to raise such a defence in this case, and as against the present Appellant.

As we have observed in going through the proceedings, the Government had recognized the rights of inheritance and succession in this identical pro-[39]-perty: it had authorized its subjects to consider that property of this description was the subject of sale; and it had had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into Court, and paid out to the creditor, and a conveyance of the property executed by the Judge of the Court to the Appellant, the Collector, that is, the officer of the Government, standing by and acquiescing in the proceedings, with full knowledge of the objection to the sale, if any objection existed.

That, after all this had taken place, the Government should insist, and that the Court should decide, that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase-money, but pay all the costs which had been incurred in his attempt to obtain redress, seems hardly consistent with ordinary notions of justice.

But, if there were not this objection to the defence, their Lordships are of opinion, that the *onus* lies upon the Government to prove that there is something in the nature of this payment which makes it incapable of alienation, and that the Government has failed to give such proof.

Of any evidence of the origin of the particular payment in question, there is no trace to be found in the case. The investigations into this subject to which we have alluded, have led persons of great learning and ability to different conclusions. It is very probable that Tora garas huks had not all the same origin. Assuming, however, that they all began in wrong and violence, still, that which had a vicious

origin may, in course of time, have been [40] legalized, since long enjoyment is itself a title, as well in favour of the recipient of an annual payment out of land, as of the possession of land itself.

The question here is, not whether the Government can be compelled to receive and hand over these sums, but, whether, actually receiving them, and having been in the receipt of them for very many years, it is entitled to say that it will not pay them to the alienee of the person to whom, but for the alienation, they would be paid.

The creditor in this case has sold, and the Appellant has purchased, such interest as the debtor had in the property sold. He will be by the transfer, in no better situation than the debtor. If this payment be conditional on the good conduct of the Grasias generally, or subject to any other condition; and if any circumstances should occur which would justify the Government in withholding the payment from Bharmulsungjee, they will equally justify the withholding it from the Appellant.

Whatever this payment may be, it clearly is not in the present case, on the evidence before us, at all analogous to the pay of a military officer, to which it was attempted at the Bar to liken it. It is not a personal payment in consideration of services to be personally performed. There is not the slightest trace of any services being claimable from Bharmulsungjee, and the mode in which he acquired the property seems to show that this is not the nature of the payment. The defence here raised by the Collector is not so much that the Huk is incapable of alienation, as that it cannot be alienated except to Grasias; but we are quite unable to find in the evi-[41]-dence, or, indeed, in any other source of information to which we have had access, any distinct account of what is meant by the term "Grasias." They do not appear to be any distinct class or tribe. If the term be used to describe freebooters, or lawless people generally, it makes the defence a very singular one.

Upon the whole, their Lordships are of opinion, that the Government has failed to establish its defence, even supposing such defence, under the circumstances, to be competent to it, and that the decree complained of must be reversed, and a decree pronounced in favour of the Appellant, with all the costs to which he has been put in the course of these proceedings.

With respect to Nusserwanjee Pestonjee, the Appellant must pay his costs, and have them over against the Collector.

A point is suggested in the appeal papers that the non-liability of this Toragaras to alienation had been established by the decree of the Zillah Court, and that this decision was not, according to the Regulations, subject to review by the Sudder Court.

It is unnecessary to consider whether the Order of the 20th of April, 1853, could be sustained as the law of procedure then stood, for however that may be, their Lordships are of opinion, that the subsequent Act of the Indian Legislature was rightly construed, and that the Court properly decided at the last hearing that the whole subject was open to their consideration.

The Appellant in this case has been kept for more than twenty years out of the possession of the annual payment to which he became entitled, and [42] has lost during the whole of that time, the interest on his purchase-money. Their Lordships think that they should do justice but very imperfectly if they were to award to him only the arrears of his annuity. The Government has been in the receipt of these sums which belonged to the Appellant. In 1842, the Government undertook to pay the money annually to the Adawlut, if a suit were instituted; if this had been done, and the fund has been invested, the Appellant will receive the amount. If the money has not been paid in (and we do not observe any allusion to such payment in the subsequent papers), we think that the Appellant must receive simple interest at the rate allowed by the Court on the arrears due when the suit was instituted, and on each subsequent payment as it accrued due.

Their Lordships will make a report to Her Majesty in conformity with the opinion which they have expressed.

[See *Maharana Fettehsangji Jaswatsangji v. Dessai Kallianraji Hekoomutraji*, 1873, L.R. 1 Ind. App. 34.]

[43] SREEMUTTY ANUNDOMOHEY DOSSEE and Others.—*Appellants*. JOHN DOE, on the demise of the EAST INDIA COMPANY. —*Respondent* * [Nov. 29, 30, 1859].

On appeal from the Supreme Court at Calcutta.

By the Hindoo law, no words of inheritance are necessary to pass the freehold of land to the heirs [8 Moo. Ind. App. 64].

A freehold interest cannot be created by parol or by an informal written instrument [8 Moo. Ind. App. 64, 65].

Disputes arose between the Indian Government and an adjacent proprietor, M. S., respecting a piece of alluvial land gained by accretion, of which M. S. was then in possession. The Indian Government required the land for public improvements. After some correspondence between the Government and M. S., an agreement was entered into, by which M. S. undertook to relinquish all claim to the proprietary right, and to rent the land from the Government, upon condition of the latter allowing him to remain in possession until the projected public improvements rendered it necessary for him to vacate the land. Possession was given to Government, M. S. holding the land from the Government at a fixed rent, and undertaking to quit possession at a month's notice. Improvements in the neighbourhood having been made by the Government, and M. S. being dead, notice to quit was served on M. S.'s representatives, who refused to quit, on the ground that the improvements were not such public improvements as were contemplated by the correspondence and agreement. In ejectment by the Government, Held:—

First; that M. S. was, under the agreement, a mere tenant at will [8 Moo. Ind. App. 64, 65].

Second; that ejectment was maintainable by the Government for recovery of the land, and that M. S.'s representatives had no defence at law to the action [8 Moo. Ind. App. 65].

Judgment of the Supreme Court affirmed, without prejudice to such equitable rights as M. S. might have under the correspondence and agreement [8 Moo. Ind. App. 65].

Ejectment by the lessors of the Respondent to recover possession of two pieces or parcels of land, situate between the Strand road and the river [44] Hooghly, in the town of Calcutta; one piece of land containing eleven cottahs, and one thirty forty-fifths of a chuttack, bounded on the South by Jackson's Ghaut; on the north by the land formerly in the occupation of Messrs. Jessop and Co., and unoccupied; on the west by the river Hooghly; and on the east by the Strand road; and the parcel of land containing one beegah, three cottahs, and eleven thirty-five forty-fifths of a chuttack; and bounded on the south by the Strand Mill Pucka Ghaut; on the north by certain lands in the occupation of Baboo Ramohun Mullick; on the west by the river Hooghly; and on the east by the Strand road.

The circumstances of the case were as follows:—

In the year 1841, the land in question, which was formed from the river Hooghly by accretion to the Strand road, was claimed by the East India Company, and by Baboo Muttylohl Seal, who was in possession. His right being disputed, Muttylohl Seal offered to lease the land from Government, so long as the Government did not require possession of the same.

In the year 1850, the Government being engaged in making arrangements with a view to improvements in connection with the Strand road, were, for that purpose, desirous of obtaining possession of the land on the river-bank between the Strand road and the river Hooghly. In accordance with the instructions of the Deputy-Governor of Bengal, Mr. W. H. Smoult, the then Solicitor to the East India Company

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner. Assessor,—The Right Hon. Sir Lawrence Peel.

at Calcutta, by a letter dated the 2nd of November, 1850, applied to Muttyloll Seal to surrender any right he had in the lands on the river-bank in order that he might not be an obstacle to the improvement [45] to be carried out; and in reply to such letter, Muttyloll Seal, on the 31st of March, 1851, sent a letter to Mr. Smoult, expressing his readiness to surrender all his interest in the property on two conditions—the first being, that he should not be required to surrender the land until the Government were prepared and actually began to carry out the proposed improvement on the Strand road; and the second had reference to the construction of a Ghaut on the banks of the river, in a manner therein mentioned.

It appeared that upon further consideration, Muttyloll Seal resolved not to insist upon these conditions, and, on the 10th of May, 1851, he sent a letter to Mr. A. Grant, the then Solicitor of the East India Company, which was as follows: “Sir,—In reference to an official letter from M. W. H. Smoult, then officiating Solicitor of the Honourable Company, of date the 2nd of November last, relating to the newly-formed land in front of the Strand Mills, of which I hold possession, I am quite ready to comply with the wishes of his Honour the Deputy-Governor, and to surrender all my interest in the property. I make this surrender in the full belief that it is the intention of the Government to reconstruct the Strand road; and that to obtain this most desirable purpose, it is necessary that they should be put in immediate possession of the land which I now hold; at the same time, I have to request that if any delay should take place, that the land which I now surrender may not in the meantime be let to other parties, or applied to any other purposes than that of a road, as it might, in such case, become a serious injury to my property immediately abutting on it to the eastward. I have also to request that the Government should [46] erect and build a Ghaut at their own expense on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the Ghaut steps to the south side), as will appear by the enclosed plan. The columns, roof, and ornamental parts of the Ghaut I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favoured with the honour of an answer.”

A copy of this letter was forwarded by Mr. A. Grant to Mr. J. P. Grant, Secretary to the Government of Bengal, and in conformity with the instructions of Government conveyed in a letter from Mr. J. P. Grant, of the 13th of June, 1851, Mr. A. Grant, on the 19th of June, 1851, sent the following letter to Muttyloll Seal:—“Sir,—I had the honour of receiving your letter of the 10th of May last, unconditionally surrendering your interest in the newly-formed land on the Strand bank of the river fronting the Strand Mills, and enclosing the ‘plan of the Flour Mill Ghaut,’ which letter and plan I had the honour to forward to the Bengal Government in copies. I am directed by the Deputy-Governor of Bengal to communicate to you, in reply to your letter, that His Honour is gratified by the course adopted by you. I am directed to say, you may be assured that, pending the execution of the project of the new Strand road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party. Respecting your request for the building of a Ghaut on the banks of the river, the columns, roof, and ornamental parts of which building you liberally offer to construct [47] at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of Ghauts, at suitable places, is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes.”

On the 26th of July, 1851, Mr. L. Clarke, acting on behalf of Muttyloll Seal, wrote to Mr. C. R. M. Jackson, the then Advocate-General, as follows:—“In Mr. Secretary Grant’s letter to Baboo Muttyloll Seal, of the 19th June last, it is not distinctly stated, that the Ghaut which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to Muttyloll, and you tell me that such is the intention of the present arrangement. Will you get a few lines from Mr. Grant to this effect, to remedy any misconception, should there be another incumbent in his office when the new Ghaut may be built?

Mr. Jackson showed this letter to Mr. Grant, the Secretary to the Government, and on the 4th of August, 1851, Mr. Grant wrote to Mr. Jackson a letter of that date, which was as follows:—“Sir,—With reference to the communication from Mr. L.

Clarke, of the 26th instant, made to you on the part of Baboo Muttylohl Seal, which you showed to me a few days ago, and which I have laid before the Honourable the Deputy-Governor of Bengal, I am directed by his Honour to say, that you can assure the Baboo that if the bank of the river and the Strand road remain as at present, the Ghaut, whereof he has announced his desire of erecting the columns, roof, and ornamental part alluded to in my letter to the [48] Company's solicitor, No. 1235, dated the 13th ult., will be erected where the Ghaut upon the land of which the Baboo now gives up possession, at present stands; but if, as is anticipated, a new road be made running in a line nearer to the river than the present line, the Ghaut will be erected on the river-bank immediately opposite the existing Ghaut aforesaid.

This letter was communicated to Muttylohl Seal and to Mr. L. Clarke, his professional adviser.

On the 27th of October, 1851, Mr. W. H. Elliot, the Chief Magistrate of Calcutta, proceeded to the premises with Muttylohl Seal, and possession was formally made over to Mr. Elliot on behalf of the Government, as proprietor of the soil, by Muttylohl Seal, and restored to Muttylohl Seal as a tenant at a fixed rent, removable at the pleasure of Government on one month's notice.

Previously to this transaction, personal interviews had taken place between Mr. Elliot and Muttylohl Seal, who had stated to Mr. Elliot his readiness to give up the land for "the purpose of a public road;" an expression which Mr. Elliot required to be corrected for that "of any public improvement," which was acceded to by Muttylohl Seal.

On the 11th of October, 1852, Muttylohl Seal executed an agreement which, after reciting that a dispute had long been pending between the Government of Bengal on the one part, and Muttylohl Seal on the other part, regarding the two parcels of land in question, proceeded as follows:—"And whereas it has been declared that the Government desire the land for the purpose of public improvements; and whereas it has been agreed between me and the Government, that on my giving up all claim to the proprietary [49] right and title in the land aforesaid, the Government will leave me in undisturbed possession thereof till such time as the projected improvements above alluded to shall render it necessary for me to vacate that land, and whereas I did, in the presence of many witnesses, on the 27th day of October last, proceed to the land aforesaid, and then and there make over my right and title in the said land to the Chief Magistrate of Calcutta, on behalf of the Government, and did afterwards receive from him possession of the land as a tenant, at the rent of Rs. 10 per annum: Now, I, being in good health of body and of sound mind, do hereby acknowledge that I have no claim whatever to the proprietary right of the land aforesaid, and that I will, year by year, and kist by kist, pay on demand, the sum of Company's Rs. 10 per annum for the rent of that land; and that when the projected improvements hereinbefore alluded to shall have been commenced, and shall have progressed so far as to render it necessary, for the further extension and continuation of such improvements, that I should vacate the said land, according to the true intent and meaning of these presents and of the agreement between me and Government, as appears in the correspondence with Mr. Secretary Grant relating to the subject, that then, and on receiving one month's notice to quit from the Chief Magistrate of Calcutta for the time being, or other officer duly authorised by Government to issue such notice, I will entirely give up and vacate possession of the said land, and remove from it all buildings and all goods and chattels of every kind whatsoever which to me and my undertenants may pertain, and will thenceforward utterly renounce all claim for myself, [50] my heirs and successors, to the possession, as I have already done to the right and title of the said land."

After the date of the above agreement, the improvements were commenced, under the authority of Government: and in the course of such improvements the Strand road was increased in width, and the land remaining between the road and the river was macadamised, so as to form an open quay, accessible from the Strand road, on which goods might be landed and conveyed in hackeries, and so as to be available for the relief of the traffic on the Strand road, one of the greatest thoroughfares in Calcutta.

In the year 1856, the improvements on and along the Strand road had extended up to the land in question, and it became necessary to obtain possession of the land

for the further progress of the improvements. Muttyloll Seal was dead, and the Appellants, his executrix and executors, were then in possession.

On the 11th of September, 1856, a notice to quit at the expiration of one month from the time of service, was issued by the Chief Magistrate of Calcutta, and served upon the Appellants.

The Appellants refused to comply with the terms of the notice, when the East India Company brought an action of ejectment in the Supreme Court at Calcutta, on the plea side, against the Appellants to recover possession; and they afterwards obtained the common rule to defend their title to the land, as landlords, and a new plaint in ejectment was filed against the Appellants, who pleaded not guilty.

The action was tried before Sir James W. Colville, Knt., Chief Justice; and Sir Arthur Buller, Knt., [51] Puisne Judge. On the part of the lessors of the Respondent the evidence adduced proved, in substance, the facts and circumstances above detailed. The ground of defence set up by the Appellants was, that the "public improvements, referred to in the agreement, dated the 11th of October, 1852, were confined to the construction of a new Strand road; and that Muttyloll Seal thereby agreed to give up possession of the land for that purpose only; and that, inasmuch as in the course of the improvements that were being made, the land in question would not, as they alleged, be applied for the purposes of the road, they were not bound to give up possession of the land. At the conclusion of the trial the Court found and declared as a jury, amongst other things, first, that if it was part of the essence of the contract that a new Strand road should be made, and that the road should have attained a certain degree of progress to authorize the giving of the notice, then the Court found and declared that this had not been done, as there was clearly no road made, either in substitution or extension of the Strand road. Secondly, assuming that the work done on the ground which the Court were of opinion was in the nature of a wharf, was a public improvement, the Court held, that it had progressed so far as to entitle the lessors of the Respondent to demand possession of the two parcels of land, and found for the lessors of the Respondent. Thirdly, as to the agreement, the Court found that it referred to public improvements generally, and that improvements other than a new road were contemplated, and that the lessors of the Respondent were not bound to any particular improve-[52]-ment. The Court accordingly gave a verdict for the lessors of the Respondent.

The Appellants applied for and obtained a rule *nisi* calling on the lessors of the Respondent to show cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was against evidence, and also on the ground of misdirection. The rule came on to be argued on the 13th of May, 1857, before the same Judges, and, after argument, was discharged.

The present appeal was from the verdict and judgment of the Supreme Court, and the Order made upon the rule *nisi* for setting aside the verdict.

Mr. Rolt, Q.C., and Mr. Leith, for the Appellants.—This case turns upon the construction and effect to be given to the informal instrument of the 11th of October, 1852, by which Muttyloll Seal agreed to give up and vacate the two parcels of alluvial land in question, coupled with the correspondence imported by express reference into that agreement. The principal question will be, whether the lessors of the Respondent have brought themselves within the terms of the agreement, so as to be entitled to eject the Appellants. Our contention is, that the Government have not constructed a public road, which we submit, was one of the conditions on which the two parcels of land were agreed to be surrendered. Except under this agreement, there is no evidence of title in the East India Company to the land. By the agreement, Muttyloll Seal abandoned his proprietary rights upon three conditions: first, that the land should be ap-[53]-plied to no other purpose than the construction of a new road; secondly, that the Government should erect a Ghaut upon the banks of the river at a certain place; and, thirdly, that he should not be required to vacate possession until the works agreed to be carried out had progressed so far as to complete the new road. The terms "projective improvements" and "public improvements" mentioned in the agreement can only refer to those mentioned or projected in the correspondence. Now, there is nothing in the agreement itself which would enable it to be enforced: the terms being too vague and too general. The Government must, therefore, stand upon their original title, and try the question whether Muttyl-

loll Seal's representatives are entitled to the land, as if no surrender had been made by him of his proprietary rights: for, we submit, that the agreement of October 1852 passed a freehold interest to Muttyloll Seal which was continued in the Appellants. The Government must certainly show that the work in progress at the date of the notice to quit was a projected improvement within the meaning of the agreement and the correspondence. Now, it was found by the Court, acting as a jury, that the work in progress was not in the nature of a road; and, it appears from the evidence, that the construction of a new public road between the old Strand road and the river Hooghly, was the improvement contemplated and agreed on at the date of the agreement, and that such new road and a new Ghaut were the only improvements projected or contemplated at that period. The verdict, therefore, ought not to have been for the lessors of the Respondent. The Court ought to have directed itself, sitting as a jury, to inquire and find what particular [54] improvements were projected or contemplated, and if the improvements contemplated by one of the parties differed from those contemplated by the others, then the improvement contemplated by Muttyloll Seal, which was the construction of the new public road, ought to have been held by the Court to be the improvement contemplated by the agreement, and this construction is clear from the correspondence, imported into the agreement by express words of reference—[Lord Chelmsford: Let me put the view of the case which has been suggested by one of their Lordships, and a very important one it is. Muttyloll Seal was a proprietor, under some sort of title to the land in question. He was a Hindoo, and he could by the Hindoo law pass land without writing. He has actually done so in this case, without delivery of possession. Now, what character was he clothed with in respect to that land? He was not a tenant from year to year, because I think the terms of the agreement show that a tenancy from year to year is excluded. He could not be a tenant at will, because a month's notice is inconsistent with the idea of a tenancy at will. A tenant at will is liable to be turned out without any notice at all. The agreement could not imply a licence to occupy the ground, because the East India Company, who must have given the licence, are a corporation, and the licence could only be given under their seal. What defence, therefore, to an action of ejectment could the Appellants have against the claim of the East India Company? If the Appellants have been induced to enter into the agreement by improper practices and suggestions, it might be set aside, or relief given in a Court of Equity; but so far as the agree-[55]-ment is concerned, we must look to the legal rights of the parties in ejectment. What defence then have you to the action?—The Appellants were entitled to hold possession until the public improvements had been completed and a month's notice had been given to require them to vacate. The verdict, we contend, is bad, first, as it is against evidence; and secondly, on the ground of misdirection, that the improvements made were not the contemplated improvements, and there ought, therefore, to be a new trial.

Mr. Forsyth, Q.C., Mr. Maule, and Mr. W. H. Melvill, for the East India Company.—Under the terms of the agreement of the 11th of October, 1852, and the correspondence therein referred to, the works in progress on the Strand road were public improvements within the meaning of that instrument. It was no part of the agreement between Muttyloll Seal and the Government, that the land should be taken by the Government, only if required for the purpose of a new road, nor was there any such understanding on the part of Muttyloll Seal. The purposes for which the land was required by Government were in accordance with the understanding of the parties as well as the words of the agreement. Muttyloll Seal must be considered as holding under a title from the Government. The surrender of such interest as he had in the land was unconditional. That being so, and the notice to quit the land in question being properly issued and served upon the Appellants, they were not justified in refusing to comply with the notice, and there was, therefore, no defence in ejectment to this action. As the verdict [56] was fully warranted in law and by the evidence, it would be useless, considering the title of the Appellants to the land in question, to refer the case back for a new trial.

Their Lordships' judgment was pronounced by

The Right Hon. Lord Chelmsford (Dec. 8, 1859).—This is an appeal upon a verdict and judgment of the Supreme Court at Calcutta in an action of ejectment.

by the lessors of the Respondent against the Appellants, and also from an Order of that Court discharging a rule *non* subsequently obtained, to set aside the verdict and for a new trial.

This ejectment was brought to recover two pieces of land lying between the Strand road and the river Hooghly, in the town of Calcutta. This land had been gained from the river Hooghly by accretion, and, at the time of the transactions out of which the ejectment arose, was in the possession of Muttyloll Seal, since deceased, as the ostensible owner. His claim was, however, disputed by the East India Company; and Muttyloll Seal, in the year 1841, appears to have been willing to have admitted their right to the land, for in two letters of the dates respectively of the 25th of August and the 4th of November, 1841, he proposed to take it on a lease, "or, if Government were not agreeable to that, he wished them to give him a written assurance that he was to keep possession so long as they did not require the said plots for some other purposes themselves." Whether anything took place upon these letters nowhere appears; but Muttyloll Seal continued in the undisturbed possession of the two pieces of land from that time down to the year 1851. The Government, for [57] many years before 1851, had it in contemplation to construct a new road in lieu of the old Strand road; and in that year the project seems to have been seriously taken up, and application was made to Muttyloll Seal to give up the land in question for this purpose. These two pieces of land were immediately in front of other land the undoubted property of Muttyloll Seal, from which they were only separated by the public highway called the Strand road, so that by the possession of them he and his tenants had immediate and uninterrupted access to the river. Muttyloll Seal had also built a Ghaut, with steps leading down to the river upon other alluvial land abutting on one of the two pieces of land in question.

There can be no doubt that when application was first made to Muttyloll Seal to surrender the land, he believed that the project of the Government was to make a new Strand road, and, also, that this was the improvement originally contemplated by them. His expectation appears clearly from the first letter upon the subject, written by him to Mr. Smout, the Solicitor of the East India Company, on the 31st of March, 1851, in which one of the conditions for which he stipulates is, that "he shall not be required to surrender the land until the Government are prepared, and do actually begin to carry out the proposed improvement on the Strand road." It is true that in his subsequent letter, written to Mr. Archibald Grant, the new Solicitor to the East India Company, on the 10th of May, 1851, he does not insist upon this condition; but he states explicitly—"I make this surrender in the full belief that it is the intention of the Government to reconstruct the Strand road, and that to obtain this most desirable purpose [58] it is necessary that they should be put in immediate possession of the land which I now hold; at the same time I have to request that if any delay should take place, that the land which I now surrender may not, in the mean time, be let to other parties, or applied to any other purposes than that of a road, as it might, in such case, become a serious injury to my property immediately abutting on it to the eastward."

What was the improvement which was contemplated by the Government at this time is shown by the answer of Mr. Archibald Grant to Muttyloll Seal of the 13th of June, 1851, after a communication from the Secretary to the Government, in which, treating the letter of Muttyloll Seal as an unconditional surrender of his interest in the newly-formed land on the Strand bank of the river, he adds:—"I am directed by the Deputy-Governor of Bengal to communicate to you, in reply to your letter, that his Honour is gratified by the course adopted by you. I am directed to say you may be assured that, pending the execution of the project of a new Strand road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party."

It has been observed in argument, that Muttyloll Seal, imposes no condition upon the Government that they shall "reconstruct" the Strand road, but merely makes the surrender "in the full belief" that this is their intention: that although he requests that, if any delay takes place, the land shall not be applied to any other purposes than a road, as well as that it shall not be let to other parties, the letter accepting the surrender is confined to an assurance that, pend-[59]-ing the execution of the project, the land will not be let to any other party, and that the surrender of

his interest is, to his own knowledge, treated as having been made unconditionally from all which it is inferred that Muttyloll Seal must have known, or at least have had strong grounds for believing, that the plan of the Government was not necessarily confined to the formation of a new Strand road.

Down to this period of the correspondence, however, there does not appear to have been any other improvement in contemplation; nor was there anything to lead Muttyloll Seal to believe that the land in question was wanted for any other purpose than for a road.

But before the actual surrender took place, some intimation was given, which might have been sufficient to lead him (in some degree at least) to expect some alteration of the original Government scheme of improvement. In his letter to Mr. Archibald Grant, containing his offer to surrender the land, he says:—"I have also to request that the Government should erect and build a Ghaut at their own expense, on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the Ghaut steps to the south side), as will appear by the inclosed plan. The columns, roof and ornamental parts of the Ghaut I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favoured with the honour of an answer.

And, in answer, he had been told:—"Respecting your request for the building of a Ghaut on the banks of the river, the columns, roof and ornamental parts [60] of which building you liberally offer to construct at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of Ghauts at suitable places is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes."

Mr. Longueville Clarke, who was the adviser of Muttyloll Seal, on the 26th of July, 1851, wrote for an explanation to the then Advocate-General, as follows:—"My dear Jackson,—In Mr. Secretary Grant's letter to Baboo Muttyloll Seal, of the 19th of June last, it is not distinctly stated that the Ghaut which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to Muttyloll, and you tell me that such is the intention of the present arrangement. Will you get a few lines from Mr. Grant to this effect, to remedy any misconception, should there be another incumbent in his office when the new Ghaut may be built?"

To which the Secretary of the Government returned this answer on the 4th of August, 1851:—"Sir,—With reference to the communication from Mr. Longueville Clarke of the 26th instant, made to you on the part of Baboo Muttyloll Seal, which you showed to me a few days ago, and which I have laid before the Honourable the Deputy-Governor of Bengal, I am directed by His Honour to say, that you can assure the Baboo that if the bank of the river and the Strand road remain as at present, the Ghaut whereof he has announced his desire of erecting the columns, roof and ornamental part alluded to in my letter to the [61] Company's solicitor, No. 1235, dated the 13th ult., will be erected when the Ghaut upon the land of which the Baboo now gives up possession at present stands: but if, as is anticipated, a new road be made, running in a line nearer to the river than the present line, the Ghaut will be erected on the river bank, immediately opposite the existing Ghaut aforesaid. I have, etc., J. P. Grant, Secretary to the Government of Bengal."

This letter was not only communicated to Muttyloll Seal, but it is referred to expressly in the agreement of the 11th of October, 1852, which was signed by him after his actual surrender of the land, and which agreement was prepared by Mr. Clarke on his behalf.

It certainly does appear extraordinary, if it was intended that the land should be surrendered only upon condition that a new Strand road should be made, that they did not at once reject the idea of there being the least uncertainty upon that subject, and insist upon a literal compliance with this condition, as the price of the surrender of the land.

It is to be observed, that this letter was written nearly three months before the actual surrender, which took place on the 27th of October, 1851. Before this event Muttyloll Seal had conversations with Mr. Elliot; but although he states that in one of them "the Baboo said he would give up the land only for a public road," and Mr.

Elliot insisted upon the alteration of the terms to any "public improvement," yet as he cannot fix the time of this particular conversation, but can only say it was "before signing the agreement B" (the agreement of the 11th of October, 1852), it cannot fairly be taken to have occurred before the delivery of possession.

[62] However, on the 27th of October, 1851, Mr. Elliot says:—"I proceeded to the premises with Muttyloll Seal after the verbal agreement: possession was formally made over to me on behalf of Government, as proprietor of the soil on the 27th of October, 1851, by Baboo Muttyloll Seal in person, in presence of numerous witnesses, and restored to the Baboo as a tenant removeable at the pleasure of Government on one month's notice, as per separate agreement; a previous day had been fixed, and it was postponed to Monday, the 27th of October, 1851."

Some little difficulty has arisen as to the meaning of the words used by Mr. Elliot, "as per separate agreement." Upon turning, however, to the evidence of Mr. Clarke, who was present at the delivery of possession, after speaking of the Bengalee Kaboolat signed at the time, he says, "There was also an agreement to be signed"; so that Mr. Elliot, by the words "as per separate agreement," must be understood to refer to an agreement to be afterwards made, which was to contain the terms upon which Muttyloll Seal was to be allowed to remain in possession. It can hardly be contended, that before this agreement was entered into, Muttyloll Seal had any interest in the land which could have been available against an ejectment brought by the East India Company upon the legal title acquired by his formal delivery to them.

Then, did the agreement of the 11th of October, 1852, place him in a better situation for resisting the enforcement of their rights in a Court of law? The Appellants contend that the proper construction of this agreement is, that they are entitled to hold possession until a month's notice has been given, [63] after the new Strand road should have progressed so far as to render it necessary, for its further extension and continuation, that they should vacate the land; and that although there is no express mention of the road in the agreement, yet that the words "public improvements" and "projected improvements" hereinbefore alluded to, must be interpreted by reference to the correspondence with Mr. Secretary Grant, to mean nothing else but the new Strand road.

But against this construction must be set the reference to the letter to Mr. Secretary Grant of the 4th of August, 1851, showing that the alteration of the Strand road was not definitively decided upon, and the conversation with Mr. Elliot before this agreement was signed, in which he insisted upon the general words "public improvements" being inserted, for the very purpose of preventing its being alleged that Muttyloll Seal had given up his land only for a public road. Now, construing the agreement by the aid which these circumstances afford, it would rather appear that whatever interest Muttyloll Seal had in the possession, was contingent, not upon the formation of the new Strand road, but upon the public improvements, of whatever nature the Government might ultimately determine to execute in this direction.

Of course, if this is the correct construction, then, even if Muttyloll Seal's interest under the agreement was a legal one, it was determined by the notice given on behalf of the East India Company. But the real question upon the agreement is, whether it created any legal interest of any description. For the purpose of this consideration let it be assumed that the "public [64] improvements" intended by the agreement, were the formation of a new Strand road, and that, consequently, Muttyloll Seal's possession was contingent upon the progress of that road. The lessors of the Plaintiff had become the absolute owners of the land, and, upon the proposed assumption, they would have let Muttyloll Seal into possession under an agreement that they would not disturb him until after a month from a contingent uncertain event. What was the nature of this interest? Did it create any tenancy between the parties? If so, of what description? It certainly was not a tenancy for years; nor from year to year; nor for a year certain; nor for a month; nor for any other certain time. In the course of the argument for the Appellants, it was suggested that the agreement passed a freehold interest, and, certainly, from the indefinite character of the interest given, it seems best to answer this description. If the agreement could have created such an interest, there being no measure assigned by years or by any portion of time, although the stipulated rent was to

be payable yearly, it could be nothing less than a freehold, and a freehold which would not end with Muttyloll Seal's life, because, as he was a Hindoo, no words of inheritance were requisite to continue his interest to his heirs. The consequence would be, that his death not determining it, it would enure to their benefit, and have an indefinite duration till determined by a notice on the occurrence of the event contemplated. Now, an interest of this nature could not be created by parol, or by a mere writing, such as the instrument of the 11th of October, 1852, which, therefore, could operate only as an agreement. Muttyloll Seal having been admitted, or holding, under this agreement, and the same sort of possession being [65] continued by the Appellants, he and they after him could not be treated as trespassers, but were in as tenants at-will; of course, such a tenancy was determinable by the mere bringing of an ejectment.

This appears to be the correct construction of the agreement, so far as the legal rights of the parties flowing out of it are concerned. It passed no legal interest out of the East India Company to Muttyloll Seal. The Company did not grant, nor did they intend to grant, as Hindoos; if they had so intended, they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of equity would have protected the Appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of equity.

Their Lordships, in determining this case, have confined themselves strictly to the legal rights of the parties, and have purposely abstained from expressing any opinion upon the equitable considerations which may be involved in it. They decide only that the ejectment was maintainable, and that the Appellants had no defence to it at law; and this decision is made without prejudice to any equitable rights of the Appellants, which must be understood to be fully reserved to them.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Court of Judicature be affirmed, and this appeal dismissed, with costs.

[S.C. 13 Moo. P.C. 162.]

[66] SONATUN BYSACK,—*Appellant*; SREEMUTTY JUGGUTSOONDREE DOSSEE,—*Respondent* * [Nov. 30, Dec. 2, 1859].

On Appeal from the Supreme Court at Calcutta.

Although the Courts in India recognize the power of a Hindoo to make a Will, yet the extent of the power of disposition by a Testator is to be regulated by the Hindoo law, and cannot interfere with a widow's right to a proper maintenance.

A Hindoo by Will, gave all his moveable and immoveable property to his family idol; and after stating that he had four sons, he directed that his property should never be divided by them, their sons, or grandsons in succession, but that they should enjoy "the surplus proceeds only"; and the Will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed, that whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the Testator directed, that after the expenses attending

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessor.—The Right Hon. Sir Lawrence Peel.

the estate, the idol, and maintenance of the members of the family, whatever net produce and surplus there might be, should be divided annually in certain proportions among the members of the family. At the date of the Will the family were joint in estate, food, and worship. The accumulations of the income were divided as directed by the Will. Held,—

First, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the Testator's four sons and their offspring in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property, after providing for the performance of the ceremonies and festivals of the idol, and the provisions in the Will for maintenance [8 Moo. Ind. App. 85-88].

Second, that the fact of the division of the income arising out of the Testator's estate among the members of the family after the Testator's death did not constitute a division of the family [8 Moo. Ind. App. 86].

One of the sons of the Testator died, leaving three sons, one of whom also died without issue, leaving a widow.

Held further, that the direction contained in the Will that the property should go in the male line did not exclude the widow of the grandson of the Testator, and that the widow was entitled to a third share of a fourth part of the property and accumulation, without prejudice to her rights as a Hindoo widow when the property should be divided [8 Moo. Ind. App. 87].

Randoss Bysack, a Hindoo inhabitant of Decca, in Bengal, died in the year 1848, leaving large self-acquired estate, consisting of moveable and im-[67]-moveable property, situate in that Province, having, on the 13th of February, 1848, made a Will in the Bengalee language, of which the following is a translation:—

"Being now far advanced in age, and being about making preparations to proceed to the holy place of Eshshor Sree Brindabun, I have (of my own free will in sound health and settled mind) with the view of making a Will of the whole of whatever properties I possess and the same being in future brought into operation specified below the distribution of all my properties which will accordingly be carried into effect. First.—Independently of my paternal concerns I having by my own earnings acquired in this district of Dacca and in the town of Calcutta etc. brick-built houses Zemindary and Talooks or landed estates and rent-free lands and Company's promissory notes and divers other mercantile transactions and cloth merchandize and gold and silver and precious stones and shawls and roomals etc. various self-acquired properties in my own name and in the names of my own sons and also in the fictitious names of other persons have been passing my time wherein none of my paternal property or money etc. was concerned the whole of the said properties I have obtained by my own exertions. Whatever has been produced and increased (through the means of my [68] funds) by the labours of my two sons namely Sree Krishnomungle and Sree Manikchund Bysack the whole of that too being blended together has been applied to the banking and mercantile transactions etc. and the purchase of lands and tenures. The acquisitions of even the sons are not held separate. Second.—The whole of my aforesaid moveable and immoveable properties I have granted to Sree Sree Joot Eshshore Muddunmohun Thakoor (the idol so called) which I have established in the house of which he is the Malik or proprietor. I am not indebted to any person at present. I have four sons, that is Sree Krishnomungle and Sree Manikchund, and Sree Shamchund and Sree Juggurnauth Bysack are in existence. Among these my above-mentioned properties shall never be divided and partitioned and the said sons or their offspring etc., that is to say, their sons and grandsons, heirs in succession, shall not have the power of alienating any one of my aforesaid properties by gift or sale, etc. If they do so the same shall be inadmissible before the administrator of justice and neither the whole of the above-mentioned properties nor any part thereof shall be liable to sequestration or auction sale for the debts of the heirs and successors. After my demise, my sons, grandsons, *et cetera*, heirs, shall have the power of enjoying the surplus proceeds only. Third.—From the time present my eldest son, Sree Krishnomungle Bysack shall as a servant of the Eshshore Thakoor control over and manage the entire estate and maintain the members of the family and whenever and what-

soever acts and business and the ceremonies and festivals etc. of the Thakoors or the deities [69] shall occur he shall perform some according to his own discretion. Whatever may be the overplus after the deduction of the whole of the expenditures the same shall be added to my said estates and other properties, or Company's papers shall be purchased, or any mercantile speculation which may be advantageous shall be entered into therewith. Fourth.—After the death of Sree Krishnomungle, in accordance with the provisions specified in the 3rd clause, Sree Manikchund Bysack being director and performer of the divine services and manager shall exercise his control over all. In the like manner in the event of Manikchund's departing this life, amongst my heirs, whoever may exist and be the oldest in age he shall exercise similar control and shall perform the whole of the affairs. Fifth.—Should no agreement and unanimity at all exist among my heirs then the profits of the mercantile transactions and traffics and banking and of the landed estates and rents of houses and on account of various interests of description etc. whatever money shall be received belonging to my estate from that first of all the public revenue and the charges of the interior and the expenses of the repairs of the houses being deducted whatever surplus may remain out of that the expenses of the idols and of the established and contingent affairs of the family and occasional acts and ceremonies and the expenses on account of the maintenance of the members of the family and connection etc. being deducted whatever nett-produce and overplus there may be the same being adjusted annually six annas portion of the said overplus money Sree Krishnomungle Bysack and his children and six annas share Sree Manikchund Bysack and his [70] children and two annas share Sree Shamchund Bysack and his children and two annas share Sree Juggernauth Bysack and his children shall be entitled to receive having the same apportioned. With the exception of these none of my children shall have (upon any plea) the power of claiming any increased share. Should they ever do so they shall be inadmissible. In consideration of the increase of the capital fortune which has been effected by the labors of Krishnomungle and Manikchund somewhat increased shares have been given to them. None shall have any power of raising any objection thereto. And after the demise of my sons their respective male issues down to sons and sons' sons etc. heirs in succession, shall be entitled to the share of the aforesaid amount of the surplus profits belonging to their respective fathers. And whatever portion of the father's share shall (according to the Shastra or Hindoo law) be lawfully due to whomsoever of the heirs he shall receive such portion of the profits. Should (owing to the non-existence of heirs in the lineage of male issue) a daughter or daughter's son be empowered to receive any share then such person shall receive a stipend which may be merely enough for food clothes and shall have no power of claiming the share of the profits. Sixth.—To whomsoever whatever streedhan has been given and to whomsoever whatever may in future be given that woman is the rightful owner of the same none else have any power of laying the hands of an heir thereupon. With the exception thereof all other whatever personal properties of gold and silver etc. there are, all the children shall have the power of using them with discretion [71] and as occasion may require and when should they be compelled to be separate then they shall receive them according to the above-mentioned proportions. Seventh.—In the event of any property out of the whole of my properties above enumerated (by becoming old or damaged have the appearance of being injured or otherwise owing to any irresistible cause) be likely to become deteriorated then the clauses above specified shall not be a bar against making a sale or exchange of such property."

Probate was granted to this Will by the Supreme Court at Calcutta.

The testator left four sons; Krishnomungle Bysack, Manikchund Bysack, Shamchund Bysack and Juggurnauth Bysack, and one widow, him surviving, and constituted a joint and undivided Hindoo family.

Krishnomungle Bysack died intestate in June, 1850, leaving three sons, the Appellant, Sonatun Bysack, Hurrymohun Bysack and Kistodoss Bysack, and a widow.

In the year 1849, Hurrymohun Bysack, one of the grandsons of the Testator, married the Respondent, and afterwards died, intestate and childless, leaving the Respondent his widow and heir him surviving.

The Respondent, then an infant, by her next friend, filed a Bill in the Supreme

Court at Calcutta, against Manickhund Bysack, Shamchund Bysack, Juggurnauth Bysack, the Appellant, and Kistodoss Bysack. The Bill set forth the principal facts above stated, and charged that the Respondent, as the widow and legal representative of Hurrymohun Bysack, deceased, was entitled to an interest for life in his estate, and that such interest extended to a third of six annas of [72] the estate of the Testator under the Will, and to a third of the estate of Krishnomungle Bysack, that might have accrued since the death of the Testator; and the Bill charged that the limitation and restriction in the Will as to none but males inheriting was too remote, and, therefore, void, and that her father-in-law, Krishnomungle Bysack, was upon a true construction of the Will entitled to an absolute six annas share in the estate of Ramdoss Bysack, and that Krishnomungle Bysack and his son were in like manner entitled to a six annas share of the accumulations thereof since the death of Ramdoss Bysack. That, even if the Court should be of opinion that the estate to which the Plaintiff's husband was entitled became divested, by his dying without male issue, still the limitations in the Will of Ramdoss Bysack could not in any way control or alter any of the accumulations made since his death; that under no circumstances whatsoever could a Will operate so as to deprive a Hindoo widow of such a maintenance out of the estate of her husband as would be suitable to his means; and the Plaintiff submitted, that although the Company's Courts, as well as the Supreme Court, had declared the power of Hindoos to make Wills, yet that such Wills must not be in derogation of any rights of parties entitled to maintenance or otherwise under the Hindoo law. And the Bill further charged that the descendants of Ramdoss Bysack were a Hindoo family, joint in estate, food and worship, and that no partition had ever been made of the same; and that the disposal of the Testator's moveable and immoveable property to the idol, Sree Joot Esshore Muddenmohun Thakoor, was [73] void; and that the restriction upon alienation contained also in the second clause was void, as tending to create a perpetuity; and, lastly, that having regard to the whole of the Will, the trust, if any, in favour of the idol could only be construed as a trust to the extent of what is sufficient to keep up the worship of the idol in a proper and becoming manner, having regard to the position of the Testator's family; and the Bill prayed, first, that the Will of Ramdoss Bysack might be carried out under the Order and direction of the Court, and that the rights of the Plaintiff and Defendants, the parties interested therein, also of the idol, might be ascertained and declared; secondly, that an account might be taken of the estate of Ramdoss Bysack, at the time of his death; thirdly, that an account also might be taken of the estate of Krishnomungle Bysack; fourthly, that as far as the Plaintiff was concerned, a partition might take place, and that she might be decreed to be entitled to hold her share, whatever that may be, in severalty for her life; fifthly, that if the Court should be of opinion that the husband of the Plaintiff was not entitled to any interest either in the estate of Ramdoss Bysack, or of the accumulation since his death, then that she might be declared entitled to a suitable maintenance out of the estate of Ramdoss Bysack and the accumulations thereof. And lastly, for an account of what amount of property was requisite to be set aside and appropriated for the due performance of the worship of the idol.

The Defendant, Manickhund Bysack, and the Appellant, filed a joint answer to the Bill. The answer stated, that some accumulations were made of the income of the property left by the Testator, first by his two eldest [74] sons, and subsequently to the death of Krishnomungle by Manickhund alone; and that such accumulations, up to the death of Hurrymohun, in the year 1258, B.E., from the death of the Testator, amounted to a nett sum of Rs. 21,512 2, and that further accumulations had been made since the death of Hurrymohun up to the end of the year 1261, B.E., amounting to the nett sum of Rs. 54,401 3. 6, and that the accumulations made up to the year 1259, B.E., estimated at Rs. 47,792 2. 6, had been divided among the whole of the Defendants, the Respondent having resided with them up to the last-mentioned date, and accordingly received her maintenance from them; and that the remainder of such accumulations had been received, and were then in the possession of the Defendant, Manickhund, as manager and executor under the Will; and that the descendants of the Testator had always been and still were a Hindoo family, joint in estate, food, and worship, excepting as to the Defendants, Shamchund Bysack and Juggurnauth Bysack, who had become separate in food only from the other members

of the joint family, and that no partition had ever been made among the descendants of the Testator of the joint estate, except so far as such accumulations up to the end of the Bengalee year 1259, which had been divided among them as aforesaid, could be called a partition; and the answer submitted to the Court the points of law raised and charged by the Bill in regard to the rights of the Respondent, as widow and heiress-at-law of Hurrymohun Bysack, in respect to the joint estate of the Testator, and the accumulations aforesaid: and it was by the answer contended, that she was only entitled to maintenance, which the Respondent had received [75] from the Defendants, as long as she had remained in their house; and that they had all along been ready and willing and had offered to maintain the Respondent. The answer of the Defendant, Shamchund Bysack, was similar in its statements to the above answer. The other two Defendants, Juggurnauth Bysack and Kistodoss Bysack, infants, by their guardian, filed the usual infants' answer.

An Order was made by the Supreme Court on the 28th of July, 1857, with the consent of the Defendants, that the Plaintiff should be allowed Rs. 100 *per mensem* for her maintenance.

The cause was heard on the 4th of August, 1857, and the Court by a decretal Order of that date declared and decreed, that the Respondent, as the widow and heiress of Hurrymohun Bysack, was entitled to a share in the estate formerly belonging to the Testator, but the Court reserved the question as to what should be the amount of such share until the Master had made his report upon the inquiries therein directed; and the decretal Order then directed accounts to be taken of the moveable and immoveable estate of the Testator, and of the rents and profits of the immoveable estate, and of the accumulations of the moveable and immoveable estate; and the decretal Order directed the Master to inquire and report what parts of the estate were outstanding and undisposed of, and whether any division of the accumulations, or of the surplus income of the estate, had taken place; and between whom and in what shares and proportions, and what portion of the income of the Testator's estate had been applied in or towards the support of the family idol, or for the performance of the religious and other ceremonies connected with the worship of [76] such idol; and what provision should be made, and what part of the estate should be set apart for the future maintenance of such family worship. All further directions and the costs of the suit were reserved until after the Master had made his report.

The judgment pronounced by the Court, consisting of the Chief Justice, Sir James W. Colville, Sir Arthur Buller, and Sir Charles R. M. Jackson, Puisne Judges, in making the above decretal Order was as follows:—"The question in this cause is, how far the rights of the Plaintiff, as the widow and heiress of Hurrymohun Bysack, in the ancestral estate which was left by Ramdoss Bysack, her husband's grandfather, are affected or varied by the document which is admitted to be the last Will and Testament of Ramdoss Bysack. The effect of the earlier dispositive clauses is to give nominally the whole of the Testator's property to his family Thakoor, but not by way of a religious endowment, properly so called. On the contrary, the Testator's plain intention is, that, subject to a proper provision for the performance of the ceremonies in favour of this idol, the amount of which seems to be left to the discretion of the managing member, his family should, as a joint Hindoo family, continue to enjoy his property, not only drawing the income from land and other fixed investments, but continuing to carry on his banking business, or embarking his capital in other mercantile speculations. It is, therefore, almost conceded, that no effect can be given to the last sentence in the second clause, which denies to the sons and other remoter descendants the power of alienation, and seeks to withdraw the property from liability to their debts, even though incurred in carrying on the trade authorized, if not enjoined, by the Testator. Such [77] provisions are obviously inconsistent with the nature of the interest in the property given, and with the use to be made of it. It would be strange if under colour of a bequest in favour of an idol, a man could not only enjoy property, but trade with it, without subjecting his beneficial interest in it to the just demands of his creditors. The utmost effect that can be given to such a disposition, is to treat the religious trust as over-riding the beneficial interest of the party in possession, and constituting a prior charge upon the property. Such was the view taken of a similar disposition by the late Chief Justice in his judgment in *Doe dem. Sibchunder Doss v. Sibkissen Bannerjee*

(1 Boulnois, p. 72). In the fifth clause of the Will, the Testator provides for a different state of things, namely, that in which 'no agreement and unanimity at all exist among my heirs.' We are inclined to think that he meant the provisions in restraint of alienation to over-ride this clause, but contemplated a state of things in which his heirs would be unable to agree in the application of the surplus income, and would cease to enjoy it as an undivided Hindoo family. To meet that state of things, he provides that his two eldest sons by whose personal exertions the fortune had, in part, been made, and their respective children, shall each have a six annas share; whilst the two younger sons and their respective descendants shall each take only a two annas share. And this provision is followed by the clause upon which the present contention arises; the effect of which seems to us to be, that the shares so given are to pass not in the course of legal succession, but perpetually in the male line, daughters and daughter's sons being excluded and declared entitled to maintenance only. It seems to [78] be agreed that this disposition, if effectual in law, would by implication, though it does not so expressly, exclude the Plaintiff who claims as widow and heiress of a childless grandson. If the question were untouched by authority, we should be of opinion that the testamentary power, engrafted upon the general Hindoo law by the custom of Bengal, which has been recognised and established by repeated decisions, must be taken to exist, subject to those restraints which the general policy of the law imposes on the exercise of testamentary power in general; and in particular that it cannot enable a Hindoo Testator to alter perpetually the legal course of succession to his property by making it pass for all time to those who, taking not as a legal but as substituted heirs, would, according to our phrase, take not by descent but by purchase. But, in truth we are bound to hold this, unless we are prepared to overrule the decision of the Court when presided over by the late Chief Justice in *Luckunchunder Seal v. Kooramoney Dossee* (1 Boulnois). In that case, the Court, in the first instance, dismissed the Bill of the Plaintiffs, who claimed by virtue of a disposition very similar in its terms to the present; and ultimately and on a re-hearing, upheld the disposition only in respect of the property which was to be governed by the law of the Testator's domicile; it having been proved that he died domiciled at Chinsurah whilst Chinsurah was still a Dutch Factory, and that the Roman-Dutch law which had been introduced into the settlement recognised the validity of such a disposition. It is, however, contended, that we can mould the clause so as to give effect to the Testator's intentions within the limits in which, without trenching on the rule against per-[79]-petuities, he might alter the course of succession; and that we ought to do so by construing the clause as one giving estates for life only to his son, Krishnomungul, and after him to his three sons, of whom all, including the Plaintiff's husband, are admitted to have been born in the lifetime of the Testator. But this would be a very arbitrary proceeding, and tantamount to making a new Will for the Testator. Nor do we see how it could be done according to the doctrine of Cy-pres, or any of the other English rules of construction which are so much discussed in the case of *Monypenny v. Dering*, supposing that authority to be applicable to the construction of a Hindoo Will. There is nothing here which in terms cuts down the interest to be taken by the grandsons to a life-estate; and the observations of Lord St. Leonards in the report of *Monypenny v. Dering* (2 De G. Mac. and Gor. 176), upon the third point submitted to him are very applicable to the argument addressed to us. Again, it is to be observed, that the gift to grandsons is a gift not to the son's, Krishnomungul's, nomination, but to a class of which many members might have been born after the Testator's death; and to such a gift, if we are to decide this case by English rules of construction, the principle established by *Leake v. Robinson* (2 Mer. 363), would apply. We could not split into portions the bequest to the class, and say that those members of it who were born in the Testator's lifetime should take for life only, and that other members of the same class should take a different estate. We are, however, always exceedingly unwilling to apply the technical rules of construction derived from the English law to a Hindoo Will. We would embarrass ourselves neither with those invoked for the De-[80]-fendants and supposed to be supported by the case of *Monypenny v. Dering*; nor with the rule in Shelley's case which was called in aid by the learned Counsel for the Plaintiff. We would endeavour to collect the Testator's intention from the terms used by him; and then consider, whether it is

within the testamentary power, limited, as we think that must be by the general policy of the law. We cannot see that the Testator has made any distinction between his grandsons, his great-grandsons, or the remoter descendants comprised in the terms, 'et cetera heirs.' All are to inherit their ancestor's share according to the Shasters, or Hindoo law, modified only by the exclusion of the females or the descendants of females. Therefore, the object which he has in view is to create for his own property as long as he has any descendants in the strict male line, a new course of descent. That object is, we think, beyond the scope of the testamentary power recognized by law, and must, therefore, fail. The only other admissible construction would be one which would confine the operation of the provision in question to the demise of the sons (the first takers). But on that, as upon the former construction of the Will, Hurrymohun would take an interest in his grandfather's estate which is descendable to the Plaintiff as his widow and heiress. The remaining question is, what is the amount of her share? On her part it is contended that she is entitled to one-third of six-tenths. On the other side it is contended that if the disposition contained in the fifth clause fails in part, it must fail altogether, and that she can claim only one-third of one-fourth. It appears to us that the disposition in favour of the two elder sons may well take effect, [81] although the attempt to make the shares descend otherwise than according to the course of legal descent has failed. The inequality of the shares is altogether independent of the manner in which they are limited to descend. The intention which dictated the one disposition is wholly distinct from the intention which dictated the other. We have had more doubt whether this division was to take effect, except in the case in which no agreement and unanimity should exist among his heirs; and, therefore, whether, if it appeared that his sons and grandsons had continued in all respects a joint and undivided Hindoo family, the widow of a grandson could come in and insist, under this clause, upon having a larger share than that which the law would have given her had the Testator left his estate to descend to his sons in equal shares. It is, however, suggested in the answer, though not proved, that there has been a partial division of the accumulations, and that the *status* of the family is not exactly that of an undivided Hindoo family. We think it desirable before we finally decide to what share the Plaintiff is entitled, to ascertain by the inquiries which we shall direct, what, if anything, has been done under the clause in question."

Some time after this decree, Manickchand Bysack died intestate, and, by an Order of the Supreme Court, the suit was revived against Koonjobeharry Bysack, Goverdhone Bysack, Choytundoss Bysack, Shadoochurn Bysack, and Gobind Doss Bysack, his sons and heirs.

The present appeal was brought from the decretal Order of the Supreme Court of the 4th of August, 1857.

No appearance having been put in for the Respondent, the appeal was heard *ex parte*.

[82] Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—As the parties to the suit are Hindoos, the Court below was bound to decide the questions of law raised according to the principles of Hindoo law and usage in force in Bengal. By Statute, 21st Geo. III., c. 70, the Hindoo law is made a part of the law of Bengal. This proposition is admitted by the Court in their judgment in establishing the power of a Hindoo in Bengal to make a Testamentary disposition of real and personal estate, ancestral or self-acquired, a fact which cannot now, whatever doubt formerly existed, be questioned, as the Courts in India and this Tribunal have recognized such a power. F. Macnaghten's "Cons. on the Hindoo Law," pp. 77, 316, 331 and 361. Strange's "Hindoo Law," vol. i. p. 254, vol. ii. p. 438 (Edit. 1830). W. H. Macnaghten's "Princ. of Hindoo Law," p. 34. *Juggomohun Ray v. Sreemutty* (Clarke's Rules and Orders of Sup. Court of Calcutta, p. 105). *Rewun Persad v. Mussumat Radha Beeby* (4 Moore's Ind. App. Cases, 137). *Mullick v. Mullick* (1 Knapp's P.C. Cases, 245). *Bahoo Janokey Doss v. Binabun Doss* (3 Moore's Ind. App. Cases, 197). *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526). It is true this proposition was admitted by the Court in their judgment, yet the Court in establishing the Will in fact, though perhaps inadvertently, indirectly applied to it the peculiar doctrines of the English law against perpetuities; doctrines of a technical character, and not founded on any principle

of general jurisprudence. But, we insist such a doctrine is unknown to the Hindoo law, as it is, reasoning by analogy to the Civil law prevailing in Holland or Scot-[83]-land. No rule of English law, which is *jus positivi*, is to be applied for convenience' sake, to restrict or restrain the operation of the Hindoo law. It cannot be urged that, because the English law in Bengal is administered to British-born subjects, there is any reason to apply its technical rules to Hindoos. As the Supreme Court was dealing with the Will of a Hindoo, the limitations contained in that instrument ought to have been considered by the Court without reference to the doctrine of the English law against perpetuities. But, assuming that the Will is to be construed with reference to the particular doctrines of English law regarding perpetuities in a limitation under a Will, the devise, we submit, is not too remote, and the Court ought to have construed the Will as giving estates for life to Krishnomungle Bysack, and after him to his other three sons, who were all, including the Respondent's husband, born in the Testator's lifetime. Now, if the sons took only a life estate, how could the Respondent's husband take more than a life estate? The true question really is, whether it was a good bequest to the idol. The Testator's moveable and immoveable estates are by the Will settled on the family idol by way of religious trust. An endowment for religious objects is valid by the Hindoo law, and will be carried into effect by the Courts in India. *Elder widow of Raja Chutter Sein v. The younger widow of Raja Chutter Sein* (1 Ben. Sud. Dew. Rep. 180), *Radha Bullubh Chund v. Juggut Chunder Chowdree* (4 Ben. Sud. Dew. Rep. 151), *Bhovanee Purshad Chowdree v. Rancee Jugudrumbha* (4 Ben. Sud. Dew. Rep. 343), *Ram Sunder Ray v. Heirs of Raja Udwant Singh* (5 Ben. Sud. Dew. Rep. 210), [84] *Mullick v. Mullick* (1 Knapp's P.C. Cases, 245), *Sibchunder Mullick v. Sreemutty Treeporah Soondry Dossee* (1 Fulton, 98), *Mohunt Gopal Dass v. Mohunt Kerssaram Dass* (10 Ben. Sud. Dew. Rep. 250). If the question is to be decided by English law, it would be hardly possible, reading the fifth clause in connection with the other clauses in the Will, to doubt, that the Testator gave estates for life *inter se* to his sons with cross remainders to the survivors, if any one died without male issue; therefore, on the death of the Respondent's husband his share would go to his surviving brothers to the exclusion of the Respondent as his heir. The Respondent, as widow of Hurrymohun, one of the Testator's grandchildren, is not entitled under the Will to any share of the estate of the Testator, either in the corpus as it stood at the time of her husband's decease, or to any part of the accumulations or surplus income thereof; and the declaration of the Court to that effect was erroneous, as she was only entitled to maintenance. *Sreemutty Soorjeemoney Dosse v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526) is distinguishable from the present case. There the widow was held entitled to the profits of an estate which had accumulated during the life of her husband; but in that case there was no direction in the Will that the family was to remain joint in estate, and, therefore, nothing to imply that the accumulations should become increment to the corpus. Here, on the contrary, the surplus profits are to be added to the corpus, and the Testator provides that in case of disagreement the surplus profits should be divided, [85] which state of things did not exist in that case. Lastly, we contend that directions as to taking the accounts were improper.

Their Lordships' judgment was delivered, as follows, by

The Lord Justice Turner.—The question in this case ultimately resolves itself, as their Lordships think, into a question of the construction to be put upon a Hindoo Will; and it may not be improper to observe that, with reference to the testamentary power of disposition by Hindoos, that the extent of this power must be regulated by the Hindoo law.

The first point which arises on the construction of this Will, is, whether, according to the true intent of the Will, the idol for whom the property is granted was intended to take absolutely.

Now, a reference to the second, third, and fifth clauses of the Will lead us to the conclusion, that although the Will purports to begin with an absolute gift in favour of the idol, it is plain that the Testator contemplated that there was to be some distribution of the property according as events might turn out; and that he did not intend to give this property absolutely to the idol seems to their Lordships to be

clear from the directions which are contained in the third clause, that after the expenses of the idol are paid, the surplus shall be accumulated; and still more so from the fifth clause, by which the Testator has provided for whatever surplus should remain out of the interest of the property, the expenses of the idol being first deducted. It is plain, that the Testator, looking at the expenses of the idol, was not con-[86]-templating an absolute and entire gift in favour of the idol.

The rights, therefore, of the idol being thus disposed of, the question then arises, what was to become of the property, subject to the payments which were to be made for the expenses of the idol. And here we have two divisions of the Will. The Testator evidently contemplated two events: one, in which the family was to continue joint and undivided, and the other, in the event of the family becoming divided. Now, with reference to the second branch of this Will, the event of the family becoming divided, that state of circumstances does not appear to have arisen. There has been no division at all of this family, unless the division of the income during the few years which followed upon the death of the Testator up to a short period after the death of Hurrymohun Bysack constituted a division of the family, and their Lordships are very clearly of opinion, that the mere division of income, for the convenience probably of the different members of the family, did not amount to the division of the family.

In considering the case, therefore, we may for the present (whatever questions may hereafter arise upon it) consider this family as an undivided family; and the point for determination is, what are the rights of these parties in the property? Considering the family as a joint and undivided family. Now, in that case, it is plain, that the Testator contemplated that the property was to go in the male line. He says, that he has four sons, that his property shall never be divided and partitioned amongst them, and that the sons and their offspring, that is to say, their "sons and grandsons, heirs in succession," shall not have the power of [87] alienating any of the property by deed or gift, nor shall the property be liable to sequestration for their debts. The Testator, then, having intended that the property should pass from the four sons to their sons and to their grandsons, the event which has happened is this, one of the sons died leaving three sons, who accordingly came into his share, and one of those three sons afterwards died leaving no male issue.

Now, what is the consequence of that? There are directions in the Will that the property is to go in the male line to the sons and their descendants, but one of them dies leaving no issue in the male line, and the Will is silent as to what the disposition of the property is to be in that event. It is a share of the property of the joint family, descendable, therefore, to the heir to whom that property would go in the absence of any provision made by the Will. The consequence, therefore, as it appears to their Lordships, must be, that upon the death of Hurrymohun, this property must have descended, and that the one-third of one-fourth passed to Hurrymohun's heir, his widow, so far as she is entitled to her widow's estate.

What their Lordships propose to do is, to declare that, according to the true construction of the Will, the property granted to the idol is effectually granted for the benefit of the Testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to the provisions for maintenance in the Will contained, and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the [88] male line, as a joint family. It appearing that Krishnomungle, one of the sons, died, leaving three sons, and that Hurrymohun died leaving no male offspring, the family continuing joint up to the death of Hurrymohun; their Lordships also propose to declare, that upon the death of Hurrymohun, his share of the joint estate, subject as aforesaid, passed to the Respondent, his widow and heir, and she is entitled to one-third of one-fourth as widow and heir. Their Lordships think that, under the circumstances of this case, it would be better not to direct the accounts to be taken in the mode in which the Court has done, but simply to give liberty to apply, in order that the parties may, as they probably will do if they are well advised, come to some arrangement upon the subject of the amount. There will be liberty to apply as to the amount, or otherwise as the parties may be advised. And, it appearing, that there has already been an Order made for the maintenance of this lady of

Rs. 100, a month, that Order must be continued, and she will account for what she has received under that Order as against what may be coming to her upon the account to be taken. The better course would be, to discharge the Order which has been made by the Court below, and simply to make the declarations which I have suggested with a limit and a direction to continue the maintenance, and that she shall account for what she may have received under it.

Their Lordships think that the costs of the appeal may very properly be given out of the estate.

The following report was made by the Judicial Committee, and confirmed by Her Majesty's Order [89] in Council. "Their Lordships are of opinion that it ought to be declared that, according to the true construction of the Will of the Testator, the whole of the Testator's moveable and immoveable property was, and is, well and effectually given for the benefit of the Testator's four sons in his Will named, and their offspring in the male line, as a joint family, so long as the family continues joint, subject, however, to the performance of the acts, business, ceremonies and festivals, and to the provisions for maintenance in the Will contained, and that the surplus income of the property after answering such performance and provision was and is, in like manner, well and effectually given for the benefit of the four sons and their offspring in the male line, as a joint family, so long as the family continues joint. And, it appearing, that Krishnomungle Bysack, one of the four sons, died leaving three sons, their Lordships report as their opinion, that it ought to be declared by Your Majesty, that each of the three sons became entitled to a third part of one-fourth part of the property, and of the accumulation thereof. And, it appearing, that Hurrymohun Bysack, one of the three sons of Krishnomungle Bysack, died leaving no male offspring, and that the family continued joint up to the time of his death and still continues joint: their Lordships do further report as their opinion, that it ought to be declared by Your Majesty, that upon the death of Hurrymohun Bysack, the third part of the fourth part of the property and accumulations to which he became entitled as aforesaid passed to the Respondent, Sreemutty Juggutsoondree Dossee, as his widow and heir, and Sreemutty Juggutsoondree Dossee accordingly became and is entitled as such widow and [90] heir, to the third part of the fourth part of the property and accumulations. And their Lordships are further of opinion, that Sreemutty Juggutsoondree Dossee ought to be at liberty to apply to the Supreme Court at Calcutta as to the accounts and otherwise as she may be advised; and their Lordships are of opinion, that the Order made in this cause by the Supreme Court of Calcutta, bearing date the 28th of July, 1857, ought to be continued until further order. And their Lordships do further report, that in case Your Majesty should be pleased to approve of this report and to Order accordingly, such Order ought to be without prejudice to any question as to the rights of Sreemutty Juggutsoondree Dossee of and when the joint family shall be separated."

[See *Bai Motivahoo v. Bai Mamoochai*, 1897, L.R. 24 Ind. App. 104.]

[91] RAJMOHUN GOSSAIN and JUGMOHUN GOSSAIN.—*Appellants*: GOURMOHUN GOSSAIN,—*Respondent* * [Dec. 2 and 3, 1859].

On appeal from the Sudder Dewanny Adawlut, Calcutta.

In a Ruffanamah, or deed of compromise of a suit between three sons, members of a Hindoo family, respecting the distribution of their father's estate, it was stipulated, that all "ancestral" property should be equally divided into four shares. Held, that the sense in which the word "ancestral" was employed

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner. Assessor,—The Right Hon. Sir James W. Colville.

was not confined to such property as the father had derived from his ancestors, but included "paternal" property, or such as had been acquired by the father by whatever title, and was possessed by him at the time of his decease.

A decree of an appellate Court in India, obtained after a compromise, held, in the circumstances, fraudulent, and set aside with costs.

The facts of this case, and the arguments, sufficiently appear in the judgment.

The appeal was argued by Sir Hugh Cairns, Q.C., and Mr. Maule, for the Appellants; and Mr. R. Palmer, Q.C., and Mr. Leith for the Respondent.

Their Lordships' judgment was delivered by

The Lord Justice Knight Bruce. -The parties to this litigation are three brothers, [92] the surviving sons of a Hindoo named Raghub Ram Gossain of Serampore, who appears to have been a person of considerable wealth. The Appellants here are the two younger of those three sons, the Respondent being the eldest. The object of the suit in which the appeal arises was to obtain possession of two-fourths of a landed property, called Lot Harit, which, at the time when Serampore was a Danish settlement, was out of that jurisdiction, and was, as it still is, within the jurisdiction of the Calcutta Courts, the deceased having had considerable property, and probably the bulk of his property, within the jurisdiction of the then Danish Court of Serampore.

The Respondent, the eldest son, admits the title of the Appellants to two-fourths of this estate which they claim, subject only to the important qualification that he claims to have a pecuniary charge on the property to a considerable amount, in respect of having, as he says, paid the price of it, the fact being that the estate was purchased by the father in the name of the eldest son; and the question raised is, whether the money, which was in fact paid to the seller, was or was not advanced by the eldest son (in whose name the purchase was made) for the father.

He alleges that the money was paid by him, and that he is still a creditor of the father for it; and the alleged charge in respect of it, is, as has been said, the only objection which he makes to the claim of the appellants. The Appellants deny that the money was paid by the Respondent, and further insist that, whether it was or was not paid by him, all questions relating to that alleged payment were formerly the subject of dispute, and settled by adjudication; and, [93] therefore, that if anything was ever due to him on the security of that property, nothing has remained due.

This, the only substantial point in dispute, was decided, in the first instance, in favour of the Appellants, by the proper Court of original jurisdiction, the Zillah Court of Hooghly; but on appeal to the Sudder Dewanny Adawlut, that decision was reversed, and judgment given in favour of the Respondent, which has brought the Appellants here.

The circumstances in which the claim arose were these. The eldest son, the Respondent here, appears on the death of his father, which took place some time before the year 1840, to have taken possession of all his property; at least, he was believed to have done so, and treated as having done so. In consequence, litigation of various kinds arose in the family, on the part of the present Appellants, on their own behalf, and also on behalf of the widow of a brother, and probably of their sisters also, on one side, and the present Respondent, the eldest son, on the other. Two of these suits were brought in the Danish jurisdiction at Serampore; the third, relating to the immoveable property out of that jurisdiction, namely, the property now in dispute, Lot Harit, was within the Calcutta jurisdiction. The result of these three litigations were three decrees, one in the Danish Court at Serampore, of the 6th of November, 1840, another in the same jurisdiction of the 14th of May, 1841, and the other in the Zillah Court of Calcutta, of the 31st of August, 1841. They were all in favour of the present Appellants, including not only the adjudication that a large sum of money was due from the eldest son, but also deciding for their title to [94] shares of Lot Harit, the estate within the Calcutta jurisdiction.

One of these decrees, that of the 14th of May, 1841, relating, it seems, to family jewels and other such specific goods, was not capable of appeal, or was not appealed from, and is out of the question; but the eldest son, the Respondent here, did appeal from the decree of the 6th of November, 1840, to the proper Court in Denmark, and

did appeal from the decree of the Zillah Court of the 31st of August, 1841, to the proper Sudder Court at Calcutta.

A family quarrel on so extensive a scale excited general attention, and an endeavour was made in a friendly and kind manner by the Governor of Serampore then under the Danish rule, or a gentleman of considerable station there, to effect a settlement of the disputes, and at last it was done. The settlement was effected by an agreement, or Ruffanamah, made on the 4th of August, 1842, in these words:—
 "Serampore, August 4th, 1842.—The long-pending dispute between Baboo Gourmohun Gossain and his brothers having occasioned great scandal and inconvenience, the Honourable Mr. Hansen, the Governor of Serampore, being exceedingly anxious to terminate these differences, called both parties before him on the above-mentioned date, and having required them mutually to explain their wishes, prevailed upon them to agree to a settlement in the following terms:—

"1. That all ancestral property should be equally divided into four shares.

"2. That the sum of Rs. 15,000, be paid to the elder brother, Rajmohun.

"3. That the sum of Rs. 15,000, be paid to the [95] third brother, Jugmohun, from which is to be deducted the sum of Rs. 5640, already paid him for the purchase of a house.

"4. That in reference to the share of the fourth brother, deceased, which amounts to Rs. 15,000, Gourmohun agrees to pay his widow monthly interest at the rate of five per cent. per annum, and also to give a bond in the Serampore Court for the payment of the principal of Rs. 15,000, if she should adopt a son, when that son comes of age. Should she die without adopting a son, the sum of Rs. 15,000 will be divided according to law into three parts among the three brothers, or their surviving families; and as security for this bond, will pledge property in Serampore to the satisfaction of the Court.

"5. That the sum of C. Rs. 10,000, be paid to the widow of the late Raghob Ram Gossain, to be disposed of according to her own wishes, in full of all claim; and in case of her dying without making any disposition of it, Gourmohun relinquishes all claim to it.

"6. That the sum of C. Rs. 12,500, be paid by Gourmohun Gossain, on account of the house built by him after the death of his father; and that the house, together with the piece of ground in front of the house, do, after the payment of this sum, remain his sole and entire property; his brothers and their family agreeing to quit it, including Hurree Chootar's ground, consisting of fourteen cottahs.

"The sum which Gourmohun Gossain thus engages to pay, to settle all differences with his family, stands thus:—

	Rs.
"To Rajmohun Gossain	15,000
"To Jugmohun Gossain	15,000
"Less for the house according to the deed of sale	5640
	<hr/> 9360
"To the widow of the late Raghob Ram Gossain	10,000
"To the sisters	10,000
"For the house in full	12,000
	<hr/> Rs. 56,860

"Of this sum Gourmohun Gossain engages to pay in cash the sum of Rs. 35,000, within thirty days from the signing of this document, and the remainder of this sum, namely, Rs. 21,860, at the end of eighteen months from this date, with interest at the rate of 5 per cent. per annum, giving security for the same.

"In witness thereof the parties have hereunto set their hands this 4th of August, 1842, Gourmohun Gossain, Rajmohun Gossain, Jugmohun Gossain. Signed in our presence, P. Hansen, John Marshman, Hurchunder Laheree, Krishno Comar Laheree."

Before proceeding to mention the next document, it should be observed as to the remarks which have been made upon the word "ancestral," contained in the first clause after the introductory part of the Ruffanamah, that their Lordships are of opinion that "ancestral," as here used, is not confined to such property, if any, as the father had derived from his father, or from any ancestor; but that "ancestral"

is here employed (and so the Respondent himself, upon more than one occasion, has shown that he [97] understood it), in the sense of "paternal," that is, as meaning property of the father, in whatsoever manner, or by whatsoever title, the father had acquired it; and, therefore, that "ancestral property" means property derived from the father; at least, immoveable property.

Some months after this agreement, namely, in February of the year 1843, mortgage bonds, as we may call them, were executed by the Respondent, to his brothers respectively: one (in the same form, *mutatis mutandis*, as the other) was thus:—"Know all men by these presents, that according to agreement concluded on the 4th August, 1842, between me and my brother, Jugmohun Gossain and others, I have been bound to pay to Jugmohun Gossain, as his share of ready money belonging to our late father's estate, the sum of Rs. 15,000, besides one-third of a sum of Rs. 12,500, that according to the agreement was to be paid by me on account of the dwelling-house in this town; and Jugmohun Gossain having on the 15th January, this year, from the Court of Serampore, received this one-third of the above sum of Rs. 12,500 on account of the dwelling-house, and in part of the above Rs. 15,000, the sum of Rs. 8442, partly by value of a house, and partly out of the sum of Rs. 35,000, deposited by me in Court on the 2nd of September, 1842. I herewith, in conformity with the agreement, execute to him the present deed of mortgage, whereby I promise to pay to him the remaining part of the last mentioned sum, being Rs. 6558, on or before the 4th of February, 1844, together with interest at five per cent. from the date of the agreement, 4th August, 1842, and until the day of payment; and to secure him the payment [98] thereof, I pledge and mortgage to him, as second mortgage, the whole of my landed property, with building and appurtenances, situated within this settlement, next after the sum of Rs. 6558, for which I have this day executed a deed, a mortgage to Rajmohun Gossain. Further, I do herewith, in conformity with the agreement, bind myself to allot to him, Jugmohun Gossain, before the 4th of August, 1843, his one-fourth share of our ancestral landed property, with appurtenances and buildings, that is to say:—

"1st. All property situated within the settlement of Serampore, which at present stands registered in the joint name of mine and either of my brothers, Rajmohun Gossain and Jugmohun Gossain, or the late Nundomohun Gossain, including the services of the family deity, Sree Sree Radhamadhubjee Thakoor, with the exception of the dwelling-house mentioned in the agreement, together with the ground belonging thereto, as per pottah No. 1379, and also the ground formerly belonging to Hurry Chootar, obtained by the decree of the Serampore Court of the 28th of August, 1841.

"2nd. The ancestral Talook, called Hooda Gopaulsingapore, in Umursee in the Zillah of Midnapore.

"3rd. The patrimonial Talook, called Lot Harit, in the Zileah of Hooghly, together with the profits from the 4th of August, 1842.

"4th. Our patrimonial share of the house called Bassabautee, in Burabazar, Calcutta. (Signed) Gourmohun Gossain. Serampore, February 6, 1843."

It need not be said that the property named in clause 3, Lot Harit, is that of which two-fourths are now in dispute; and by the effect of the agreement, [99] and these two mortgage bonds, two fourths of that property, among others, were allotted to the two younger sons.

It seems that some time after this, the Respondent was desirous of obtaining, and, almost of course, perhaps, for that reason, the Appellants were desirous of not giving, a release, and accordingly, the Respondent instituted a suit for the purpose of compelling them to give it; and he obtained a decree against them in the Court of First instance. The adjudicating part of the decree being in these words:—

"It is, therefore, directed, that when the Plaintiff, Gourmohun Gossain, complies with the conditions of the Ruffanamah, of the 4th of August, of the year 1842, filed in the present suit, and besides pays to Puddomonee Dabee, Rs. 438. 14a., the costs of suit, No. 109, of the year 1838, and pays to Oornopoorno Dabee, Rajmohun Gossain, Jugmohun Gossain, Ruddumbenee Dabee, Dimla Dabee, Madhobee Dabee, Proshunno Dabee, C. Rs. 2003. 2a., the costs of civil suit, No. 969, of the year 1838, then he will be exonerated from the claims of the said individuals on account of the paternal

property which they have inherited as the heirs of their father, Raghub Ram Gossain, deceased. Both the parties will pay their respective costs of the present suit."

The present Appellants appealed from that decision, and the decision was affirmed in the year 1849. The judgment of the Court is in these words:—"No attempt has been made to show that the settlement was partial or unfair. The mere fact of compromise for a less amount than was legally due, cannot of itself impugn the settlement: for it is in evidence that great difficulty was experienced in [100] executing the decree, and an appeal from it to Denmark, attended with ruinous expense, had been preferred; and it was ordered, that the decision of the Court of Serampore should be affirmed, and the appeal dismissed; and in consideration of the special circumstances of this case, each party pays his own costs of the suit."

Now, it is with documents such as these, altogether unimpeached, before us, that the Respondent contends that the true meaning of what took place in the years 1842 and 1843 was this: that though he was to divide Lot Harit, yet he was to divide it without prejudice to his claim as an alleged mortgagee, or holder of a lien, as we should call it, and that all that he was to give up was what we should call the equity of redemption, subject to that. Their Lordships, however, are of opinion, that the documents themselves, whether the rest of the evidence be or be not considered, afford a plain and complete contradiction to that allegation.

Their Lordships are of opinion, that such a construction of the documents as would leave the Respondent in possession of a pecuniary charge upon Lot Harit is unreasonable and inadmissible.

If, therefore, there were no other difficulty in the case, the title of the Appellants would be plain and clear, viz., to have two-fourths of Lot Harit, and an account of the wassilat in consequence, as originally decreed. But this difficulty has arisen. Notwithstanding the arrangements of August, 1842, and February, 1843, the Respondent thought fit, but as their Lordships think against all propriety, to prosecute an appeal against the Zillah decree of the 31st of August, 1841, which had given to the Appellant's shares of [101] Lot Harit. Accordingly, that appeal having been brought up, and substantially unopposed, the Respondent obtained from the Sudder Court, on the 30th of March, 1843, a decree, the ordering part of which is in these words:—

"Therefore it is finally ordered, that the Appellant's appeal be decreed, and the decision of the Judge amended; and the Plaintiffs, Respondents, on the condition that if they deposit in the treasury of the Court from this date, within the period of six months, the purchase-money of a 12 annas share of Talook Harit, then they are to be put in possession of a 12 annas share, without wassilat, and the whole of the costs of this Court, according to the account of Khurcha Nuves (Accountant of costs), with interest thereon, from this date up to the date of realization, be entered against Respondents. And if the Appellant has deposited the costs of the Zillah Court, then he is to present a petition for its return, and the order for its payment, with interest, up to the date of realization, according to the general Order of this Court dated the 3rd of June, 1837, will be passed."

Of course the money was not paid, and the contention of the present Respondent is, that the decree of 1843, established the title which he alleges, and that as the money was not paid within the period prescribed by the decree, he is entitled to claim the property as his own in a manner analogous to a title by foreclosure; but, he says, that he is willing to submit to what we should call redemption.

Their Lordships, however, are of opinion, that the claim is entirely untenable.

Assuming (though their Lordships do not decide) that the decree of 1843, amounted to an adjudication [102] against the present Appellant's title, we think, that it was an adjudication obtained not only with great impropriety, but, in effect, by fraud; for it was plainly the duty, in every sense the duty of the present Respondent after the compromise (a compromise insisted upon by him) not to prosecute that appeal. Doing so, he did it at his own peril, for success could by no possibility benefit him, if his title, by reason of that success, should be properly impeached.

It is said that, on the assumption that the decree of 1843, is an adjudication against the present Appellant's title, the fraudulent nature of the decree has not been put in issue, and it has not been in a proper manner sought to be set aside.

Their Lordships are not of that opinion. They are of opinion, that the fraudulent

nature of the Respondent's conduct in obtaining the adjudication is sufficiently put in issue by the original plaint in the case, and by the replication, in both of which it is impeached, and, as their Lordships view the matter, in a proper manner impeached, for fraud: and the decree of the Zillah Court treating it as a nullity against the title of the present Appellants was, as their Lordships consider, properly made, with costs, and ought to be restored.

If the Appellants have paid any costs under the decision of the Sudder Court, those costs should be repaid: and the present Appellants should have their costs of the proceedings in the Sudder Court, and of the appeal here, from the Respondent.

The humble recommendation of their Lordships to Her Majesty will be made accordingly.

[103] THOMAS EALES ROGERS.—*Appellant*. RAJENDRO DUTT, and Others.—*Respondents* * [June 27, 28, 1860].

On appeal from the Supreme Court at Calcutta.

In the case of damage occasioned by a wrongful act, though such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action [8 Moo. Ind. App. 131].

It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, *i.e.*, it must prejudicially affect him in some legal right. The fact that it will, however directly do him harm in his interests is not enough [8 Moo. Ind. App. 135, 136].

An order issued by the Superintendent of marine, in his official capacity, to the Bengal Pilot service, employed by the East India Company on the Hooghly river prohibiting them from allowing a particular steam tug to take any ship in tow of which such pilots should have pilotage charge, made in consequence of what the Superintendent deemed an exorbitant demand on the part of the owner of the steam tug, whereby such owner was deprived for a time of the profits of being employed by the pilots in charge of ships going up or down the river Hooghly; in the absence of malice, alleged or to be inferred, is not such a wrong as would sustain an action by the owner of the tug against the Superintendent of marine, the officer of the Government, issuing such order.

Upon appeal the judgment of the Supreme Court at Calcutta maintaining the action, reversed, on the ground that the Government had the same rights as a private individual in declining to employ the tug if the charges were too high [8 Moo. Ind. App. 133, 134].

In the action, the Court at Calcutta gave damages, the amount of which was under the appealable value prescribed, by the Calcutta charter. As an important point of law was involved, special leave to appeal was upon petition, granted [8 Moo. Ind. App. 120].

This was an action brought in the Supreme Court at Calcutta, by the Respondents against the Appellant, under the following circumstances:—

The appellant was the Superintendent of marine at Calcutta, an official Government situation under [104] the East India Company, and in that capacity had the control of the whole of the Marine department under Government, including the superintendence and control of the Bengal pilots employed by the Government, who were the only pilots who are engaged in piloting vessels on the river Hooghly. There was no legal obligation to employ a pilot, but from the dangerous nature of the river no ship could be safely navigated up or down unless in charge of a pilot. Tugs were required for bringing vessels up the river. The Respondents were the owners, or part owners, of a steam tug called the *Underwriter*, which was employed in tow-

* Present: Members of the Judicial Committee,—The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor,—The Right Hon. Sir Lawrence Peel.

ing vessels on that river. It appeared that there were two rates of payment for the steam-tugs employed, the first called the Government certificate, according to a tariff, for the time employed, and the second by a special contract.

On the 20th of September, 1857, whilst the Indian mutiny was raging in full force, and every exertion of the Indian Government and its officers was being made to face the difficulties in which they were placed, Her Majesty's ship "with *Belleisle*," with troops on board destined for Calcutta, arrived at the mouth of the river Hooghly; and on the 19th of that month, the Captain of the *Underwriter*, having understood that she wanted steam, went on board the *Belleisle*, and entered into a negotiation with the Captain of that ship as to the terms upon which she should be taken in tow. The Captain of the *Underwriter* required at first Rs. 3000 and then Rs. 2500, and produced a contract ready prepared, for the Captain of the *Belleisle* to sign. This, however, he refused to agree to: when the *Underwriter* left the *Belleisle*, and carried on shore a [105] telegram from the Captain of the *Belleisle* to Mr. Beadon, the Secretary to the Government of India, asking to be allowed to employ the *Underwriter*, but without stating the terms demanded by her Captain. Beadon replied to this communication, authorising Captain Rodd of the *Belleisle*, to employ the *Underwriter* under Government certificate, which would have entitled her to a certain fixed rate per diem, according to the work done; and, on the morning of the 20th, the Captain of the *Underwriter* having proceeded on board the *Belleisle*, was informed of this by Captain Rodd. He, however, refused to tow upon certificate, and still required a contract for Rs. 2500: and thereupon Captain Rodd again telegraphed to Beadon, and requested instructions. This message Beadon sent at once to the Appellant, with a note, telling him shortly what had happened, and asking what, in the circumstances, had better be done, when the Appellant, considering the charge exorbitant, and that it was an attempt to make a market of the necessities of the Government, at so critical a period, and that it was of great importance that some step should be taken to prevent the recurrence of similar attempts, went to Beadon and expressed this to him, as his opinion, and that he thought the better course was to inform the agents of the *Underwriter*, that if they declined to take the *Belleisle* in tow, an order would be issued, prohibiting the pilots of the port, who should be in charge of any vessel, from taking steam of the *Underwriter*. Beadon, having approved of this course, Hill, the officiating first assistant, made a communication to that effect to the agent of the *Underwriter* at Calcutta, and the Captain of the *Belleisle*, [106] in the circumstances, refused to take steam of the *Underwriter*, except under Government certificate.

On the 22nd of September, 1857, the Appellant, in his official capacity, directed an order to be issued in the terms stated by him to Beadon. This order was as follows:—"Steamer *Underwriter*. No. 2629.—For general information. Memo.—Officers of the Pilot service are, under orders of the Superintendent of marine, prohibited from allowing the steamer *Underwriter* to take any ship in tow of which they have pilotage charge. (Signed) J. S."

Upon the issuing of the order, the Respondents applied to the Government upon the subject, complaining of the order, and after some correspondence, the Government, on the 19th of October, 1857, directed the order to be withdrawn. On the 13th of November, 1857, an action was brought by the Respondents in the Supreme Court at Calcutta against the Appellant.

The plaint was in form, an action on the case, and pleaded, in substance, the facts above stated, charging the Appellant with wrongfully and injuriously issuing the order in question. It did not contain any averment of malice; but damages were claimed for the alleged non-employment of the *Underwriter* during the period the order was in force. The Appellant pleaded not guilty, and other pleas not material to mention. The cause came on for trial in the Supreme Court at Calcutta, on the 3rd of March, 1858, before Sir James W. Colville, Chief Justice, and Sir Charles M. Jackson, Puisne Judge: when the above facts were in substance proved, all malice on the part of the Appellant being negatived. Evidence was given that, during the period the order was in force, the *Un*[107]*-derwriter* had not been engaged in towing vessels in the course of her ordinary business, but on the occasion of the refusal to tow the *Belleisle*, she afterwards took in tow a private ship drawing nine inches less water than that ship for Rs. 1600. At the close of the Respondents'

case, the Appellant's Counsel applied for a nonsuit on the ground that no cause of action was disclosed: the Court found a verdict for the Respondents on all the issues, with Rs. 6624 damages, leave being reserved to the Appellant to move to enter a nonsuit, on the ground that no action was maintainable, or to reduce the damages to a nominal sum. A rule *nisi* was afterwards granted, when the questions reserved came on for argument, and the rule was discharged on the 19th of March, 1858, with costs: the Court holding that the plaint was established by the evidence, and that it disclosed a good cause of action.

The judgment of the Court was delivered by the Chief Justice, Sir James W. Colvile, as follows:—"In this action on the case, the Plaintiffs have recovered a verdict for Rs. 6624, subject to the questions raised by the rule of which we have now to dispose. These questions are, first, whether judgment ought not to be arrested, on the ground that the plaint does not disclose a legal cause of action? Secondly, whether the verdict entered for the Plaintiffs ought not to be set aside, and a nonsuit entered, on the ground that the Plaintiffs have not proved any legal cause of action? Thirdly, whether, assuming a legal cause of action to be alleged and proved, the Court was justified in giving more than nominal damages? The first question, of course, arises on the record: the others, on [108] the evidence given to meet the plea of not guilty. Besides that plea, there are only two traverses on the record raising issues on which the finding for the Plaintiffs is not impeached by the rule; if, therefore, a legal cause of action has been alleged and proved, the Plaintiffs are necessarily entitled to recover something, since nothing is pleaded by way of confession and avoidance. I have somewhat changed the order of the questions raised by the rule, because it is more convenient to consider, first, that which arises on the record, since, if that is determined in the Defendant's favour, it will be unnecessary to consider the effect of the evidence. The plaint is in case. It states, by way of inducement, first, that, at the time of committing the grievance, the Plaintiffs were the owners of the steam-vessel the *Underwriter*, which had theretofore been, and then was, profitably employed by them as a steam-tug between the mouth of the river Hooghly and the port of Calcutta. Secondly, that the Defendant, as a Superintendent of marine, was invested with and possessed of the chief authority and control over all the officers of the Bengal pilot service employed by the East India Company on the said river, for the purpose of piloting vessels thereon to and from the port of Calcutta. Thirdly, that the officers of the Bengal pilot service are the only pilots who upon the river exercise the trade and calling of pilots, and take pilotage charge of inward and outward bound ships; and that, in consequence of the perils of the navigation of the said river, no ship can with safety proceed inwards or outwards thereon, or be duly navigated, except the same be in charge of a competent pilot. It then alleges that the Defendant, contriving and intending to injure the Plaintiffs, and [109] to prevent them from continuing to employ their vessel in the manner before mentioned, and to deprive them of the profits resulting therefrom, wrongfully and injuriously issued and published a certain order, addressed to the officers of the Bengal pilot service, whereby the Defendant, as such Superintendent of marine, strictly prohibited them from allowing the said steam-vessel the *Underwriter* to take any ship in tow of which they, the officers of the Bengal pilot service, should have charge. It further alleges, that this order continued in force and unrevoked, and was obeyed by the officers of the Bengal pilot service, for a long space of time, to wit, from the 22nd of September to the 19th of October—and that, during all that space of time, the masters and owners of divers ships were desirous of employing the Plaintiffs' steam-vessel to tow their ships inwards and outwards on the river Hooghly, and would so have employed the same, but that they were prevented from so doing by the continuance of the said order, and the obedience thereto of the officers of the pilot service, so long as the same remained in force. *Per quod*, the Plaintiffs were for a long time, to wit, twenty-five days, and until the recall of the order, prevented from continuing to employ their said vessel in towing ships, and had been thereby deprived of the large profits which they would otherwise have made from such employment. It may be well to admit at once, because it will clear the ground of some of the arguments used, that this plaint does not allege either that the Defendant was under a legal obligation to furnish a pilot to every ship that required one, or that there was any contract between the Plaintiffs and the Defendant, or that

any contract [110] subsisting between the Plaintiffs and any other persons had been broken by the procurement of the Defendant. Therefore, the right of action, if it exist, cannot be rested on the breach of any public duty imposed by Statute or otherwise, or on the breach of any duty flowing from a contract between the parties, or upon the grounds recognized in *Lumley v. Gye* (2 Ell. and Bla., 216). But wrongs falling within one or other of these classes are not the only wrongs for which an action on the case will lie. *Gerhard v. Bates* (2 Ell. and Bla., 476), is a clear authority for the position, that if the wrong and the consequential loss are, to use Lord Campbell's phrase (*ib.* 490), 'clearly concatenated as cause and effect,' the action is maintainable, although it does not arise from any public wrong, or the neglect of any public duty, and the parties are entire strangers to each other, no privity subsisting between them. Have we, then, here alleged a tort, occasioning a loss to the Plaintiffs? The loss is clearly stated, but it may be *damnum sine injuriâ*; or, if the tort be established, the loss may not be sufficiently 'concatenated with it as cause and effect'; or, in other words, may be too remote to be the subject of an action. Now, if we turn to the definition of a tort in Broom's Comms., so often cited at the bar, we find that, if not founded on the violation of some special duty, public or private, it may be founded simply on the invasion of a legal right; and the fallacy in some of the arguments used for the Defendant, consisted in the erroneous statement, or in the absence of a clear perception, of the right which the Plaintiffs say the Defendant has invaded. That right is not the right to have a pilot, but the right to employ their vessels in towage: in other words, the right of exercising their [111] lawful trade or calling without undue hindrance or obstruction from others; and surely it cannot be contended that this is not one of the rights which the common law recognizes and protects! The contest between the House of Commons and the Crown, in the times of the Tudors and the Stuarts, which resulted in the Statute of Monopolies, and all the learned arguments in the great case of *The Monopolies*, in the reign of Charles the Second (10 State Trials, 312), assume the existence of the right. The only question was, the degree in which the asserted prerogative of the Crown could override it. Lord Coke's definition of a monopoly is, 'An allowance by the King, by his grant or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using, anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' The resolutions in *The case of the Taylors, etc., of Ipswich* (11 Co. Rep. 53), and in *The case of the Monopolies* (11 Co. Rep. 84), also assume the right of the subject to be protected in the exercise of his lawful trade. Again: if this right is not recognized and protected by law, on what principle do words spoken, though not actionable in themselves, become actionable if spoken of a man in his trade or calling? Therefore, that the Plaintiffs had a common law right to contract with the master of any vessel on the river who might be willing to engage the *Underwriter*, and to perform that contract by towing his vessel, cannot, we think, be denied. The difficulty in the case lies in the nature of the alleged invasion. The invasion, to be actionable, must, of course, be wrongful. Interference [112] with a man's trade by fair competition; as in the instance found in the authorities, of a new school established so as to draw away the scholars from an old school; is not actionable. The loss in such a case is, in fact, not caused by wrong, but by another's exercise of his undoubted right; and, in every complicated society, the exercise, however legitimate, by each member of his particular rights; or the discharge, however legitimate, by each member, of his particular duties; can hardly fail occasionally to cause conflicts of interest which will be detrimental to some. The question here is whether enough is stated on the face of this plaint to show that the Defendant's interference with the Plaintiff's trade was wrongful? Now, what appears on the face of the plaint? That the Defendant, by virtue of his office, had the power to control the pilots of the Bengal pilot service; but there were no other pilots on the river; that no ships can be safely navigated up or down the river unless it be in charge of a pilot; that the Defendant, with the intention of preventing the *Underwriter's* employment, issued an order forbidding the pilots from allowing that steamer to take any vessel in tow of which they should have charge; that the order was obeyed and remained in force a certain time, during which the Plaintiffs were, by reason of the order, prevented from employing

their steamer as a tug, and so hindered in their trade. It may be said that it is not the pilot but the Master whose business it is to engage towage, and, therefore, that the employment of the Plaintiff's vessel was not prevented by an order addressed to the pilot. But if this objection arise in arrest of judgment, the fair intendment from the third statement in the inducement is, we think, [113] that the order being operative upon, and obeyed by, the pilot, was necessarily operative upon the Master, because he, though not under a legal obligation to take a pilot, could not safely navigate his vessel without one, and could not get a pilot other than one of the Bengal service. Therefore, upon the plaint, we must assume that the Defendant, intending to injure the Plaintiffs in their trade, and having a power over the pilots of the port which he could effectually use for that purpose, did consciously use that power to that end, and so invaded the Plaintiffs' legal right. It cannot, by any fair intendment, be collected from the statements of the plaint that this was in the necessary or ordinary exercise of the Defendant's power as Superintendent of marine, or in the regular discharge of his duty as a public officer. *Prima facie*, it can matter nothing to the pilot, or the officer who supplies the pilot, by what steamer the vessel is towed to sea; and the injurious intention here alleged is, as it is in many other cases, of the essence of the action. Thus Baron Parke, in *Langridge v. Lory* (2 Mee and Wels. 531), speaking of actions on the case founded on deceit, says:—'A mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act produce damage to him, there is no question but that an action would lie. It may be said fraud and falsehood are *mala in se*; but the arbitrary abuse of power, to the wilful injury of another, is also *malum in se*. Assuredly, such a wanton exercise of power is less innocent than the act of shooting, which, in the ancient, as well as the more modern cases, reported in 11 East, pp. 571-4, became wrongful because done [114] with the intention of disturbing the Plaintiff's decoy. The judgment of Gibbs C. J., in *Sutton v. Clarke* (6 Taunt. 29), shows how a public officer, acting wantonly and oppressively in the exercise of an undoubted power, may become liable in an action on the case. But then it is said, that the damage is too remote; or, in other words, that the damage and the loss are not, in Lord Campbell's phrase, sufficiently 'concatenated as cause and effect'; and *Ashley v. Harrison*, and *Taylor v. Neri* (both reported in 1 Esp., p. 48 and p. 386) were relied upon. But the real principle of those cases, as of *Vicars v. Wilcocks* (2 Smith's L.C. 299), and of the other cases of slander collected by Mr. Smith, in his note on *Vicars v. Wilcocks* (2 Leading Cases, 299), is, whether the damage is the natural result of the thing done, or whether it is not capable of being attributed to some other cause. In *Lumley v. Gye* (2 Ell. and Bla. 216), Erle, J., also remarks on the absence of intention in those cases to cause the damage complained of; and, assuredly, the Defendant in one of those cases may well have libelled the actress, and the Defendant in the other may well have beaten the actor, without intending to injure the manager; and, therefore, though some doubt has been thrown on their authority by *Lumley v. Gye*, those cases may be good law, and yet not govern this case. For it is difficult to conceive a more necessary connection, as cause and effect, than that which here exists between the damage done to the Plaintiffs and the Defendant's act. The order, moreover, is insensible, if it is supposed to have been issued with any intention but that of causing the damage; the damage followed upon it, and there is no other assignable cause which will account for that damage. Then it [115] is urged that the intervention of the pilot between Captain Rogers and the Master of the ship, and of both pilot and Master between Captain Rogers and the Plaintiffs, makes the damage too remote. But we are not dealing with a case like that of *Ward v. Weeks* (7 Bingham. 211), in which A. used slanderous words to B., which B. repeated to C., and thereby caused the damage to the Plaintiff; and, it was, therefore, held, that the Plaintiff could not sue A. Even in a case of slander, the rule is different if the repetition of the words is in the course of duty, as is shown in *Kendillon v. Maltby* (1 Cro. and M., 402). Here the pilot is but the officer, compelled by the rules of his service to obey the Defendant, his superior. The Master acts under the necessity imposed upon him by the Defendant, through the pilot; and the case seems to us to fall within the principle which is thus expressed by Erle, J., in his judgment in *Lumley v. Gye*: 'It is clear that the procurement of the violation of a right is a cause of action, in

all instances where the violation is an actionable wrong'; and he goes on to say, 'He who procures the wrong is a joint wrong doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' The liability is still clearer, where, as in this case, the agent is an innocent agent. Upon the whole, therefore, though this action is in many respects of a novel character, and we have been unable to find any case which is exactly in point, we are of opinion that, on principle, it is maintainable, and that some authority for it is to be found in the old case cited by the Plaintiff's Counsel—*Garret v. Taylor* (2 Rolles' Rep. 162); and *Carrington v. Taylor*, and *Keble v. Hockingill*, [116] both reported in 11th East, pp. 571, 574. We cannot think, with the Defendant's Counsel, that the two latter cases are distinguishable from the present by the circumstance that the decoy in the one was parcel of a manor, and, in the other, is described as an ancient decoy; for the difficulty here, as we said before, does not arise from the nature of the right, but from the nature of its invasion. Again, we think, upon the authority of these cases, and of *Ferguson v. The Earl of Kinnoull* (9 Cl. and Fin. 251), that the action is maintainable, without any allegation or of proof of malice. This being so, we have next to consider whether the cause of action laid has been sufficiently proved; or, rather, for that is the form of the rule, whether there is, on any material point, that absence of evidence which can entitle the Defendant to insist on a nonsuit. The issues, as to the ownership of the vessel and the authority of the Defendant over the officers of the Bengal pilot service, have been found for the Plaintiffs; nor is it now contended that there was not evidence to support that finding. The other material statements in the inducements were not traversed, and we must, therefore, take it to be admitted, on the pleadings, that there were no pilots but those of the Bengal pilot service, and that no ship can be safely navigated in the Hooghly without a pilot. On this record, therefore, we have not to consider whether the existence of five or six licensed pilots would in any degree affect the right to maintain the action; and the admission seems also to exclude the hypothesis that the Plaintiffs were not hindered in their trade, because Masters of vessels might have taken their tug and gone up or down the river without a [117] pilot. The question remains, whether the Plaintiffs have proved all they were bound to prove under the plea of not guilty. They have proved that the Defendant issued the order in question; that he issued it with the avowed object of punishing the Plaintiffs for their refusal to comply with certain conditions which he had no right to impose upon them. They have proved its continuance for a certain time. They have put in the final orders of Government on this proceeding, which prove that, in issuing the order, the Defendant was so far from acting in the regular discharge of his duty, that his act was, in the opinion of his superiors, unjustifiable and an improper exercise of power. They have proved that, by the rules of the service, the pilots were bound to obey that order of their superior officer so long as it was unrevoked. They have proved that the order emanated from, and was issued on the responsibility of, the Defendant; for the conversation with the Secretary (if the purport of it was what the Defendant represents it to be) is not tantamount to the authority of Government, supposing that the authority of Government (if given) could have relieved the Defendant from liability, or done more than give him a claim to be identified by his superiors. Then, as to the damage, the Plaintiffs have, unquestionably, proved that damage did result to them in consequence of the order. But the nature and effect of that evidence will be best considered with reference to the only question that remains to be determined on this rule: namely, whether that evidence justified the award of more than nominal damages. We can see no reason why the damages which the Court gave on the trial should be reduced. We then disclaimed any intention to give those penal damages [118] by which the learned Counsel for the Plaintiffs insisted the Court ought to mark its sense of the arbitrary conduct of the Defendant; but we thought (and we endeavoured to measure the damages according to this principle) that, if the act of the Defendant was wrongful, the Plaintiffs were entitled to recover the actual loss which they had sustained in consequence of it. We had clear and positive proof of the continuance of the order, and that immediately after its issue the pilot in charge refused to unmoor a vessel if the *Underwriter*, which had been engaged to tow, took her in tow. The Captain also has sworn that, but for the order, he might have had other engagements, but

that in consequence of the order his vessel remained idle. This is entirely confirmed by every inference to be drawn from the state of trade in the port, the ordinary principles on which men act, and by the acts of the Plaintiffs, as shown in their remonstrance and appeal to Government. We gave, therefore, what, upon the evidence of the average nett earnings of the steamer when in work, would have been its probable earnings if it had been allowed to work during its period of enforced idleness. We continue to think that the evidence given of the refusal to unmoor the *Daniel Webster*, though objected to at the time, was properly received; but we must observe, that the proper mode of persevering in the objection would have been by moving for a new trial, on the ground of the improper reception of evidence, and that the point is not regularly raised by this rule. It may, however, be open to the Defendant to insist, in arrest of judgment, that the special damage is not alleged with sufficient particularity; that, as in certain well known class of action for [119] slander, the names of the persons who would, but for the order, have employed the Plaintiff's steamer, ought to have been stated. But we would observe, that the question here is, not whether customers who have been wont regularly to deal at a particular shop, and whose names are necessarily known to the person who keeps that shop, have been driven from that shop; we have to deal with the case of a steamer plying for hire in a port to which ships from all quarters of the world resort, many of them for the first time. Again: the notorious existence of the order, and the first act of obedience to it, would necessarily prevent Masters of vessels from coming to hire the *Underwriter* in the port, and the *Underwriter* from making what are termed in the evidence, 'seeking trips' to the Sand Heads. It seems to us, therefore, that this case falls within the principle of *Hartly v. Herring* (8 Term, Rep. 130), that the plaintiff alleges the special damage with as much certainty as the subject-matter is capable of, and that the damages have been correctly assessed. We repeat our regret that the delay in the rescission of the order has increased the Plaintiff's loss and the Defendant's liability; nay, more, we are sorry that the Defendant should suffer at all, because, although we think that he took an erroneous view of the Plaintiffs' conduct, and a still more erroneous view of his own position and powers, we doubt not that he acted honestly on the notions which he says prompted his conduct. But though we regret that Captain Rogers has not escaped the fate which generally attends on those who, without measuring their own powers or authority, Quixotically undertake to be the redressors of grievances, real or imaginary, [120] this cannot influence our decision as Judges. If in our judgment the Plaintiffs have suffered a certain pecuniary loss, in consequence of an actionable wrong done to them by the Defendant, we must declare them entitled to recover that loss from him. The rule must be discharged."

The amount of the damages recovered, Rs. 6624, being under the appealable value, the Appellant presented a special petition to Her Majesty for leave to appeal, in which, amongst other things, he stated that he had issued the order in question, with the sanction and approval of the Secretary of the Government in the Home Department in Calcutta, believing that the exigencies of the public service demanded the same; that the action was brought for the wrong alleged to have been done by him to the Respondents by such order, and he submitted, that as an important principle of law was involved in the decision in the action, the amount of damages ought not to deprive him of the benefit of an appeal, and prayed that the judgment might be reversed, altered, or varied, and the verdict found for the Respondents in the action set aside, and a verdict, or a nonsuit, entered on his behalf.

Mr. W. Field for the Petitioner, cited *Spooner v. Juddoo* (4 Moore's Ind. App. Cases, 257).

(July 11, 1859 *) Their Lordships gave leave to appeal on security being given to the amount of £100, for costs.

[121] The appeal now came on for hearing.

Mr. Macaulay, Q.C., and Mr. W. Field, for the Appellant.—This is a case of first impression, arising from a prohibition issued by a public servant in the proper discharge of his duty, and without malice, to the officers of the Bengal pilot service

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Thomas Erskine, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Lawrence Peel.

employed by the Government on the river Hooghly, not to use the Respondents' steam-tug; or, in other words, not to deal with the Respondents in their trade or calling of steam-tug owners; and the first question is, whether the action is, in the circumstances, maintainable. To sustain such an action, there must have been either a violation by the Appellant of a legal right or a wrongful act done by him in violation of a legal right or private duty, productive of damage to the Respondents. We contend there is neither of these requisites. The alleged right of the Respondents is not a legal right at all; it is simply a right, as owners of a steam-tug, to trade like the owners of other steam-tugs, on the river Hooghly, which is an open river. The wrong complained of is an order by a Government officer to the pilots under his control not to use the Respondents' steam-tug. In *Lumley v. Gye* (2 Ell. and Bla. 232), Mr. Justice Erle says that "the procurement of the violation of a right is a cause of action." That case is relied on by the Chief Justice in the Court below, on the assumption that there was a legal right in the Respondents to be employed, it may be in their turn, by the pilot service. If they had only a claim to be employed, there is no ground of action; but we deny that even any such claim existed. It is [122] admitted that there was no legal obligation on the Appellant to furnish pilots for all the vessels navigating the Hooghly in the service of the Government. Nor is it pretended that there was any contract between the Respondents and any other parties which the Appellant procured to be broken. The Chief Justice in the Court below states this broadly. It is admitted, also, that there was no malice; it is not charged, or alleged, or attempted to be proved; and yet, without such averment, or proof, the Court below, on the authority of *Ferguson v. The Earl of Kinnoull* (9 Clk. and Fin. 251), has held that this action could be maintained. But that case differed materially from the present, and really decided only, that when the law casts a duty upon a person, which he refuses or fails to perform, he is answerable in damages, though no malice is proved to those whom his refusal or failure injured; his neglect of duty, and its consequential injury to the party, is the ground of action. There is no such case here. *Gerhard v. Bates* (2 Ell. and Bla. 476), also relied on by the Court below, was an action for false representation, by which the Plaintiff was induced to take shares in a joint stock Company; and it was held, that the damage to the Plaintiff being shown to be the direct result of the Defendant's fraud, the Plaintiff was entitled to recover against the Defendant as for tort. The *dictum* of Lord Campbell in that case, that if the wrong and consequential loss "are clearly concatenated as cause and effect," an action is maintainable, is not applicable to the circumstances of this case. The case of the Taylors, etc., of Ipswich (11 Co. Rep. 53), and The case of the Monopolies (11 Co. Rep. 146), only, [123] assume the right of the subject to be protected in the exercise of his lawful trade, which we don't deny; but that is very different from an assumed right to be employed in such trade. *Langridge v. Levy* (2 Mee. and Wels. 519, and 4 Mee. and Wels. 337) was a case of false representations and fraud. In *Winterbottom v. Wright* (10 Mee. and Wels. 115), Baron Alderson, referring to that case, refused to carry the principle of that decision further. So in *Howard v. Shepherd* (11 East's Rep. 571). The cases of *Carrington v. Taylor* (9 Com. Ben. Rep. 297, 322), and *Keeble v. Hickeringill* (11 East's Rep. 574), are, we submit, misapplied by the Judges in the Court below. In those cases there was a disturbance of the enjoyment of a legal right; there is no legal claim at all here. In *Sutton v. Clarke* (6 Taunt. 29), also cited in the Court below, it was held that if a person in the exercise of a public function without emolument which he is compellable to execute, acts without malice, and according to the best of his skill and diligence, and upon the best information he can obtain, does an act which occasions consequential damage, he is not liable to an action for such damage. The action must be on tort, or for breach of contract; here there is neither. The action is for an alleged damage, which was simply a refusal to allow dealing with the Respondents on their own terms. As the act complained of was done by a Government officer on behalf of, and with the sanction, of the Government, it may be a question whether an action against such officer could be entertained by a Municipal Court. *Elphinstone v. Bedreechund* (1 Knapp's P.C. Cases, 316), *The Secretary of State in Council of India v. Kamachee* [124] *Boye Sahaba* (7 Moore's Ind. App. Cases, 476), *Baron v. Denman* (2 Exch. Rep. 167), *Dohree v. Napier* (2 Bingham, N.C. 781). We submit, therefore, that the declaration

discloses no cause for action, and, even if such existed, which we deny, a further insist that the damages are excessive; and that they ought only to have been nominal.

Mr. Montague Smith, Q.C., and Mr. H. Mills, for the Respondents. — If the order of the Appellant was a wrongful act, it is actionable. He had the control of all the pilots in the Government service upon the river Hooghly, and it is impracticable for ships to navigate that river without a pilot. If the pilots disobeyed the order of the Appellant, they were liable to be punished; the obedience of the pilots to this order rendered also that of Masters of vessels necessary. The effect of their obeying the order was to prevent the owners of the *Underwriter* obtaining any employment in their lawful trade or calling. This the Appellant knew, his avowed object being punishment of the Respondents for refusal to tow under Government certificate. Now, the issuing such an order was an improper exercise of his power, and a tortious act as against the Respondents; being done without lawful justification and with the intention of damaging them. The plaint which sets forth these facts discloses a good cause of action, and is sufficient in law. It avers that the Respondents were damaged in their trade, and in the lawful use of their property, by the order issued by the Appellant, who, as against them, is thereby a wrong doer, and that such order was [125] issued intentionally, authoritatively, and with the design of damaging the Respondents. The judgment, we submit, was well founded upon these grounds.

First, the damage was the effect of the act of the Appellant; that is quite clear, and is sufficiently averred. Now, the great principle of law is, that every man must be considered to contemplate the probable consequences of his own act, *Townsend v. Walker* (9 East, 296), *Ferguson v. The Earl of Kinnoull* (9 Clk. and Fin. 251), or the act of his agent. *Jarman v. Hooper* (6 Man. and Gr. 827), *Bowles v. Senior* (15 Law J. Q.B. 231), *Childers v. Woodler* (29 Law J. Q.B. 129). The damage here was immediate, and, therefore, actionable; it is not, as in the case of a slander, *Fears v. Wilcocks* (2 Smith's L.C. 300; 8 East, 1), too remote. In *Parkhurst v. Foster* (1 Ld. Raym. 480), Lord Holt says, "If a man does an unlawful act, he shall be answerable for the consequences of it, especially where the act is done with intent that consequential damage shall be done."

Secondly, the damage was done to the legal right of the Respondents to prosecute a lawful trade, namely, the hire and use of their steam tug; and this is *prima facie* actionable. He that hinders another in his trade or livelihood is liable to an action, else slander affecting a man's trade would not be actionable. *Keeble v. Hickeringill* (11 East, 575-6). And, though no action may lie for a public nuisance, yet if a private injury is sustained thereby, an action will lie. *Iveson v. Moore* (1 Ld. Raym. 486), *Rose v. Groves* (5 Man. and Gr. 613), *Wilkes v. Hungerford Market Co.* (2 Bingh. N.C. 281), [126] *Dobson v. Blackmore* (16 Law J. Q.B. 233). These authorities show that the law recognizes that description of right in individuals, in respect of which the special damage is claimed, and that it was actionably wrong to inflict that sort of damage.

Thirdly, as the damage done flowed from the Appellant's acts, by which he intended to damage the Respondents in their use of a lawful right, such act was wrongful on the part of the Appellant, and made him liable to an action. *Gregory v. The Duke of Brunswick* (6 Man. and Gr. 205), *Millar v. Taylor* (1 Burr. 2303), *Pasley v. Freeman* (2 Smith's L.C. 62), *Langridge v. Levy* (2 Moo. and Wels. 579), *Mostyn v. Fabrigas* (1 Smith's L.C. 528), *Keeble v. Hickeringill* (11 East, 574). Com. Dig., tit. "action on the case for misfeasance," A. Every loss or damage occasioned by the wrongful act of another is actionable. *Ashby v. White* (Ld. Ray. 938, 1 Smith's L.C. 105), *Perring v. Harris* (2 Moo. and Rob. 5), *Dean v. Clayton* (7 Taunt. 489, 495), *Bird v. Holdbrook* (4 Bingh. 628), *Ferguson v. The Earl of Kinnoull* (9 Clk. and Fin. 251, 310, 321). This is not a case of *dammum absque injuria*: if the Appellant so contends he must make out such position. It is not as where a Defendant carrying on an offensive trade, but in a proper manner, and in a proper place, in pursuance of a previous right acquired, is protected. *Rich v. Basterfield* (16 Law J. C.P. 273), *Hole v. Barlow* (27 Law J. C.P. 207). Nor is this a case where some other maxim of law comes into play and prevents the Appellant from being actionable. *Revis v. [127] Smith* (18 Com. Ben. Rep. 126), *Henderson v. Broomhead* (28 Law J. Exch. 360), *Barber v. Lessiter* (29 Law J. C.P. 161), *Lumley v. Gye* (2 Ell. and Bla. 216).

Lastly, no averment of malice was necessary; it is not like the case of Judge acting or alleged to have acted, from corrupt motives, but of a wrong committed which has worked damage to the Respondents. *Ferguson v. The Earl of Kinnoull* (9 Clk. and Fin. 321), *Saxon v. Castle* (6 Ad. and Ell. 652), and with regard to the amount of damages, the special damage averred is sufficient to let in the proof of loss of trade given; there is no ground for saying they are excessive.

Mr. Macaulay, Q.C., in reply.

The judgment of their Lordships, prepared by Sir John T. Coleridge, was now delivered by

The Right Hon. Dr. Lushington (July 30, 1860).—This was an appeal from the Supreme Court of Calcutta. The Respondents were the Plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been, and then were, the owners of a steam-tug called the *Underwriter* employed for hire in towing ships to and from the port of Calcutta, and in the receipt of large profits from such employment; and that the Defendant was an officer in the public service of the East India Company, having the name and style of the Superintendent of marine, and that, as such, he was invested with the chief authority and control over all the officers of the Bengal Pilot service employed by the Company on the Hooghly river for the purpose [128] of piloting vessels thereon to and from the said port; and that the said officers of the Bengal pilot service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward bound ships; and that in consequence of the perils of the navigation, no ship can with safety proceed inwards or outwards, or be duly navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the Defendant wrongfully and unjustly contriving and intending to injure the Plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order addressed to the said officers of the Bengal pilot service, whereby he, as such Superintendent of marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at Rs. 20,000. To this plaint the Appellant pleaded three pleas, on the first only of which, being the plea of not guilty, the question before their Lordships arises. The allegations in the inducement by way of recitals must be taken to have been admitted by the Defendant; and supposing the direct allegations which are in issue to have been proved, in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded: the point for consideration, therefore, is, whether upon the evidence in the case this action is maintainable.

As their Lordships view the evidence, the facts appear to be the following:—The Bengal pilots are [129] an organised body, under the control of the Superintendent of marine, which office, at the time in question, was filled by the Defendant. They form by far the larger part of the Calcutta pilots, and on them devolves the almost indispensable duty of piloting vessels up and down the Hooghly to and from the sea and port of Calcutta. Tugs are constantly required for bringing vessels up; and the Plaintiffs were owners of one, a steam-tug, the *Underwriter* employed in this service. For such service there are two rates of payment, one called the Government certificate, in which the amount is regulated by a tariff according to the time employed; the other depending on the special contract between the parties. On the 20th of September, 1857, when the mutiny in India was in full vigour, Her Majesty's ship *Belleisle* entered the Hooghly, bringing troops for the public service. The Captain of the *Underwriter*, Fox, who was seeking employment, went on board and offered to take her up. At this time a Bengal pilot was in charge of her. Fox declined to take her on the terms of the Government certificate, and asked a much larger sum, first Rs. 3000, and finally Rs. 2500. The Captain, not choosing to incur the responsibility of agreeing to this demand, telegraphed once and again to Beadon, the Secretary to the Government of India, stating, on the second occasion, the demand, that his pilot required a powerful tug, and asked what amount he might offer. On the receipt of this second application, Mr. Beadon communicated to the Defendant, with a letter stating what had passed, and concluding with these

words: - "What had better be done?" The Defendant immediately went to Beadon, and gave him his opinion that the charge was exorbitant; that [130] it was Beadon's duty to take steps to prevent such charges being made for ships coming in with troops; that the rate of charge might otherwise increase from day to day with the increasing necessities of the Government; and added, that if he left the matter to him, he would proceed to The Bankshall (the place of rendezvous for the Bengal pilots) and direct one of the officers to see the owners of the tug, and tell them that if they did not send down immediately an order to take the troops in tow, he would issue an order to the officers of the pilot service, strictly prohibiting them from allowing the *Underwriter* to take any ship in tow of which they had pilotage charge. To this Beadon answered, "I think you would do right;" and so left it with the Defendant to dispose of the matter. What the Defendant said he would do, he immediately did. The Government terms were still refused by the Plaintiffs, and the service was unperformed by them. Whereupon, on the 22nd of September, by the direction of the Defendant, the order complained of was issued, and remained in force until the 19th of October, when, by the direction of the Government, it was rescinded; and it is for the loss of employment during this interval, that the action has been brought and the damages awarded.

On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the Plaintiffs was exorbitant or not, nor whether the opinion expressed by the Defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the action, that the act complained of is to be considered as the act of the Government, and that in the part which [131] the Defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the Plaintiffs. For if the act which he did was in itself wrongful, as against the Plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the Supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below: indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be, the invasion of "the right [132] of the Plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling, without undue hindrance or obstruction from others." No doubt an act which, *prima facie*, would appear to be innocent and rightful, may become tortious if it invades the right of third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house: *prima facie*, it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

The question then is, whether, in this sense, the Defendant has been guilty of a wrongful act. On the one hand, the Government has frequent occasion to have vessels towed up the river, and it desires to have this done by the owners of towing-vessels on certain terms which it believes to be just; and it keeps in

its service a body of pilots, who have the charge of vessels coming up the river; and it is assumed that practically, the discretion, for the time being, of employing the particular towing vessel that is to bring up a ship, is vested in the pilot who has her in charge. The Plaintiffs decline to deal with the Government on the terms which it desires to deal on, and in a particular case insist on what appears to the Government not only to be an unreasonable demand in itself, but likely, as a precedent, to be injurious to the public interests, if yielded to in this particular interest. If the Plaintiffs have the right, as undoubtedly they have, of prescribing what terms they please for the [133] services they are to render, it cannot be doubted that the Government has an equal right to accept or refuse to deal with the Plaintiffs on those terms: to say, "We will employ you only if you will accept such or such a remuneration." And, if the prohibition complained of had been limited to pilots in charge of vessels in the public service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequences might have been to the Plaintiffs' business: nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government, although the consequence would have been directly a total loss of employment by the Plaintiffs; for their right to exercise their calling must be understood only as co-extensive with, and not as overriding, the right of the public or of individuals to deal with them or not, at their pleasure: the right to buy or to refuse to buy is as much to be regarded as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this: it forbids the officers of the pilot service from allowing the *Underwriter* to take any ship in tow of which they have pilotage charge: and the question is, whether this difference in extent makes it, as against the Plaintiffs, wrongful. Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has organized a body of pilots: it does not appear that any law forbids the employment of a pilot who is not of that body, and, indeed, it was proved that there were other pilots exercising their calling in the port of Calcutta on whom the Government prohibition [134] would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or co-operate with in performing the services for the due performance of which they are enrolled and taken into its service. Supposing it had been believed, that the *Underwriter* was an ill-found vessel, or in any way unfit for the service, might not the pilots have been lawfully forbidden to employ her until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And, is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels, of all but those employed on its own account, the Government, by its pilots, co-operates with the Plaintiffs in the service of bringing their vessels safely into port; may it not refuse that co-operation so long as it believes the demand made by them unreasonable, and likely to be prejudicial to its own interests, that is, the interests of the public? Their Lordships think this question can admit of only one answer, and if so, the prohibition issued by the Defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the Plaintiffs.

It will be observed that their Lordships are only dealing with a case in which no malice, in the most general sense of the term, is imputed, or proved against the Defendant. It is unnecessary to consider what would have been their judgment in a case in which the Defendant had given the same advice to the Government, and done the same act towards the Plaintiffs from any indirect motive, or with direct [135] malice against them. It is enough to say, that the decision of such a case would turn on totally different principles from the present.

It will be observed also that their Lordships' reasoning identifies the act of the Defendant with the approbation of the Secretary to the Government; and they do this, not forgetting his letter to the Defendant, dated on the 15th October, in which the Defendant is censured for his act, and directed to recall it; for their Lordships think that the evidence of the Defendant, uncontradicted by the evidence of Beadon, clearly establishes that the Defendant acted with his approbation. To

him application had first been made for directions by the Captain of the *Belleisle*, and he sought advice of the Defendant, accepted the advice which was given in good faith, and could not have been withheld without breach of duty; and if so, the character of the act cannot be changed by the change of opinion subsequently manifested, or by the censure which it was thought right to inflict upon the agent.

This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. The appeal has been very ably argued at the Bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited, either in the judgment of the Court below or in the argument. It seems to them that when the legal principles to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point: it is essential to an action in tort that the act complained of should, [136] under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however, directly, do him harm in his interests, is not enough. Cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly without being actionable. The present case appears to their Lordships to be no more, and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the Respondents.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL. 3. *Leave to appeal*: tit. TORT. I. GENERALLY. S.C. 13 Moo. P.C. 209; 3 L.T. 160; 9 W.R. 149; See *Palmer v. Hutchinson*, 1881, 6 A.C. 623; *Mogul S.S. Co. v. McGregor*, 1889, 23 Q.B.D. 613; (1892) A.C. 25; *Trollope v. London Building Trades Federation* (1895), W.N. 29, 45; *Allen v. Flood* (1898) A.C. 1; *Leatham v. Craig* (1899) 2 I.R. 667; affirmed in H.L. *sub nom. Quinn v. Leatham* (1901), A.C. 495. As to special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

MAHOMED BAUKER HOOSSAIN KHAN BAHADOOR.—Appellant: SHURFOON NISSA BEGUM,—Respondents * [Feb. 3 and 4, 1860].

On appeal from the Supreme Court at Madras.

By the Mahomedan law the legitimacy of a child of Mahomedan parents may be presumed or inferred from circumstances, without any direct proof either of a marriage between the parents, or of any formal act of legitimation.

In the absence of evidence or circumstances sufficient to found such a presumption, or inference, a claim by a party as a legitimate son to share in an intestate's estate dismissed.

The question in this case was one of legitimacy, and related to the right of the Appellant to three-[137]-eighths of the estate of Shasavar Jang Bahadoor, deceased. The parties were Mahomedans, and inhabitants of Madras, and the Appellant claimed as the brother of the deceased. The case of the Respondent, the infant daughter and only child of Shasavar Jung Bahadoor, was, that the Appellant was not his legitimate brother, but was the offspring of a slave girl, brought up by one

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

of the Nicka wives of the father of the deceased, Shasavar Jung Bahadoor, and, as such, was not entitled to a share of his estate.

The Bill was filed by Syed Fareed, the Respondent's grandfather and next friend in the Supreme Court at Madras against Mayroon Nissa Begum and Madar Ool Oomrah Bahadoor, alleging that Shasavar Jung Bahadoor died on the 24th May, 1856, intestate, leaving the Defendant, Mayroon Nissa Begum, his nicka and only wife, and the Respondent, his daughter by Mayroon Nissa Begum, an infant, him surviving; that the Appellant claimed to be a brother of the intestate, and a sharer in his estate, which right was denied, and that after certain proceedings had been taken on the Ecclesiastical side of the Supreme Court, letters of administration to the estate of the intestate were granted by that Court to the Defendant, Mayroon Nissa Begum, as his widow; and the Bill prayed, that the usual accounts might be taken of the intestate's estate, and that the Defendant, Maroon Nissa Begum, as such widow, might be declared entitled to receive one-eighth, and the Respondent, as such daughter, might be declared entitled to receive one-half of the estate and effects of the intestate; and that it might be referred to the Master to inquire whether there were any other relatives of the intestate entitled to the remaining three-eighths of the [138] residue: and in default thereof, that the Respondent and the Defendant, Mayroon Nissa Begum, might be declared entitled to such remaining three eighths in proportion to their respective shares as aforesaid.

The defendants, by their answers, admitted the facts stated in the Bill.

The suit came on to be heard on the 9th of February, 1858, when the Supreme Court referred it to the Master to inquire and report, whether the Appellant was a brother of the intestate; and for that purpose the Appellant was to be at liberty to go before the Master.

The Appellant left with the Master a state of facts, which alleged that, Shasavar Jung Bahadoor was the son of Oomdut Ool Oomrah, a former Nawab of the Carnatic, then deceased; that Oomdut Ool Oomrah married, in the form usual amongst Mahomedans for performing Nicka marriages, to one Ameen Sahiba, *alias* Buddee Beebee; that the Appellant was the only issue of that marriage and was the son of Oomdut Ool Oomrah, by Ameen Sahiba, his nicka wife, and was, therefore, the brother of the intestate; that the Appellant had, from the date of his birth, been acknowledged, treated, and received by the Governors in Council in Madras, by the Nawabs of the Carnatic, his relations, and by the intestate in his life, and by his relations and friends, as the son of Oomdut Ool Oomrah, and as the brother of the intestate. That the Appellant and the intestate were, on the death of their father, Oomdut Ool Oomrah, on the representation of the family of Oomdut Ool Oomrah, on the 29th of September, 1801, acknowledged by Lord Clive, the then Governor of Madras, to be the sons of Oomdut Ool Oomrah, and a pension of Rs. 10,000, [139] was granted to each of them, Shasavar Jung Bahadoor and the Appellant, as the nicka sons of Oomdut Ool Oomrah, which pension was still paid to the Appellant; and it further alleged that the Appellant had been admitted by the Defendants, Mayroon Nissa Begum and Madar Ool Oomrah, to be the brother of the intestate, on the hearing of an Ecclesiastical suit in the Supreme Court, in which her right as widow of the intestate was established and declared, and also by Madar Ool Oomrah.

The Respondent also left a state of facts with the Master, which stated that the Appellant was not the brother of the intestate, and was not one of the legitimate sons of Oomdut Ool Oomrah, formerly Nawab of the Carnatic. That the Appellant was the son of a slave girl, named Nurgees, otherwise called Ameen Sahiba, by Oomdut Ool Oomrah, and was brought up by Chattoore Begum, one of the nicka wives of Oomdut Ool Oomrah; that Ameen Sahiba was a slave girl in the establishment of Chattoore Begum, and always lived with her; was not the nicka wife of Oomdut Ool Oomrah, and never had any establishment of her own; while all the other wives of Oomdut Ool Oomrah had. That the intestate never acknowledged the Appellant as his brother. That he kept himself aloof from the other members of the family. That Oomdut Ool Oomrah had one shadee wife, Doolary Begum, and four nicka wives, namely Coolsoom Begum, Chattoore Begum, Mahtaub Begum, and Hyath Begum, and no others. That on the death of Oomdut Ool Oomrah, Doolary Begum, as the shadee wife of Oomdut Ool Oomrah, received a pension of Rs. 24,000, annually, from the Government of Madras: and Coolsoom Begum, Chattoore Begum, Mahtaub

Begum, and Hyath [140] Begum, as the nicka wives of Oomdut Ool Oomrah, received a pension of Rs. 5,000, each annually from the Government of Madras. That Ameen Sahiba was maintained and supported by the Appellant for some time, but that he afterwards refused to support her, in consequence of which refusal Ameen Sahiba complained to the Government agent that the Appellant, who was in the receipt of Rs. 833, from Government, did not support her, and prayed that the Government would order him to maintain her. That the Government agent, in a letter dated the 8th of December, 1810, addressed to the Appellant, directed him to pay his mother, Ameen Sahiba, the sum of Rs. 50, monthly.

The evidence was contradictory. The Appellant adduced evidence before the Master in support of his state of facts, and, amongst other documents, put in an extract from the records of the Government, containing a copy of a letter, dated the 3rd of October, 1801, from the then Governor General to Uzeen ul Dowlah, the Nawab of Arcot, transmitting a statement of the allowance to be made to the family, and requesting the Nawab to furnish him with a statement of the different receipts to be granted for the allowances, and the statement sent in return, in which statement it was insisted that the Appellant's name was returned as a nicka son of Oomdut Ool Oomrah. It was deposed by two of the witnesses, sisters of Oomdut Ool Oomrah, who were examined *viva voce* in support of the Appellant's state of facts, that they were present at the nicka marriage of Ameen Sahiba with Oomdut Ool Oomrah, and that the Appellant was the issue of that marriage, and that he was always treated by Oomdut Ool Oomrah as his legitimate son, and had [141] as such been received by the witnesses and other members of the family. The Government agent and paymaster of the Carnatic stipends was also examined by the Appellant, and he stated that the Appellant and Shasavar Jung Bahadoor had both the same yearly allowance as nicka sons of Oomdut Ool Oomrah, and that the Appellant had been treated as a nicka son by the British Government.

The Respondent adduced evidence in support of her counter state of facts, and relied upon a document, being the reply of the Nawab of Arcot to the letter of the Governor General, forwarding a memorandum of the receipts to be taken, in which the Appellant was thus described:—"Receipt under the seal of Raulul ul Nissa, alias Chattore Begum, with her sons as follows:—"For Bauker Hoossain Khan (the Appellant) Rs. 834 5½a.; for Chattore Begum, Rs. 416 10½a." The Respondent also tendered an extract from the records of Government, being a copy of a letter dated the 7th of October, 1820 (see *post* [7 Moo. Ind. App.], p. 150), from Nawab Azeem Jah, deceased, the then Nawab of the Carnatic, to the Government, stating that Chattore Begum, who received the Government stipend of Rs. 416 10½a., had died on the 15th of September, and that the stipend and that of Mahomed Bauker Hoossain Khan (the Appellant), son by a concubine of the late Nawab, had been paid on one receipt, and that then the stipend of Mahomed Bauker Hoossain Khan, amounting to Rs. 833. 5½a., would be payable on his separate receipt. This document was objected to, and was not admitted, the Master considering it irrelevant, and the Appellant no party to it. Evidence was also adduced by her to the effect that the Ap-[142]-pellant might have been regarded as the nicka son of the Oomdut Ool Oomrah, as he had been adopted by Chattore Begum, the childless nicka wife of the Nawab, and brought up by her as her own son, but that he was the offspring of a slave of Chattore Begum named Ameen Sahiba.

The Master by his report found that the Appellant was the son of the Oomdut Ool Oomrah by his nicka wife, Ameen Sahiba, and that he was the legitimate brother of the intestate.

The Respondent filed two exceptions to this report: first, that the Master had rejected the letter of the 7th of October, 1820, whereas he ought to have admitted it as evidence for the Respondent; and secondly, that the Master had found the Appellant to be the brother of the intestate, whereas the Master ought to have found that the Appellant was not the brother of the intestate.

These exceptions were argued on the 2nd of July, 1858, before the Chief Justice, Sir Christopher Rawlinson, and allowed. The reasons of the Chief Justice for making the Order allowing the exceptions, transmitted to the Privy Council, were as follows:—"First exception, as to the document purporting to be a translation of a letter or note from the late Nawab Azeem Jah to the Government, bearing date 7th of October, 1820, was tendered on behalf of the Plaintiff as a declaration by the head of the

family concerning pedigree, in the same way as the other letters of the Nawab in 1801 had been admitted on the other side. It was admitted before the Master to be a true translation; it came from its proper custody, namely, the Government office. No objection was taken that a further search for the original [143] Persian note was necessary. Upon the above state of facts, I was of opinion that the document should have been admitted, whatever might have been the case, had other objections been taken: but I added, that when deciding the second exception, I would consider the document as not before the Court. Second exception.—The allowance of this exception turned on the fact, whether the claimant, Mahomed Bauker, was the legitimate brother of Shasavar Jung Bahadoor, deceased; or, in other words, whether his mother the girl Buddee Beebee, alias Ameen, was the lawful wife of the Oomdut Ool Oomrah Bahadoor. To establish this fact, two old female witnesses, relatives of the Nawab, deposed to the fact of a marriage having taken place as far back as 1800, if at all; they gave no dates. There was no other witness to, or any other evidence of the marriage, save the above direct testimony. There was not any evidence, as is usual, and might have been expected in the case of a Nawab's marriage, such as the attendance of the Cazeer or some other Mahomedan officer, no fixing of the dowry, etc., while all the facts and circumstances which were beyond dispute since 1800, instead of supporting the fact of a marriage, tended most strongly to the opposite conclusion. It was proved on both sides that the alleged wife, Ameen Sahiba, was a poor girl, a *protege* and servant of Chattore Begum, one of the wives of the Oomdut Ool Oomrah; that after the time of the supposed marriage she continued to live with her mistress, instead of having a separate house and establishment of her own, as all the other wives of the Nawab had. That on the birth of her child (in 1800 or 1801) he was given to Chattore Begum; that on the death of the Nawab shortly after, in 1801, [144] when the list of his family was sent in to the Government by his successor for pensions, the name of this woman nowhere appeared, either in the list of wives or of other persons entitled to any payment (see Lord Clive's letter of October the 3rd, 1801, and the Nawab Azcen-ool-Dowlah's answer of the 17th of October, 1801). It was not proved that she either received any pension or did any act claiming to be a wife from 1800 down to the day of her death, about fifty years afterwards, but that she was dependent on what she could obtain from her son Mahomed Bauker. In support of the claimant's case, it was also urged that his name appears in the Nawab's list of the 3rd of October, 1801, as a 'nicka son' of the late Nawab. True it is that it does, but the letter of October 3rd, taken as it should be, together with the answer of the 17th of October, destroys rather than strengthens his case; for though in the first list of October 3rd, Mahomed Bauker's name appears in the list of Nicka sons, the name of his mother nowhere appears either in the list of wives or elsewhere; while in the list of October 17th, he is described as the son of Chattore Begum, under whose seal the receipt for his and her pension is to be given, thus explaining how the Nawab came to insert his name in the first list as a 'nicka son,' viz., because he considered Chattore Begum, to be his mother. On weighing the whole of the above evidence I could not come to the conclusion that the claimant had established the marriage of his mother Ameen, or his own legitimacy. The girl, Ameen Sahiba, I consider never was the wife of the Nawab, though the Nawab was probably the father of her illegitimate child; that Chattore Begum not having any children of her own, took to it soon after its [145] birth, a proceeding to which a humble attendant would gladly consent, and would not object to his name being sent, in 1801, as a 'Nicka son' of the Nawab, entitled to a pension; while the improbability of the name of a wife of a Nawab not being returned in the list of the family in 1801, and of her remaining, during a long life, content with such exclusion and consequent loss of all pension, the equally great, if not greater, improbability of a Mahomedan wife giving up her only son (if legitimate) to another wife,—pressed so strongly on my mind as altogether to outweigh the not very clear and wholly unsupported testimony of the two female witnesses to the marriage. In support also of the case of Mahomed Bauker being a brother, some evidence was adduced before the Master of admissions by Mayroon Nissa (the Defendant and infant Plaintiff's mother) both in this and the Maukamah Court, though this class of evidence was not much, if at all, relied on, when the case was before the Court. I refer to it lest it should be supposed that it had escaped my notice.

Supposing, however, that such evidence could be made admissible against the infant Plaintiff, I do not think it was entitled to any weight under the circumstances of this case. The Defendant, Mayroon Nissa, a person of low origin, had only been married four or five years before the death of her husband, Shasavar Jung Bahadoor. She was, as is unfortunately too frequently the case in the East, immediately after the death of her husband surrounded by claimants, who, after disagreeing amongst themselves as to the division of the property of the infant, commenced law suits, some as friends of the infant, some for administration, etc. : no less than two or three on the present [146] occasion were so commenced, one by the claimant himself, Mahomed Bauker, in the Maukamah Court. The finding in this last Court, I will only observe, is rested solely on the admissions of the claimants, none of whom had any claim except the widow, and on the fact of his name appearing in the first list of the Nawab of 3rd of October, 1801, as a 'Nicka son': on the small weight this is entitled to when read with the second letter of 17th of October, 1801, I have already remarked."

From the Order allowing the exceptions the present appeal was brought.

Mr. R. Palmer, Q.C., and Mr. W. H. Melvill, for the Appellant. As the parties are Mahomedans, their rights are to be regulated by the Mahomedan law. By that law, a marriage, in circumstances of reputation and acknowledgment, like the present, will be presumed, and, consequently, the legitimacy of the Appellant, *Ujuz Ali Khan v. Mussaumaut Fatima Khatoon* (1 Ben. Sud. Dew. Rep. 357), *Khan Bahadur Hidayat Oollah v. Rai Jan Khanum* (3 Moore's Ind. App. Cases, 295), *Jeswant Singjee Ubbhy Singjee v. Jet Singjee Ubbhy Singjee* (3 Moore's Ind. App. Cases, 245), *Mirza Quaim Ali Beg v. Mussaumaut Hingun* (3 Ben. Sud. Dew. Rep. 152), Macnaghten "On Mahomedan law," Introd. p. xxiv. and ch. vii. par. 33 *ib.* and pp. 132, 376. Baillie, Muh. law of Ind. 35. But, here the evidence of the witnesses to the marriage examined by the Appellant, two of whom were members of the family, satisfactorily establish both in law and in fact the Nicka marriage of Ameen Sahiba with Oom-[147]-dut Ool Oomrah. Hearsay evidence is admissible by the Mahomedan law, if there be no formal proof of the marriage, Macnaghten "On Mahomedan law," Introd. p. xxiii. and ch. xii. par. 14. p. 77. At all events, we submit, that the evidence, after so long a lapse of time, was sufficient to raise a legal presumption in favour of the marriage and of the legitimacy of the Appellant, which presumption, we submit, has not been rebutted. The rule in such a case is, *Semper presumuntur pro matrimonio*, which is admitted in English Courts, *Piers v. Piers* (2 H.L. Cases, 331). It is shown that the Appellant was acknowledged and treated by Oomdut Ool Oomrah as his legitimate son, and that he was recognized as such by the family, and by the Government of Madras. The statement that Ameen Sahiba was a slave is unfounded in fact.

Sir Hugh Cairns, Q.C., and Mr. Ayrton, for the Respondent.—There are no circumstances in this case to raise the presumption of legitimacy contended for. The authorities relied upon by the Appellant's Counsel in support of their propositions do not apply. Here there is no satisfactory evidence that the Appellant's mother was the Nicka wife of Oomdut Ool Oomrah, or of any acknowledgment by him, that the Appellant was his child; on the contrary, the Respondent's evidence establishes the fact, that he was adopted by Chattore Begum, one of the Nicka wives of the Nawab, she being childless, and was the son of Ameen Sahiba, a *protege*, or dependant, living with her. The Master improperly rejected the letter dated the 7th of October, 1820, which was a statement of a deceased member of the intestate's family respecting his pedigree and, therefore, relevant to the inquiry.

[148] Their Lordships' judgment was delivered by

The Lord Justice Knight Bruce (June 20, 1860).—The question in the present appeal from the Supreme Court of Judicature at Madras, between Mahomedans, is, whether upon the evidence in the case, the Appellant ought to be considered as the lawful brother of Shasavar Jung Bahadoor, that is to say, the lawful son of Oomdut Ool Oomrah, a Mahomedan, formerly Nawab of the Carnatic, the father of Shasavar Jung Bahadoor, who having survived Oomdut Ool Oomrah for more than half a century died at Madras in the year 1856.

The point arose in a suit, in the Court already mentioned, for administering

the estate of Shasavar Jung Bahadoor, the decree in which, dated the 9th of February, 1858, directed among other things, a reference to the Master of the Court, to inquire and report whether the Appellant was a brother of Shasavar Jung Bahadoor, and directed that for that purpose the Appellant (not a party to the cause) should be at liberty to go before the Master.

The Appellant, availing himself of this permission, carried in a state of facts and charge before the Master, which is in these terms:—"That the Master be directed to inquire and report to the Court whether the said Mahomed Bauker Hoossain Khan Bahadoor is a brother of Shasavar Jung Bahadoor, the intestate in the pleadings of this cause named. That Shasavar Jung Bahadoor, the said intestate, was the son of Oomdut Ool Oomrah Bahadoor, Nawab of the Carnatic, now deceased. That the said Oomdut Ool Oomrah Bahadoor, Nawab of the Carnatic, the father of the said Shasavar Jung Bahadoor, deceased, was, some three or four years prior to his death, on or [149] about the month of December, married, in the form usual amongst the Mahomedans for performing nicka marriages to one Ameen Sahiba, alias Buddee Beebee. That the said Mahomed Bauker Hoossain Khan Bahadoor was the only issue of the said marriage, and was the son of the said Oomdut Ool Oomrah Bahadoor, Nawab of the Carnatic, by his nicka wife, the said Ameen Sahiba, alias Buddee Beebee, and was born on the 10th of June, 1800, and is, therefore, the brother of the said Shasavar Jung Bahadoor, deceased. That the said Mahomed Bauker Hoossain Khan Bahadoor has, from the date of his birth up to the present time, been acknowledged, treated, and received by the Governor in Council in Madras, by the Nawabs of the Carnatic, his relations, and by the late Shasavar Jung Bahadoor, deceased, in his life, and by his relations and friends, as the son of the said Oomdut Ool Oomrah Bahadoor, Nawab of the Carnatic, and as the brother of the said Shasavar Jung Bahadoor, deceased. That the said Mahomed Bauker Hoossain Khan Bahadoor, and Shasavar Jung Bahadoor, deceased, were, on the death of their father, the said Oomdut Ool Oomrah Bahadoor, Nawab of the Carnatic, on the representation of the family of the said Oomdut Ool Oomrah Bahadoor, the Nawab of the Carnatic, on the 29th of September, 1801, acknowledged by Lord Clive, then Governor of Madras, to be the sons of the said Oomdut Ool Oomrah Bahadoor, the Nawab of the Carnatic; and a pension of Rs. 10,000, was granted to each of them, the said Shasavar Jung Bahadoor, deceased, and the said Mahomed Bauker Hoossain Khan Bahadoor, as the nicka sons of the said Oomdut Ool Oomrah Bahadoor, the Nawab of the Carnatic, deceased, which pension has since been and still is paid to the said [150] Mahomed Bauker Hoossain Khan Bahadoor. That the said Mahomed Bauker Hoossain Khan Bahadoor has been admitted by the Defendants, Mayroon Nissa Begum and Madar Ool Oomrah Bahadoor, to be the brother of the said Shasavar Jung Bahadoor, the former by her Counsel and Proctor on the hearing of the Ecclesiastical suit in the Supreme Court, in which her right as widow of the said Shasavar Jung Bahadoor, deceased, was established and declared, and by the said Madar Ool Oomrah Bahadoor, in the late Nawab's Maukamah Court, and in certain writings under his hand."

The claim was opposed on behalf of the Respondent, the daughter and only child of Shasavar Jung Bahadoor, and evidence was adduced on each side in support of it and against it. Upon the whole of the evidence, the Master reported in the Appellant's favour, finding that the Appellant was the son of Oomdut Ool Oomrah, by "his nicka wife" Ameen Sahiba, and was the brother of Shasavar Jung Bahadoor. But exceptions to the Master's report were taken by the Respondent, and, upon argument, decided in her favour by the Supreme Court; a decision that produced the appeal now before their Lordships, and which was argued here fully and very well.

The exceptions are thus:—"First exception.—For that the said Master hath, in and by the said separate report, rejected the Exhibit C (a), mentioned and set

(a) Exhibit C.—Deposed to by P. Nullatomby Moody. "From his Highness the Nawab Azum Jah, dated 7th October, 1820. On the 15th September died Chatoor Begum (Nicka wife of the late Nawab Oomdut Ool Oomrah), who received from the honourable company a stipend of rupees 416 10^g. Her stipend, and that of Mahomed Bauker Hoossain Khan, son by a concubine of the late Nawab, have been paid on one receipt, and now the stipend of Mahomed Bauker Hoossain Khan,

[151] forth in his said report, and offered as evidence on behalf of the Plaintiff, in support of her state of facts and charge left in this cause on the 23rd of April, 1858, whereas the said Master ought not to have rejected such exhibit C, but ought to have admitted it as evidence for the said Plaintiff. Second exception.—For that the said Master hath, in and by the said separate report, found that Mahomed Banker Hossain Khan Bahadoor is the brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named: whereas the said Master ought to have found that the said Mahomed Banker Hoossain Khan Bahadoor is not the brother of the said Shasavar Jung Bahadoor, deceased. Wherefore the said Plaintiff doth except to the said Master's separate report, and appeals therefrom to the judgment of this Honourable Court." And the order allowing these exceptions is in these terms:—"The matter upon the exceptions taken by the plaintiff to the separate report of Charles Martin Teed, Esquire, the Master of this Honourable Court, dated the 10th of June last, made in pursuance of the decree made on the hearing of this cause, and bearing date the 9th of February last, coming on to be argued this present day before the Honourable the Supreme Court of Judicature at Madras, in the presence of Counsel on behalf of the said Plaintiff and Mahomed Banker Hoossain Khan Bahadoor; and the said exceptions and report being opened, upon debate of the matter, and hearing what was alleged by the Counsel on both sides; this Court doth Order that the said exceptions be allowed, with costs of the proceedings had before the said Master, and of this application and Order."

In the view that their Lordships take of the matter, [152] the first exception is unimportant; for, whether the document to which it relates be considered or not considered as part of the evidence, the conclusion as to the question of legitimacy must, according to their Lordships' opinion, be the same; and with regard to that question, their Lordships find it to be, if not established, at least highly probable, that the Appellant, who seems now to be between fifty-eight and sixty-two years of age, was born in the house of Chattore Begum, a Nicka wife of Oomdut Ool Oomrah, and it appears to be clear that he (the Appellant) is the son of a woman who was a *protégé*, or dependant, if not a servant, of that lady. She seems to have brought up the Appellant's mother, Ameen Sahiba, mentioned in the report, and to have taken an interest in her. It appears likely that Ameen Sahiba, from a time preceding her adolescence until the death of Chattore, had no other home than the residence of Chattore, and that Oomdut Ool Oomrah, whether legitimately or illegitimately, was the father of the Appellant, and so, from the time of his birth, reputed generally to be; their Lordships, by using the term "reputed generally," not, however, meaning to affirm or deny that there ever was any acknowledgment of the paternity by Oomdut Ool Oomrah. He (Oomdut Ool Oomrah) died before the year 1802, and was survived for several years by Chattore. She was survived for several years by Ameen Sahiba, and since the death of Ameen Sahiba some years have elapsed.

More than once in the proceedings before us, Ameen Sahiba is described as a slave. Their Lordships, however, believe, and it has been, by the Counsel on each side, at the bar, expressly and distinctly admitted, that she was not so. Their Lordships, accordingly, for [153] every purpose of the present litigation, assume that Ameen Sahiba, during her whole life, was free.

Chattore Begum, who seems not to have had any child of her own, appears to have adopted the Appellant from the time of his early childhood, if not from the time of his birth, and thenceforth during the whole of her life to have treated him as her son; and both the Appellant and his mother lived continually, as it seems, with Chattore until her death—the Appellant from his birth, his mother from a time preceding that event. The Appellant's examination in support of his state of facts contains but an indistinct and indirect, if it contains any, allegation that his mother was the wife of Oomdut Ool Oomrah.

Proceeding on the basis of these remarks, their Lordships deem it necessary or convenient now to divide the evidence into two portions: the first consisting of the testimony of two widow ladies, named Shurfoon Nissa Begum, and Fakroon Nissa Begum, and the second consisting of all the rest of the evidence: and to consider

amounting to rupees 833 5 $\frac{1}{4}$, will be payable on his separate receipt. I state this for your information, etc."

the second portion previously to considering the first; and, in considering the second portion, to deal with it as if the first were not existing. So viewing the evidence, their Lordships are of opinion that what has just been described as the second portion of it is insufficient to support the Appellant's contention that he is the legitimate or legitimated, son of Oomdut Ool Oomrah. By the second portion of the evidence it is not shown that there was at any time a ceremony of marriage between him and Ameen Sahiba, or that she at any time claimed or professed, or represented herself to be his wife or widow, or was at any time acknowledged by him as his wife, or was by the Government or other-[154]-wise at any time recognised or treated as his wife or widow. Though five other ladies, as his widows, had allowances from the Government, she had none.

The case, too, thus regarded, there is no proof that Oomdut Ool Oomrah at any time treated, recognized, or acknowledged the Appellant as his son, and it does not (we think) help the Appellant that, soon after his alleged father's death, the Appellant, as a member of Oomdut Ool Oomrah's family, had a pension from the Government, which the Appellant still enjoys, and which there seems to their Lordships to be no reason in point of justice, fairness, or propriety, why he should not continue to enjoy. That pension was, with the assent and concurrence of the family of Oomdut Ool Oomrah, certainly allotted to the Appellant, then a minor, in very early childhood, as a son of Oomdut Ool Oomrah, but also as the son of Chattore, which, by adoption, though by adoption alone, as already mentioned, the Appellant was: nor can he, in our opinion, be taken to have had, or to be enjoying, any Government pension or Government allowance whatever, in the character of a son of Ameen Sahiba. It was for the pecuniary interest of Chattore, with whom the mother and the son were living, to represent the Appellant as Chattore's son, and if Ameen Sahiba was not a widow of Oomdut Ool Oomrah, it was for her interest also, and that of the Appellant, that he should not be represented as her son. Their Lordships are of opinion, that unless the testimony forming what their Lordships term the first portion of the evidence ought to be deemed credible and of some weight, the Appellant's claim fails. Is, then, Shurfoon Nissa Begum, or Fakroon Nissa Begum, a credible witness? They have deposed thus:—[155] Shurfoon Nissa Begum, a widow, residing at No. 25, in Amyapah Modelly Street, at Royapettah, deposed: "I know Mahomed Bauker Hoossain Khan. I knew his mother and his father, who was my brother. There was a girl inside the house; he married her by Nicka. The Nabob Oomdut Ool Oomrah married by Nicka, Ameen Sahiba. Some time after the Nicka marriage Bauker Hoossain was born. Immediately on the birth of the child he was given in adoption to Chattore Begum. I was present at the Nicka. The Nicka was read outside. The people came in, tied a Lutchu, and put a nose ornament. The Lutchu was tied on Ameen Sahiba, and the nose ornament was put on her; I cannot say who by, there were so many persons present. I do not know if any of the people are alive except us two. After the Nicka ceremony, Oomdut Ool Oomrah and Ameen Sahiba lived as husband and wife. After Bauker Hoossain Khan's birth Ameen Sahiba was in the Chattore Begum's house. Bauker Hoossain Khan has been treated by myself as my brother's son, as my nephew. I knew Shasavar Jung; he was the son of my brother, Oomdut Ool Oomrah. Shasavar Jung's mother was Koolsoon Begum, who brought him up, and Bauker Hoossain was brought up by Chattore Begum." Cross examined by Mr. Wilkins.—"Ameen Sahiba was a child of a poor man; I do not know his name. Ameen Sahiba was not a slave girl in the family; she was a child of a poor nobleman, who, being unable to support his child, he gave the child to be supported by Chattore Begum. I know this because we were in the habit of going to Chattore Begum's house, and she in the habit of coming to us. Upon asking Chattore Begum, she said it was a poor nobleman's [156] child, and I bring her up; she did not say who the poor nobleman was, and we did not ask." I was present when the Nicka took place. I was not in the Dewanah Khanah when the Nicka was read and took place. I was among the assembly of the females. Ameen Sahiba died lately, about seven or eight years ago." Re-examined by Mr. Ritchie.—"Ameen Sahiba lived in Chattore Begum's house up to the time of her death."

Then Fakroon Nissa Begum, is examined. She deposed as follows: "I know Mahomed Bauker Hoossain Khan Bahadoor. I knew his mother: she was called

Ameen Sahiba, but commonly known by the name of Buddee Beebee; she married Oomdut Ool Oomrah by a Nicka ceremony. Oomdut Ool Oomrah was my brother. I was present at the ceremony. This was many years ago. It took place in the Chepauk garden. I cannot say when Mahomed Bauker Hoosain Khan Bahadoor was born, but he was about a year or a year and a quarter old when his father died. I knew the late Shasavar Jung Bahadoor: he was my nephew; he was the step brother of Mahomed Bauker; when they were young they were received as brothers and played together; when they grew up they remained separate. Mahomed Bauker was brought up by Chattore Begum, who was the mother of Shasavar Jung. Mahomed Bauker was born after the Nicka marriage of Ameen Sahiba. Oomdut Ool Oomrah used to call the child to him, see it and caress it, and treated him as he did Shasavar Jung. Mahomed Bauker has been received by myself and other members of Oomdut Ool Oomrah's family as his son." Cross-examined by Mr. Wilkins.—"I am 75 years old. Ameen Sahiba was the [157] daughter of a poor woman, who was not a slave girl; I do not know who the father of Ameen Sahiba was. I do not know if the Cazee was present at the time of the Nicka marriage. The ceremony took place outside, and the ladies were all collected inside of the house on occasion of the ceremony. I was in the assembly. I saw the Nicka was read; it was read in the Dewan Khanah: afterwards the people came where the ladies were, and congratulated each other. I was not present in the Dewan Khanah when the Nicka ceremony was read. After this was read outside, the people came in where the ladies were, and tied the Lutcha and put the Nuttoo. The Nuttoo was put in the nose of Ameen Sahiba; I do not recollect who did this. The Lutcha was tied on the neck of Ameen Sahiba; I do not recollect who tied the Lutcha. Before her marriage Ameen Sahiba was a Mussulman's child, a poor man's child; and was brought up in the house of Chattore Begum. Ameen Sahiba is dead; she lived many years after Mahomed Bauker's birth. I do not know any thing more of the Nicka than I have said. I know nothing about the dowry." Re-examined by Mr. Ritchie.—"I did not hear the Nicka read. Ameen Sahiba was inside the Zenanah with the females during the whole of the marriage ceremony. Ameen Sahiba was of a marriageable age at the time of the ceremony. After the ceremony Ameen Sahiba lived in the house of Chattore Begum. Chattore Begum was the wife of Oomdut Ool Oomrah."

Whatever may have induced the ladies to give this testimony, their Lordships find themselves unable to credit it. They think it very highly improbable that [158] if a ceremony of marriage between Oomdut Ool Oomrah and the Appellant's mother of any such kind as that stated, or of any kind, had taken place with such a degree of publicity as that alleged by the two ladies, or with anything like it, the fact would not have been proved also by some other witnesses or witness, notwithstanding the lapse of time. Nor do their Lordships believe that Chattore or Ameen Sahiba would so have conducted herself, or so acted, as they respectively appear to have done, if there had been any such marriage. The conduct of both is so strongly opposed to the notion of a marriage between the *protégé*, dependant, or servant, and the husband of the protectress, patroness, or mistress, as to render it impossible for their Lordships to think that such a marriage took place, upon the foundation merely of the evidence before them. Why had not Ameen Sahiba, why did she not claim, a house or establishment of her own? Why did she continue in that of Chattore? Why not have, why not claim, an allowance from the Government? Why concede, as she seems to have conceded, her son to Chattore? Why rest contented or discontented in the humble and dependent, and almost, if not altogether, ignominious position in which she remained, when five wives of the Prince (her husband as now alleged) had establishments and allowances agreeing with his rank? Their Lordships think that not a single portion of the evidence of either of these two ladies can be trusted; and if that is so, there is (it cannot be necessary to repeat) no proof that Ameen Sahiba was ever married, nor proof that she ever represented herself as a married woman, or as a widow, nor proof [159] of any acknowledgment on the part of the alleged father by word or deed, by language or conduct, that he was her husband, or the father of her son.

Their Lordships, therefore, hold that the judgment under appeal is right, unless as to costs. But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahometan law, the

law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

Here there is, in their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.

With regard to cost, however, their Lordships do not impute to the Appellant either wilful or corrupt perjury, or subornation of perjury; and therefore, not merely from the Master's opinion, but from the circumstances of the case also, they consider the Appellant's claim, though untenable, so excusable that they will humbly recommend to Her Majesty that the Appellant should not be subjected to any costs (except his own) of the proceedings before the Master, or of those before the Supreme Court; that the Order before them should so far, and only so far, be varied; and that there should be no costs of the present appeal.

[See *Ashrafud Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan*, 1866, 11 Moo. Ind. App. 114, 116; *Abdool Razack v. Aga Mahomed Jaffer Bindaneem*, 1893, L.R. 21 Ind. App. 56.]

[160] RANEE BIRJOBUTTEE and Others,—Appellants; PERTAUB SING, EDWARD AUGUSTUS BABOONAN, and THE GOVERNMENT,—Respondents * [June 15, 1860].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Appeal dismissed for want of prosecution, under Rule V. of the Order in Council of the 13th of June, 1853, restored, under circumstances showing that the interest of infants was materially affected; but upon condition, that the appeal should be prosecuted within a given time.

The security entered into in the Sudder Court for the costs of appeal to England is vacated by the dismissal consequent upon non-prosecution of the appeal within the prescribed time.

When an appeal is restored fresh security will be required to be deposited in England.

This was an application to restore an appeal which stood dismissed in consequence of no effective steps having been taken to prosecute the appeal as required by Rule V. of the Order in Council of the 13th of June, 1853 (see Order in Council, 5 Moore's Ind. App. Cases, App. p. ix.).

The petition set forth that the decree of the Sudder Dewanny Adawlut, at Calcutta, appealed from, was made on the 13th of August, 1855; that the transcript was forwarded to the Registrar of the Privy [161] Council, on the 8th of March, 1859, and registered. That no steps having been taken in England to prosecute the appeal, and six months having elapsed from the lodging of the transcript record, the appeal was under Rule V. of Her Majesty's Order in Council of the 13th of June, 1853, dismissed without further order. The petition then stated, that the neglect to prosecute the appeal arose from the delay in the execution of a power of attorney by the Appellants to prosecute the same. That the Appellants represented the interest of infants, and having regard to the magnitude of the sum at stake, and the desire to prosecute the appeal, it was submitted, that the Appellants, or their attorneys, had not been guilty of any wilful negligence or delay, and the petition further stated that the Appellants were prepared to prosecute the appeal in due

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course. An affidavit by one of the attorneys engaged in the case in India confirmed the statements in the petition as to the delay in the execution of the power of attorney being occasioned by the death of his partner who had the conduct of the appeal.

Mr. Rolt, Q.C., in support of the petition.

Mr. Leith, opposed.

The Lord Justice Knight Bruce.—The decision proposed to be brought under appeal was ripe for hearing in the year 1856, if not in the year 1855, and the delay, in various ways, has been so considerable that, notwithstanding the state of India, especially that part of India where this matter arises, in and since the year 1857, it is probable, to say the least, that if Baboonan's personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their [162] Lordships, however, cannot but give some degree of consideration to the circumstance that there are infants concerned whose interests were confided to him. Now, their Lordships do not mean to go the length of saying, that where infants are concerned any degree of delay may be considered justifiable, or excusable, or such as may be passed over; as there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology, or excuse of infancy, and considering the manner in which the interest of minors are involved, and the state in which the part of India from whence the case comes was, in and after the year 1857, they are of opinion, that on certain terms this application may be acceded to.

The Applicants, their Lordships think, must pay the costs of the present application. The Applicants, their Lordships also think, must find security to the amount of £600, to be made on or before the 1st of December next, and must undertake to have the appeal set down so as to be in their Lordships' list for hearing at the sittings after Hilary term next.

Mr. Rolt.—That will enable us to communicate to the parties in India.

The Lord Justice Knight Bruce.—One of their Lordships' reasons in thus deciding has been, that the security given in India is gone by the dismissal of the appeal. Security was given to the amount of Rs. 4000, in India; that is gone: therefore, if that money was deposited, you would be able to get it back.

[163] Mr. Rolt.—I was not aware that it would have actually gone by the dismissal of the appeal.

The Lord Justice Knight Bruce.—We fix the amount of £600, on the hypothesis that that security is gone, and that you will obtain it back.

Mr. Rolt.—If the security stands, it would be £200, in addition: that would answer your Lordships' purpose.

The Lord Justice Knight Bruce.—That, I suppose, would be so, if that security stands; but we do not think it can stand.

The Lord Justice Turner.—I do not see how it can stand.

The Lord Justice Knight Bruce.—The authorities in India will be informed that we proceed upon the hypothesis that you will be entitled to have the security-money back.

By an Order in Council, it was ordered, that the appeal from the Sudder Dewanny Adawlut, of the 19th of August, 1855, should be restored, and that leave should be granted to the Appellants to enter and prosecute the same, upon condition that the sum of £600, sterling, be lodged by the Appellants, or their agents, in the Registry of the Privy Council, as security for the costs of the Respondents, to stand and abide the determination or Order of Her Majesty upon the appeal, on or before the 1st of December next; and likewise upon condition of the Appellants undertaking to set down the appeal for hearing at the sittings of Judicial Committee, after Hilary term, 1861, and that, upon failure of these conditions, the appeal should stand dismissed, at the sittings after Hilary term, 1861, with costs, to be paid by the Appellants.

The Appellant not having complied with the above [164] conditions, either by depositing the security, or prosecuting the appeal within the prescribed time, the appeal was dismissed.

[Mews' Dig. tit. COLONY: III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; d. *Restoring*; m. *Security for Costs and Damages*. S.C. 13 Moo. P.C. 465. See *Rabiabai v. Mahomed Ismail*, 1897, L.R. 24 Ind. App. 128. As to appeals from Calcutta, see now Letters Patent of 28th Dec. 1865 (Stat. R. and O. Rev. iv. p. 82), arts. 39-42; and, as to appeals generally, see Code of Civ. Proc. (Act XIV. of 1882), ss. 595 *et seq.*]

MAHARAJAH SUTTEESCHUNDER ROY,—*Appellant*; GUNESCHUNDER and Others,—*Respondents* * [June 15, 1860].

On Petition from the Sudder Dewanny Adawlut at Calcutta.

Principles upon which the Courts in India are to estimate the appealable value, Rs. 10,000, prescribed by the Order in Council of the 10th of April, 1838.

By a decree of the Sudder Court the principal sum decreed was under Rs. 10,000; but the Court also decreed interest. Held, that in calculating the appealable value, interest was to be added to the principal.

This petition was for special leave to appeal. By the final decree of the Sudder Court, that Court awarded the Plaintiff the sum of Rs. 5041, with interest. The Petitioner submitted, that if the interest awarded on the principal sum by such decree, was calculated at the Court rate of interest, namely, 12 per cent per annum, and such interest added to the principal, the aggregate amount of principal and interest would, without costs, amount to a sum considerably beyond Rs. 10,000, the prescribed appealable amount.

The petition was heard *ex parte*.

Mr. Leith appeared for the Petitioner.

As the same point was, in substance, involved in [165] the two next petitions, a joint judgment was given by their Lordships in the three petitions. See judgment, *post* [8 Moo. Ind. App.], p. 167.

[S.C. 13 Moo. P.C. 469. See note to *Gooroopersad Khoond v. Juggutchunder*, 1860, 8 Moo. Ind. App. 169.]

SREE MUTTY RANEE SURNOMOYEE.—*Appellant*; MAHARAJAH SUTTEESCHUNDER ROY,—*Respondent* * [June 15, 1860].

On Petition from the Sudder Dewanny Adawlut at Calcutta.

An estate, the subject of the suit, was charged with a fixed annual quit-rent of Rs. 64, which the Sudder Court decreed with a declaration of the right of the Plaintiff to an enhanced rent of Rs. 822. 13a. Held, that the value of the subject-matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000, and, upon special petition, leave to appeal granted.

In this petition the application was for special leave to appeal. The petition

* Present: Members of the Judicial Committee,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

* Present: Members of the Judicial Committee,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

alleged that the Petitioner's husband and his ancestors had been in possession of land in the Zillah Nuddea, and held the same as a heritable tenure, at a fixed quit-rent of Rs. 64. 12a., from the successive Zemindars of Pergunnah, Ockrah, in which the lands in question were included. That in a suit brought in the Zillah Court at Nuddea, for the purpose of obtaining a decree for enhancement of the rent, the Principal Sudder Ameen decreed that the Petitioner was liable to pay the sum of Rs. 822. 13a. as an enhanced rent. That, as the matter was under Rs. 5000, the Sudder Dewanny Adawlut refused to admit a special appeal. That the effect of the decree was, that the Petitioner [166] would be compelled to pay annually Rs. 822. 13a. in lieu of the quit-rent of Rs. 64. 12a., which enhanced rent would necessarily exceed the sum of Rs. 10,000, and, it was submitted, that the whole value of the lands in dispute came within the meaning of "value of the matter in dispute" in the Order in Council, of the 10th of April, 1838.

This petition was heard *ex parte*.

Mr. Leith, for the Petitioners.

See judgment, *post* [8 Moo. Ind. App.], p. 167.

[S.C. 13 Moo. P.C. 470. For subsequent proceedings see 10 Moo. Ind. App. 123.
See note to next case.]

GOOROOPERSAD KHOOND.—*Appellant*; JUGGUTCHUNDER and Another.
*Respondents** [June 15, 1860].

On Petition from the Sudder Dewanny Adawlut at Calcutta.

Mode of estimating the appealable value. Interest given by decree to be added to the principal.

Whether interest subsequent to the date of the decree can be added, is a question for the discretion of the Judicial Committee.

Petition for special leave to appeal. By the final decree of the Sudder Court, the Petitioner was decreed to pay Rs. 5000, with interest. The petition alleged, that if the interest awarded on the principal moneys was calculated at the Court rate, namely, [167] 12 per cent per annum, from the time it became due, and the amount added to the principal, the aggregate amount, without costs, would amount to a sum beyond Rs. 10,000.

Mr. Leith, in support of the petition.

Judgment in this and the two preceding petitions was delivered by

The Lord Justice Turner.—The question in each of these three petitions is, whether leave should be given to appeal from the Sudder Court to Her Majesty in Council.

In none of the petitions has there been any application to the Sudder Court for such leave. The reason of there having been no such application to the Sudder Court, in two at least of the cases, is stated to have been, that the Sudder Court has proceeded upon a certain rule as to cases in which leave would be given to appeal, and that, according to the rule on which they have proceeded, leave would not have been given in those two particular cases.

It is not very clear to their Lordships on what particular grounds the Sudder Courts have proceeded with reference to giving or refusing leave to appeal. But their Lordships feel no doubt upon what grounds the Sudder Court ought to proceed in such cases. It is quite clear, in their Lordships' judgment, that the matter must be regulated by the Order in Council of the 10th of April, 1838, and by that

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Order the Sudder Courts are not to give leave to appeal unless the petition be presented within the time limited by the Order, and unless the value of the matter in dispute in such appeal shall amount to the sum of Rs. 10,000, [168] at least; importing, therefore, that leave to appeal is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to the specified sum of Rs. 10,000.

Now, where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear, that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council.

That, in their Lordships' understanding, disposes of the first and third of these petitions.

The second petition is somewhat different in its circumstances. It appears to be a case in which the party applying for leave to appeal claims to be entitled to an estate, subject only, as he contends, to the payment of a fixed annual rent of Rs. 64; but the Plaintiff in the suit, who is in possession of the judgment of the Court below, and would be the Respondent upon the appeal, claims the right to set upon the estate any rate which he may think fit. In this case it appears to their Lordships, either that the value in dispute in the appeal must be considered to be Rs. 10,000, within the meaning of [169] the Order in Council, or if not that it must be within the discretion of their Lordships, whether leave to appeal should or should not be given. Taking the case to be within the meaning of the Order in Council, it is clear that the value of the matter in dispute will exceed the sum of Rs. 10,000; for, of course, an estate held at a quit-rent of Rs. 64, must be increased in value to an amount far exceeding Rs. 10,000, if it be chargeable with a rent of Rs. 822, the amount of the enhanced rent given by the decree. Their Lordships, however, do not think it necessary to decide whether the case falls within the meaning of the Order in Council or not. They think that, whether it falls within the Order in Council, or within their discretion, the leave to appeal ought to be given.

Their Lordships have thus stated the reasons on which they have proceeded in these three cases, because they consider it of importance that the Sudder Courts should understand the rules which ought to be proceeded on in giving leave to appeal, as a contrary practice on their part drives parties into this Court to obtain the leave. They desire, therefore, that the rules which have been mentioned should be observed, and are of opinion, that in all these three cases leave should be given to appeal, and that in each case security should be given to the amount of £300. Their Lordships must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. Such cases must, in their Lordships' opinion, rest in their discretion.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 2. *Appealable Value*. S.C. 13 Moo. P.C. 472. See note to *Ranee Birjobuttee v. Pertaub Sing*, 1860, 8 Moo. Ind. App. 164; also *Doorga Doss Chowdry v. Ramanauth Chowdry*, 1860, 8 Moo. Ind. App. 264; *Mutusaumy Jagawera Fettaa Naiker v. Feneataswara Yettia*, 1865, 10 Moo. Ind. App. 320.]

[170] G. F. FISCHER, - *Appellant*; KAMALA NAICKER, - *Respondent* *

[Feb. 4 and 6, 1860].

On appeal from the Sudder Dewanny Adawlut, Madras.

The Sudder Dewanny Adawlut at Madras, dismissed a suit on the ground, that the facts disclosed a case of champerty: a question not raised by the pleadings, or in the Court below. Held by the Judicial Committee, that as that objection was not raised, or the points recorded by the Court, as required by Madras Reg. XV. of 1816, sec. 10, cl. 3, the dismissal upon such ground could not be maintained, as the objection, founded upon the English doctrine of champerty, ought not to be noticed by the Court upon a mere inference arising incidentally from the evidence in the suit.

K. being in urgent want of money entered into an agreement in writing with N. acting as the agent of F., for an advance of Rs. 19,000. The agreement recited that N. had undertaken to procure this amount from F., on his return, he being then absent from the place where the agreement was executed, and K. promised, in consideration of the loan, to grant N. a lease of his Zemindary, and it was provided that K. should, on F.'s arrival, execute a regular deed. N. could only accommodate K. with a part of the proposed loan, and as the matter was urgent, and F.'s return was expected to be within a few days, it was verbally agreed, that the remaining portion of the loan should be advanced within eight days. F. did not return till nineteen days after, when he was willing to make the advance required; but in the interim, and after fifteen days from the date of the agreement, K., from pressure for money had been obliged to get the advance from another party, and had, thereupon, granted him a lease of his Zemindary. N. then brought a suit for specific performance of the agreement. He afterwards died, when his heir assigned N.'s interest under the agreement to F., who thereupon brought an action against K. for breach of contract. The Civil Court awarded damages for the breach, but, upon appeal, the Sudder Court dismissed the suit, on the ground that the assignment by N.'s heir to F. was void for champerty.

Held: that as N. was only the agent of F., the party really interested in the performance of the agreement, the assignment by his heir of his interest under the agreement, for the purpose of enabling F. to bring the suit, was not champerty or maintenance, as it was wholly unnecessary, as F. was suing in respect of his own interest for a breach of contract [8 Moo. Ind. App. 188].

Held further, that as the agreement to grant the lease was incomplete in itself and conditional upon the advance by F. within eight days, a delay of nineteen days, in the circumstances of the want of money by K. to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease [8 Moo. Ind. App. 192].

By the English law, to maintain an action for champerty or maintenance, it is necessary to establish that the transaction was against good policy and justice, or tending to promote unnecessary litigation.

Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs [8 Moo. Ind. App. 192].

This was an action brought by the Appellant against the Respondent to recover the sum of Rs. 50,000, as damages for a breach of a contract entered into by the Respondent with one Narasihma Chetty, as the Appellant's agent, to grant him a lease of the Respondent's Zemindary.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, The Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors. The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The facts of this case which give rise to the action were these:—

[171] The Respondent was the Zemindar of Amanaicknoor, near Madura, and in the month of October, 1846, being in greatly embarrassed circumstances, and having pressing demands upon him to a large extent, he applied to one Narasihma Chetty, who was connected in business transactions with the Appellant, in order to obtain the loan of an immediate sum of money to procure his release from prison, and also for a loan of a further sum of money within a very short period. The total sum required by the Zemindar was Rs. 19,035. 2a. 7p., and Narasihma Chetty engaged to procure that sum on the security of a lease of the Zemindary, consisting of sixteen villages, and their hamlets, for ten years, at an annual rent of Rs. 19,000, out of which the lessee was to pay all the outgoings, and allow the Zemindar Rs. 2000, annually for his [172] maintenance. Narasihma Chetty had not, however, the immediate command of more than Rs. 1000, and it was, therefore, agreed that he should advance that sum at once upon a bond, and should procure the balance from the Appellant, for whom Narasihma Chetty acted, and as the Appellant was not at the time in Madura, where this agreement was made, being then at Ramnad, a short distance off, but his return being immediately expected, it was arranged that a provisional agreement should be executed, by which Narasihma Chetty should engage to procure the advance from the Appellant on his return, when the Rs. 1000, secured by the bond, were to be deducted, the bond cancelled, and the Respondent was to execute the lease of the Zemindary. The Respondent's necessities were, however, so urgent that he verbally stipulated that if the Appellant did not return within seven or eight days he should be at liberty to procure the money elsewhere.

In pursuance with this arrangement, and on the 25th of October, 1846, the following agreement was entered into between Respondent and Narasihma Chetty:—
 “An agreement executed by Kamala Naicker, the present Zemindar of Ammayanaikanoor, son of Ramaswamy Naicker, residing at Pottisettepatty, attached to the Zemindary of Ammayanaikanoor, in the Zillah of Madura, to Narasihma Chettyar, a dealer in silk thread, an agent of Mr. Fischer, residing at Salem, now but on circuit at Ramnad. Whereas I have to pay to my creditors Rs. 19,035. 2a. 7p., made up of these items, viz., Rs. 8385. 2a. 7p., amount of the Razenamah filed in favour of Moottoosamy Pillay, the Plaintiff, in O. S. No. 15 of 1845, on the file of [173] the Sub-Court of Madura; Rs. 1000, due, under a Razenamah, to Adiyappa Chettiar, late Sheristadar of the Court, and Plaintiff in O. S. No. 59 of 1844, on the file of the Moofly Sudder Ameen's Court; Rs. 3400, remaining over and above the partial payment of Rs. 1000, out of Rs. 4400, amount of the Razenamah filed in O. S. No. 133 of 1845, before the Moofly Sudder Ameen's Court; Rs. 1000, paid this day by you, under bond, in satisfaction of the warrant of execution issued in suit No. 216 of 1836, before the late Zillah Court; Rs. 1000, borrowed of Ramakristnan Chetty, of Madura, on the security of my jewels and bond, in order to satisfy the amount of the Razenamah in O. S. No. 47 of 1845, on the file of the Sub-Court; Rs. 250, borrowed of the same person for sundry purposes, and for satisfying the balance of the amount of the warrant issued in O. S. No. 256 of 1836, on the file of the late Zillah Court; and Rs. 2000, required, among other purposes, for the costs of the suit pending before the Court. And, whereas, you have promised to procure the said sum from the said gentleman on his return to Madura, in the event of your getting the sum accordingly, I shall lease to you the sixteen villages attached to my Zemindary, and the hamlets thereof, for ten years, commencing with the current year, for annual rent of Rs. 19,000; out of the said rent of Rs. 19,000, you should forward to the Circar an annual peshkush of Rs. 13,966. 8a. 6p. accompanied by an arzee and Iroosalamah, and procure a receipt for me. You should pay me annually Rs. 2000, either in coins or in kind, for my household expenses, and take a receipt from me. In consideration for the amount to [174] be advanced by you to me, you shall take Rs. 2500, annually, and enter the same upon the bond granted to you, in addition to furnishing a receipt to me for the sum. You shall, in the presence of my people, carry on the repairs of tanks of the villages to the extent of Rs. 500 and odd, and render account to me, obtaining receipt from me every year. As there are arrears of revenue due for the last Fusly from the villages, you shall realize the same in the presence of my people, and appropriate it to the liquidation of the debt and the arrears of peshkush, granting receipts to me for the same. You shall permit me to

manage the taxes, contributions, and maniyams fixed by the Circular for charitable purposes, such as pagodas, choultries, etc. You shall continue the service maniyams granted by the circular. You shall realize from the villages and pay to me the taxes and contributions usually allowed to me for such annual festivities as Adi, Kartikai, Depavali, Sankranti, etc. You shall not exact from the Ryots a greater amount of assessment than is fixed upon by Government, but shall treat me, my people, and Ryots with due respect. As the gentleman aforesaid is not here at present, I shall, on his arrival, execute a document in detail, on a stamped vadjan, in the manner dictated to by him. Thus have I executed this agreement of my own free will and accord.—Kamala Naicker, Zemindar.”

The Rs. 1000, were thereupon advanced on the same 25th of October, 1846, and a bond and conditional mortgage of a village belonging to his Zemindary to Narasihma Chetty, dated on that day, for securing the repayment, with interest, on the 1st November following, was executed. The Appellant did not, however, return by the stipulated time, nor until nineteen days [175] from the date of the above mentioned instrument, when he at once offered to advance the money, but the Respondent's necessities being urgent, he had, in the interim, and on the 9th of November, in that year, after communicating with Narasihma Chetty, obtained the required advance from a Mr. Fondeclair, to whom he executed a lease of the Zemindary.

Upon this Narasihma Chetty instituted a suit in the Civil Court of Madura for a specific performance, by which he claimed the execution of a lease to himself in accordance with the above agreement. The Judge of the Civil Court, however, on the 16th of February, 1848, dismissed the suit, on the ground, that the agreement of the 25th of October, 1846, was not, under the circumstances, binding on the Respondent, and on the 21st of October, 1851, the Sudder Court upon appeal confirmed this decision, although upon different grounds, the Court intimating an opinion that the agreement was still binding.

In the year 1855, Narasihma Chetty died, and thereupon Condiah Chetty, his son and heir, executed a deed of assignment, dated the 11th of September, 1855, transferring to the Appellant all his title under the agreement of the 25th of October, 1846.

This assignment was in these terms: —“Whereas, instead of giving possession to my father of the Zemindary of Ammayanaikanoor, under the lease executed by him, to my father in relation thereto, under date the 25th October, 1846, Kamala Naicker, the Zemindar of Ammayanaikanoor, attached to the talook of Nelakottah, Zillah Madura, fraudulently demised it under a lease to Mr. Fondeclair, whereas my father filed an action in consequence, and in the appeal pre-[176]-ferred to the Sudder Adawlut from it was finally decreed that the lease aforesaid was good and valid, and that as the enjoyment thereof was anticipated by the fraudulent execution of a lease in favour of Mr. Fondeclair by the first Defendant in that suit, the income derivable up to the term of the lease might be sued for and recovered: whereas if my father had possession as per the lease an annual income of not less than Rs. 5000 would have been derived, exclusive of all charges of the Zemindary: and whereas my father is dead and I am unable to sue for and recover the sum of Rs. 50,000, derivable during the ten years of the lease at the rate aforesaid, I execute this deed of assignment to you, making over to you all right and title conferred upon me by the lease and confirmed by the decrees of the Sudder Adawlut regarding it, for adequate valuable consideration, inclusive of the sundry sums borrowed of you by my father on different occasions for the purpose of prosecuting the suit, and of the Rs. 2000, borrowed likewise of you by my father under a deed of assignment on stamped paper, executed by my father on the 22nd of October, 1853, but which became inoperative; and accordingly put you in possession of all the documents relating thereto, authorising you to recover the amount of the profit aforesaid either by a civil action or by any other means. Thus do I execute this deed of assignment by my own free will and accord.”

The Appellant on the 7th of November, 1855, filed a plaint in the Civil Court of Madura, to recover from Respondents Rs. 50,000, as damages for breach of contract.

The Respondent by his answer to the plaint, con-[177]-tended that the suit was untenable, inasmuch as the agreement of the 25th October, 1846, was an incomplete arrangement, and that on its execution it had been verbally agreed that within eight

days after the return of the Appellant from Ramnad, where he was staying at that time, Rs. 19,035. 2a. 7p. was to be paid to the Respondent by the Appellant, and if so advanced a detailed lease was to be executed on a stamped paper, and in default of such payment the contract was to be null and void; and that the Appellant having failed to advance that sum, the Respondent had rented out the Zemindary to the late Mr. Fondeclair, and thereby discharged his debts; that the suit brought by Narasihma Chetty, founded on the agreement, had been dismissed; that the present claim had no basis, and was vague; and lastly that the suit was opposed to sec. IX., Reg. II., of 1802, and to the principle laid down in Macpherson's "Civil Procedure." p. 49.

On the 7th of August, 1856, Mr. A. W. Phillips, the Judge of the Civil Court of Madura, recorded the following points for proof by the Appellant. To file the deed of assignment, dated the 11th of September, 1854, and prove the same. Prove the assignees' right and title to claim for the damages. Prove the damages in detail which the assignee has sustained by the non-fulfilment of the Defendant's contract. The Respondent was to prove that the assignee possessed no right and claim for damages, and to adduce proof to combat the claim of the Plaintiff to the extent sued for, or to any portion thereof.

Witnesses were examined on both sides. The evidence was contradictory upon the point whether the period of seven or eight days mentioned in the answer [178] was the time specifically agreed to by the parties to the agreement of the 25th of October, 1846, as the term beyond which the Respondent was not to wait for the Appellant's return to Madura.

The Acting Civil Judge, Mr. A. W. Phillips, pronounced the Court's decree on the 11th of December, 1856, the material part of which was in these terms:—"The Court of Sudder Adawlut has already declared, that as the Defendant in this case did not wait for the Plaintiff's return to Madura, which took place within what they considered a reasonable period, that the document of the 25th of October, 1846, was a valid contract, and as such binding on the Defendant, but that as he had divested himself of the power to fulfil that contract with the Plaintiff, the latter should seek his remedy, not by a suit to obtain what could not be awarded to him, but by an action for damages sustained by the non-fulfilment of the contract. The validity of the document, therefore, which the Defendant protests against, must be looked upon as an established fact no longer a subject for discussion, and all the Court has to do in the present case is to ascertain what damages the Plaintiff has sustained by its non-fulfilment;" and the Court assessed the damages at Rs. 40,000, with costs.

The Respondent appealed from this decree to the Sudder Dewanny Court at Madras, and that Court delivered judgment on the appeal on the 20th of March, 1858. After stating the facts of the case the judgment proceeded as follows:—"The Judges of the Sudder Adawlut consider that they are responsible for upholding the law in its integrity, whether a suitor may have challenged or not an attempted violation of the law. The Court are bound to see that their decisions [179] rest upon unexceptional and legal grounds, and they cannot pass a decree in this case without first ascertaining whether the serious imputation of champerty attaches to the action. They resolved consequently to give hearing in this matter, and have confined the addresses of the Pleaders on either side to this one question, upon the decision of which any further question would depend. It is argued on the Plaintiff's behalf that the transaction with Narasihma Chetty's heir, as described in the assignment, is not champerty, from the circumstance that the parties had not arranged to divide the gains of the suit. But it has been satisfactorily shown on the other side that however true, that there should be such agreement to constitute champerty as originally defined, the existing and uniform practice of the Courts is to discourage all that savors of champerty, and that the purchase of a mere right of action is now distinctly viewed as champerty. Again, it is argued that the right purchased was not a mere right of action, but that as in the disposal of the former suit by Narasihma Chetty, it was held that a suit for damages such as are now in question might lie, there was in effect an adjudication that Narasihma Chetty had a title to the damages, and the thing purchased was a judgment. The Court considers this argument to be a futile one; a suggestion that there might be a suit for damages is a very different thing from a declaration of right to damages; nor had there been any attempt to estimate such damages, or to represent as vested in Narasihma

Chetty any title of ascertained value, admitting of transfer by sale. Narasihma Chetty had still to establish by suit his right to damages, and the sum of such damages, and the only thing sold under the assignment was his [180] right so to sue. It is finally argued that Plaintiff only went through a form of purchase for the better assurance of his position, while in reality the contract between Narasihma Chetty and the Defendant was on the Plaintiff's behalf, Narasihma Chetty acting simply as his agent. The contract certainly contains much to countenance the idea of such agency. In the title of the deed, Narasihma Chetty is described as the agent of Mr. Fischer, of whom it is further specified, as if to account for his not being personally dealt with, that he was then at Ramnad. In the body of the deed it is agreed that the money to be advanced under the contract should be obtained from that gentleman on his return from Madura, and at the close of the deed the Defendant uses the following remarkable expression: "As the gentleman aforesaid is not here at present, I shall, on his arrival, execute a document in detail, on a stamp Cadjan, in the manner dictated to by him. In the suit brought by Narasihma Chetty to enforce the contract, he again described himself as the Plaintiff's agent. On the other hand, the assignment does not set out as it should have done, that the contract was made by the agent under authority from his principal and for his benefit. On the contrary, the lease of the Zemindary contracted for was to be conferred upon Narasihma Chetty, and when this person was asked by the Civil Judge of Madura to explain the particular object of his suit, whether he wished to have the contract enforced for his own benefit, or that of the Plaintiff, whom he described as his master, he put in a motion declaring his desire to be, that the lease of the Zemindary should be made to him individually. It is not alleged that Narasihma [181] Chetty acted thus in fraud of the Plaintiff. The suit was allowed to run its course from 1847 to 1851, through several remands, re-hearings, and re-appeals, without any such representation being made by Plaintiff, and in this suit he has explicitly subscribed to Narasihma Chetty's action. He says, that the lease was to have been to Narasihma Chetty, that the sum advanced by Narasihma Chetty in consideration for the contract was borrowed from him, not that it was advanced on his account, and that the interest in the deed of contract having descended to Narasihma Chetty's heir, the latter had sold the same to him 'on the receipt of adequate consideration.' And he puts in the assignment as the groundwork of his suit, in which the said purchase for 'full consideration' is set forth, none of the items making up the consideration being described. The plea of agency is only now set up, and for the specific purpose of meeting the charge of champerty. The Court hold the plea to be utterly untenable in the face of the Plaintiff's formal acts and declarations against the existence of such agency. They must take the suit as presented by the Plaintiff, and he having therein based his claim upon purchase made by him of a right to sue, by that representation he must stand or fall. The Judges are of opinion, that such a purchase constitutes champerty, and the practice being one they are bound to discourage as promoting litigation, which otherwise might not arise, and the fostering of hazardous and questionable claims, they resolve to reverse the original decree, and dismiss the suit with costs."

The present appeal was from this decree.

[182] Mr. R. Palmer, Q.C., and Mr. Coryton, for the Appellant. First, the Sudder Court, in dismissing the suit on the ground of champerty, departed from the issues raised by the pleadings. No such defence was pleaded, and, therefore, cannot be noticed by the Court. Best "On Evidence," sec. 254 (3rd Edit.). It certainly could not in England under the Common Law Procedure Act, 15th and 16th Vict., c. 76. Nor had the Appellant an opportunity of meeting the case upon that point, or of showing as he might have done, if his title had been impeached on that ground, the true state of the circumstances under which the title was acquired. Another fatal objection is, that this question was not put in issue by the points recorded by the Judge of the Civil Court of Madura. The terms of Madras Reg. XV. of 1816, sec. 10, cl. 3, are imperative, and declare that the Court is to record the points necessary to be established by the parties to enable the Court to take notice of an objection. A point not recorded cannot be noticed. *Srimut Mootoo Vijaya Raghavanatha Gounder Vallabha Perria Woodia Taver v. Rany Anga Moottoo Natchier* (3 Moore's Ind. App. Cases, 278). Neither was it competent to the Sudder Court to decide the question of champerty, as being a "question of fact" within the meaning of cl. 4, sec. 1, of

Act, No. XVI., of 1853.—[Sir John Coleridge: If their Lordships should be of opinion that there was champerty, or more properly speaking, maintenance, what course ought to be taken; to remit the case or hear it upon the merits!—Sir Hugh Cairns, Q.C., for the Respondent: The proper course would be to remit the case.]—That would [183] cause delay. There are sufficient materials before the Court to decide upon the merits.

As to the question of champerty or maintenance, we submit, that the deed, dated the 11th of September, 1855, was in the nature of an assignment from a trustee to a *cestui que trust*, and was not in the nature of champerty or maintenance. Sugden, Ven. and Pur. 299 (13th Edit.), *Byrne v. Frere* (2 Molloy, 157), *Hartley v. Russell* (2 Sim. and Stu. 244), *Findon v. Parker* (11 Mee. and Wels. 675), *Wood v. Downes* (18 Ves. 120). The agency of Narasihma Chetty, for the Appellant, in the original transaction, is apparent throughout the whole of the proceedings in the suit, and, as a fact, is so recited in the agreement of the 25th October, 1846, and has never yet been controverted by the Respondent. Now, the Sudder Court, in relying upon the alleged title asserted by Narasihma Chetty to sue in his own name for specific performance as being inconsistent with such agency, has given an undue weight to the form and totally disregarded the substance of the transaction. The money to be advanced was the Appellant's, and the lease of the Zemindary, if granted to Narasihma Chetty, would have been for the Appellant's sole benefit.

Sir Hugh Cairns, Q.C., and Mr. W. Field, for the Respondent.—The Sudder Court was in principle correct in holding that the agreement between the Appellant and Condiah Chetty and the assignment of Narasihma Chetty's interest in the suit brought by him against the Respondent, was illegal and void for champerty, as it in law conferred no right upon the Appellant to maintain this [184] action. *Andrews v. Maharajah Sreesh Chunder Rhee* (S.D. A. Decis. Ben. 1849, p. 340). In *Prossor v. Edmonds* (1 You. and Call. 481), Lord Abinger held, that a Court of Equity would give no encouragement to contracts which savoured of maintenance or champerty, though such contracts might not be within the strict legal limits assigned to such offences. *Reynell v. Sprye* (1 De G. Mac. and Gor. 660), and in *Doe dem. Witham v. Evans* (1 Com. Ben. Rep. 717), a sale by an administrator of a pretended title to certain premises was set aside, and the conveyance held void as well at Common Law, as by Statute, 32nd Hen. VIII., c. 9.

But, secondly, upon the merits. The Respondent was not bound by the agreement of the 25th of October, 1846, in the event which happened. The Respondent's necessities were so urgent that he stipulated that if the Appellant did not return within seven or eight days, he was to be at liberty to procure the money elsewhere; and as the Appellant did not return within such stipulated time, indeed, not until nineteen days after, such unreasonable delay obliged the Respondent to obtain the required advances from Fondeclair, and he, therefore, determined the agreement with Narasihma Chetty, as representing the Appellant, and leased the Zemindary to Fondeclair. The fact that the contract was broken by the Appellant was lost sight of by the Acting Judge of the Civil Court, who was also wrong in holding that the liability of the Respondent under the agreement was concluded by the judgment of the Sudder Court in the suit in that Court between Narasihma Chetty and the Respondent.

Their Lordships' judgment was delivered by

The Right Hon. Sir John Coleridge (March 7, 1860).—This was a suit brought in the Civil Court of [185] Madura, to recover damages from the Respondent for the breach of an agreement. Judgment passed in that Court for the Appellant, and this judgment was reversed in the Sudder Adawlut. The present appeal is brought for the purpose of procuring a reversal of that decree.

The facts on which the case arise are in substance these:—On the 25th of October, 1846, the agreement in question was entered into between the Respondent on the one hand, and Narasihma Chetty on the other, who is thus described in the commencement of it: "A dealer in silk thread, an agent of Mr. Fischer, residing at Salem, but now on circuit at Rannad." Narasihma Chetty was in truth acting as Fischer's (the Appellant's) agent, whose residence was at Salem, and he was at the time absent on circuit as described.—[His Lordship read the agreement, *ante* [8 Moo. Ind. App.], p. 172, and proceeded.]

On the day of the execution of this instrument the Respondent also executed a Bond and a conditional mortgage of a village attached to his Zemindary, for a loan of Rs. 1000, from Narasilma Chetty, which were then advanced, and were to be repaid on the 1st of November following. This was to meet one of the debts enumerated in the preceding agreement. In this transaction also Narasilma Chetty was acting as, and was described in the instrument to be, the "agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad."

The Appellant did not return by the 1st of November, nor until some days after the 9th, on which day, in violation, as the Appellant alleges, of the agreement to which he claims to have been the principal party, the Respondent executed a lease of the Zemindary to one Fondeclair.

[186] This led to proceedings in which Narasilma Chetty was made the Plaintiff, for the purpose of enforcing the performance of the agreement. These proceedings failed, and the lease to Fondeclair was supported; whereupon the Appellant determined to institute the present action for damages, and Narasilma Chetty being dead, it was thought desirable for him to institute it in his own name; but the original agreement having provided that the lease should be made to Narasilma Chetty, and he having been the ostensible party to the previous proceeding, the following assignment was procured from his son, Condiah Chetty. "[His Lordship read it, *ante* [8 Moo. Ind. App.], p. 157.]—The action and appeal then followed, which have been already mentioned.

The decree of the Sudder Adawlut did not pass on the merits, nor on any point raised in the Court below; but it having been objected that the suit disclosed a case of champerty, the Court resolved to entertain the objection; because, as they say, they thought themselves "responsible for upholding the law in its integrity;" (see [8 Moo. Ind. App.] p. 178) they confined the addresses of the Pleaders on either side to that one question, and decided the case against the present Appellant on that point only.

Their Lordships are clearly of opinion, that the decree of the Sudder Adawlut in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law, and partly by Statute, are forbidden; and also, if so forbidden, [187] whether the point was in this case so raised by the pleadings, or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that though it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance, *mutu proprio*, of any objection, manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation, or answer by counter-evidence, it is highly inconvenient, as well as contrary to the Regulation, XV. of 1816, which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry, if the issue has not been presented by the pleadings, or the points recorded for proof. But, assuming that in the present case the Court properly instituted the inquiry, their Lordships do not agree with them in the conclusion to which they conducted it.

The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments. Now, here it is clear, that the Appellant was the real party to the [188] original agreement, and the person really interested in its performance; he was to advance the loan; the profits that were expected to result from the loan were to be his; he might have intervened in the first instance, and conducted the litigation, which first ensued, in his own name. Narasilma Chetty was but an agent, contracting for the Appellant in his own name, but avowedly as agent only, not undertaking to borrow from the Appellant the money, and then lend it to the Respondent, but to procure for him the loan of it from the Appellant. All

this was perfectly consistent with his being put forward as the ostensible party, with the full knowledge of the Respondent. This was the substance of the contract, and the Court should have treated the assignment from Condia Chetty as merely an unnecessary precaution, unwisely adopted, perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this: Was the Appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment? If this had been borne in mind, their Lordships think that the Court would have arrived at a different conclusion from that which they in fact came to.

Here, therefore, their Lordships would have stopped, simply recommending that the judgment should be reversed; but in the commencement of the argument it was arranged, with the consent of the Counsel on both sides, that if their Lordships [189] should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it; a course by which it was probable that much litigation and expense might be saved to the parties.

Their Lordships have, therefore, examined the facts of this case as they appeared before the Civil Court of Madura. As it is indisputable that a lease of the Zemindary has not been granted to the Appellant, or his agent, Narasihma Chetty, it is clear that the Appellant ought to recover if there was ever a binding contract between the parties to grant one, unless the non-performance of that contract be in any way justifiable. The first of these must be ascertained by an examination of the agreement of the 25th of October, 1846, of the circumstances attending its execution, and of the remaining facts of the case. The instrument commences with a recital, that the Respondent was under an obligation to pay his creditors the sum of Re. 19,035. 2a. 7p., made up of items of which an enumeration follows, and this enumeration shows that the money was wanted without the least loss of time, that the pressure on him was urgent. It then recites a promise from Narasihma Chetty to procure the amount from the Appellant on his return to Madura, and then it promises to grant the lease; but only "in the event of Narasihma Chetty getting the said sum accordingly." It then proceeds to stipulate for a number of payments to be made, things to be done, and conditions to be observed by the lessee, after the lease granted, and during the continuance of the term; and it concludes thus: [190] "As the gentleman aforesaid (the Appellant) is not here at present, I shall, on his arrival, execute a document in detail, on stamped cadjan in the manner dictated by him."

On the face of the instrument, it is obviously a contract incomplete in itself and conditional; nothing in it binds the Respondent to the granting of the lease, unless the money was procured for him from the Appellant on his return to Madura, and it is clear also that nothing in it binds the Respondent to advance the money, when he should return. Further, it is obvious that no time being specified for this return, the parties must either by some collateral agreement have fixed a day for that return, or must be taken to have contemplated, what the law would imply from their language, a return within a reasonable time, all the circumstances considered. For the Respondent setting out his urgent necessities, showing the pressure that was on him, and professedly borrowing the money, not to meet future casual or uncertain expenses, but to liquidate the debts which occasioned the pressure then upon him, it would be highly unreasonable to suppose that a return after any indefinite period, however long, could have been in the contemplation of the parties. And this conclusion is strengthened by the circumstance that there is no evidence of any previous authority from the Appellant constituting Narasihma Chetty his agent to make the contract; indeed, the instrument itself shows that he was not bound, that it was uncertain whether he would on his return adopt and ratify the act of Narasihma Chetty; and the conclusion is therefore irresistible, that the Respondent was bound to wait only for that ratification and performance until the Appel-[191]-lant's return on a specified day, or a return within a reasonable time.

The Respondent contends that the time was fixed by a collateral parol contract, and limited to the 1st of November, or to eight days from the 25th of October; the Appellant, that the return was to be within a reasonable time, that he did not

return within such reasonable time, and forthwith ratified the act of his agent, but that the Respondent had in the meantime put it out of his power to fulfil the contract, by granting the lease to Fondecclair.

The undisputed facts of the case are these:—

On the 25th of October, the date of the agreement in question, the Respondent executed the mortgage and bond to Narasimma, as already stated. This appears to their Lordships to have been substantially part of the principal transaction, and to be most material on the point now under consideration; it was a loan of Rs. 1000, to meet one of the demands specified in the agreement, which may be presumed to have been peculiarly pressing, and the Rs. 1000, are stipulated to be repaid on the 1st of November, in default of which the mortgage of a single village was to take effect. Their Lordships think there is every reason for presuming that the repayment was intended to be made out of the Rs. 19,000, to be advanced by the Appellant on his return to Madura; and if that be so, it is clear that his return was contemplated to take place on or before that day.

The next fact is that, on the 9th or 10th of November, the lease was executed to Fondecclair; and the remaining fact is the return of the Appellant on the 13th of November, as their Lordships understand the [192] evidence: this would be nineteen days after the execution of the agreement.

There is a good deal of parol evidence to the effect, either that a period of eight days, or that the 1st of November, was agreed to specifically by the parties as the term beyond which the Respondent was not to be bound to wait for the Appellant's return; and their Lordships are disposed to give credit to the evidence: they do not think that the variation in regard to the eight days and the 1st of November makes the testimony unworthy of belief. But, it appears to them unnecessary to decide the case on this point; for they are clearly of opinion, looking at all the circumstances which appear on the face of the documents, the first of which discloses the nature of the debts due from the Respondent, which were mostly judgment debts, or debts on which the execution was pending, or for which warrants had issued; and the second that a portion of the money contracted for was advanced at once, and to be repaid on the 1st of November: that it was understood by both parties that a reasonable time for the Appellant's return would be within a few days, and that the delay of nineteen days was unreasonable. Such a delay would probably defeat the whole purpose of the loan: and there is not the slightest evidence that either by reason of distance, difficulty of conveyance, or the necessary or usual business of the circuit, a delay of nineteen days could have been considered probable.

On this ground their Lordships are prepared to recommend to Her Majesty that the appeal be dismissed: but as they do this on wholly different grounds from those relied on by the Court below, that the dismissal should be without costs.

[See *Chedambara Chetty v. Renga Krishna Muthu Vira Puchaiya Naickar*, 1874, L.R. 1 Ind. App. 241.]

[193] MOHUN LALL SOOKUL and Another.—*Appellants*: BEBEE DOSS and Others,—*Respondents* * [June 14, 1861].

On petition from the Sudder Dewanny Adawlat, Calcutta.

By Ben. Reg. X. of 1829, the test of the value of the property in suit is the selling or market value.

An order in Council made upon an *ex parte* application granting special leave to appeal upon an allegation as to the value of the property in dispute rescinded.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner. Assessors. The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

there being omissions in the petition, of proceedings in the suit, which showed the true value of the property.

In ordinary circumstances, an Order in Council obtained upon an *ex parte* petition, which omitted to state the true facts, will be discharged with costs, but if there has been laches in applying to discharge the Order on the part of the Respondent, no costs will be given.

In this case special leave to appeal had been granted upon an *ex parte* application of the Appellants (7 Moore's Ind. App. Cases, 428), upon an allegation as to the value of the subject matter in dispute in the suit.

A petition was now presented by the Respondents to rescind the Order in Council granting leave to appeal, alleging, that in the petition for leave to appeal, several important omissions had been made, namely, first that the answer of the Respondents to the plaint, whereby the question at issue, whether by Ben. Reg. X. of 1829, the value of the subject matter was to be computed according to the real or market value, had been omitted; [194] and, secondly, that a supplementary plaint filed by the Appellants, which stated that the suit had by mistake been valued at three times the Sudder jumma instead of Rs. 4300, the real or market value of the property had also been omitted. The petition further alleged, that throughout the proceedings it was treated by the Appellants as a case regarding mortgaged premises, valued at Rs. 4300; that the Respondents had applied to the Sudder Dewanny Adawlut at Calcutta, and to the Officiating Judge of Chittagong, to whom the enquiry had been by the Order in Council delegated, to give evidence of the value, but that such application had been refused by that Court, upon the ground that by the Order in Council, evidence of that fact was to be supplied by the Appellants, and the petition prayed, that the order in Council granting leave to appeal might be rescinded, or that an Order might be made, directing an enquiry as to the real or market value of the property in dispute.

Mr. W. Field, for the Respondents, in support of the application, cited Ben. Reg. X. of 1829, schedule B, 8.

Mr. Leith, for the Appellants, opposed.

The Right Hon. Lord Kingsdown.—This is an application to discharge an Order in Council made by Her Majesty at the recommendation of their Lordships, on the 16th of February, 1860. By that Order liberty was given to the Appellants to appeal, notwithstanding that the property which was the subject of the suit, was of less value, as appeared upon the proceedings in the case, than Rs. 10,000, which is the sum limited by the Order in Council of the 13th of June, 1838.

[195] A petition of this nature, be *ex parte*, it is a universal and a most important rule of this Court, that every fact which is material to the determination of the question raised upon the petition should be truly and fairly stated; and where there is an omission of any material facts, whether it arises from improper intention on the part of the Petitioner, or whether it arises from accident or negligence, still the effect is just the same; if this Court has been induced to make an Order, which if the facts were fully before it, it would not, or might not, have been induced to make.

Now, in this case, their Lordships were of opinion, that in order to justify an appeal to this country it should be satisfactorily proved that the property in dispute really was of the value of Rs. 10,000. They did not think that there were any special circumstances in the case which would justify the Court in taking it out of the ordinary rule. There were no particular questions of law or indeed anything which would prevent the application of the strict general rule, which requires that the property in dispute should be of that value.

It was stated in the petition for leave to appeal, that the Plaintiffs had in the plaint represented the property to be of the value of Rs. 3572, and that the suit was instituted to recover possession of certain mortgaged premises, of which the value was so estimated, but only for the purpose of complying with the rules of the East India Company's Courts for fixing the amount of the stamp upon the plaint; and then, after stating the proceedings in the case, the petition concluded with assigning as a ground for making the application here, that the value of the property having been represented by the Plaintiff as [196] Rs. 3572, the Court below had no authority

to grant an appeal. The petition also alleged that although it appeared from the statements in the plaint that the real or market value of the land in question in the suit must be taken to exceed the amount of Rs. 10,000, yet the amount laid in the plaint as the value of the suit for the purpose aforesaid, being only Rs. 3572, three times the amount of one year's jumma, or rent, the Petitioners were prevented by the rules of the Court from applying to that Court for such leave.

The misrepresentation, therefore, upon that petition is this. The plaint, according to the Regulation, estimates the value of the property at three years' jumma. Three years' jumma amounts to Rs. 3572, and, therefore, according to the Regulation, represented a value which would furnish no criterion of what the actual value was. In this state of things it appeared to their Lordships that the parties ought not to be concluded by such a statement: that there was nothing inconsistent with that statement: that the property might be of a greater value, and, therefore, their Lordships gave leave to appeal upon somewhat unusual terms, namely, referring it to the Court below to report what was the actual value of the property.

Ben. Reg. X. of 1829, cited before us, enacts, that in suits respecting revenue lands three years' amount of the jumma shall be taken to be the value of the property, and with respect to suits for houses, etc., and other things of value, the amount is to be computed according to the estimated selling price, and that every plaint shall specify the value of the thing claimed.

Now, it appears, that there were in this case two distinct modes of valuation, one of which affords no criterion whatever of the actual value, the other of which, if it were fairly stated, afforded a most certain [197] criterion, being the estimated selling price, not the price it sold for, but what the property would sell for at the time the plaint was filed.

Now, it appears that the Plaintiff had represented by his plaint that the property was estimated at Rs. 3572, which was three years' jumma. But this statement does not fall within the above Regulation. For the purposes of this suit it was necessary to state what the actual value was: what the real selling value was: what the value was according to the Regulation, and, upon the final supplemental plaint, it was stated that the property was valued for this purpose at Rs. 4300, and in the record of the proceedings which had been drawn up, stating the issues which the parties were going to try, it was stated that afterwards the Plaintiff had filed a supplemental plaint, in which it was alleged that the suit had been valued at Rs. 4300, the price or value of the land, and that as the stamp was Rs. 150, it was sufficient to cover a claim of Rs. 5000. Is it possible not to understand this as applying to Regulation X. of 1829, and as stating therein the value, the estimated selling price? and which is stated at Rs. 4300. Now, if that fact had been stated to their Lordships, it is hardly to be believed that the Order for leave to appeal granted by their Lordships would have been made.

If we were of opinion that this had been an intentional misrepresentation on the part of the then Petitioners, we should, without the least hesitation, not only have discharged the Order, but we should have made the party who applied for it pay all the costs, and have given no liberty whatever to make any further application.

Their Lordships are, however, inclined to take an indulgent view of the case. They are inclined to [198] think that there was not any intentional misrepresentation; and, therefore, though they discharge the Order for leave to appeal, they will not do it on the conditions I have mentioned. They would, indeed, under any circumstances, have thought it right, whether the mistake was intentional or unintentional, to have made the party applying for it pay all the costs, were it not for the delay on the other side. The Order for leave to appeal was made in February, 1860; it went out to India, and it appeared that at least in August, 1860, the Petitioners who now apply to discharge the Order were informed that they would have liberty to give evidence under it. We think they might have applied the moment they saw the petition and the Order which contained the directions I have mentioned: for then they must have been aware that a very important fact had been kept back from the Court, and they might then have applied to have discharged the Order. Still they might have thought, that on the construction of the Order they should be enabled to give evidence, and they might have thought that it would be less expensive to make the application to the Court below. But, in August, 1860, they were told of the construction which the Sudder Dewanny Court at Calcutta had put upon their Lordships' Order,

that they would not be at liberty to give evidence upon that enquiry; and they were, therefore, then apprised of the manner in which the Order of their Lordships was to be carried out.

Under these circumstances, their Lordships are of opinion, that costs should not be awarded against the parties who obtained the Order giving leave to appeal, and they discharge such order without cost and without prejudice to any other application by the Appellants, upon giving notice to the Respondents.

[See *Ram Sabuk Bose v. Monmohini Dossee*, 1874, L.R. 2 Ind. App. 71; *Mussoorie Bank v. Raynor*, 1882, L.R. 9 Ind. App. 70. For subsequent proceedings see 8 Moo. Ind. App. 492, and 10 Moo. Ind. App. 1].

[199] MAHARAJAH KOOWUR BABOO NITRASUR SINGH.—*Appellant*; BABOO NUND LOLL SINGH, and Others, *Respondents* * [June, 19, 20, 22, 1860].

On appeal from the Sudder Dewanny Adawlut, at Calcutta.

Decrees were made in the year 1816, in suits respecting disputed boundaries of certain Mouzahs in two Zemindaries and the boundary line determined. In 1845, a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these Mouzahs, which land it was admitted by the Plaintiff that the Defendants had been in the possession of since the year 1834. It was pleaded in defence, first, that the land claimed, was within the boundary declared by the decrees of 1816 to belong to the Defendants; and, secondly, that the Plaintiff, or those under whom he claimed, had been out of possession for upwards of twelve years, and that the cause of action was consequently barred by Ben. Reg. III. of 1793, sec. 16. In such circumstances it was held that the issue of possession was the first point to be considered, and that such issue was wholly independent of the question of boundary [8 Moo. Ind. App. 220, 221].

Held further, that as the Plaintiff sought to disturb the possession of the Defendants, admitted by him to have existed for eleven years, but which the Defendants alleged was a much longer period, the *onus probandi* was upon the Plaintiff to remove the bar to the action by Ben. Reg. III. of 1793, sec. 16, by satisfactory proof that the cause of action accrued to him on a dispossession, twelve years before the commencement of the suit, and that he, or some person through whom he claimed, was in possession during that period; and that no proof of anterior title in his favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on the Defendants, by compelling them to prove the time and manner of possession [8 Moo. Ind. App. 220, 221].

Although the evidence of witnesses for the Defendants as to possession is of no better character than those produced by the Plaintiff as to dispossession, yet it lies on the Plaintiff to make out his case, and as the probabilities of the case in this instance were against dispossession, it was held by the Judicial Committee, affirming the judgment of the Sudder Dewanny Adawlut, that the Plaintiff had failed to prove the dispossession of the Defendants, which was necessary to maintain the suit [8 Moo. Ind. App. 223.]

A preliminary objection was taken in the Sudder Court to a decree of the Principal Sudder Ameen, on the ground that the Sudder Ameen had omitted to draw up the issues in the suit as required by sec. 10 of Ben. Reg. XXVI. of 1814. This objection was held fatal, and the Sudder Court remitted the suit to the Lower Court with directions to lay down the issues in a regular way, and to try and determine the suit *de novo*. The Principal Sudder Ameen accordingly prepared the proper issues, and ordered that the parties should be called upon for their proofs. The Plaintiff

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, The Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

did not go into fresh evidence, but prayed for judgment on the evidence already given, and upon the former evidence taken the Principal Sudder Ameen made a decree against the Plaintiff.

Held upon appeal by the Judicial Committee:—

First, that if this mode of trial was irregular, the Plaintiff had no just ground of complaint, as the irregularity was committed at his instance, or with his consent [8 Moo. Ind. App. 220].

Second, that a suspicion, however probable in the mind of a Judge that a party who has failed to prove his case, might be more successful on a fuller investigation, does not constitute sufficient ground for directing a new trial [8 Moo. Ind. App. 220].

The Appellant, the Zemindar of Pergunnah Nursingpore Koorah, owned a village in his Zemindary, called Mouzah Gopaulpore, otherwise Gopaulpore Maholee.

[200] The Respondents were the proprietors of Mouzah Rampore, part of a Zemindary, called Naredegur.

The two Mouzahs adjoin each other, and disputes respecting the boundary line of the Mouzahs had arisen from a very early period between the ancestors of the Appellant and of the Respondents. The Appellant in the present appeal claimed 700 beegahs of land as being part of Gopaulpore; whilst the Respondents' case was, that the land in question was part of Rampore, and had been so declared by a decree of the [201] Court in the year 1816; and, further, that the land claimed had been in their possession and their ancestors' without any claim on the part of the Appellant, or under those through whom he claimed, since the year 1818.

The facts of the case, which were complicated, were, in substance, as follows:—

The village of Rampore, together with certain other villages called Rajpore, Cuddeah, Jypore, and Jypore Pukree, were formerly the property of one Mohun Singh, the ancestor of the Respondents. In the year 1791, he was dispossessed of those villages by one Deo Raj Singh and obliged to bring a suit for their recovery, and that suit having ended in Mohun Singh's favour in 1803, he was again put in possession.

During Deo Raj Singh's possession, a dispute arose between him and Madho Singh, the Appellant's ancestor, who was the proprietor not only of the village of Golaulpore, but of a village called Surseeah, in Pergunnah Nursingpore Koorah; touching the boundaries of Surseeah and of Jypore, the adjoining village, claimed by Deo Raj Singh, and that dispute was referred to an Ameen, named Khoda Yaar Khan, to ascertain the boundaries, who, on the 24th of August, 1792, made an award to the effect, that the lands in dispute belonged to Madho Singh, and in that report he laid down the boundaries of the two Pergunnahs of Naredegur (in which Mohun Singh's villages were situate), and of Nursingpore Koorah, which included Surseeah and Gopaulpore. These boundaries were laid down principally with reference to a point, the position of which was ascertained, called Baugh Jhujree, due south of Jypore, as appeared from a plan annexed to the award. [202] and the substantial result was, that Pergunnah Naredegur (Mohun Singh's and the Respondents' property) lay to the north and west of that point, and Nursingpore Koorah to the south and east.

Notwithstanding this award, however, Madho Singh took advantage of the unsettled state of the title as between Mohun Singh and Deo Raj Singh, to lay claim to parts of the lands which were in dispute between them, and in 1803 and the following year he claimed or got possession of 411 beegahs, part of the village of Jypore Puckree, and of 251 beegahs, parcel of Rampore, which Madho Singh alleged to be parcel of Gopaulpore Maholee.

In 1810, Mohun Singh, who, on the termination in his favour of the litigation with Deo Raj Singh, had obtained the right to the possession of his villages, instituted a suit against Chuttur Singh, the son of Madho Singh, he having died in the interim, to recover possession of both these parcels of land; but he was, on the 27th of January, 1814, nonsuited, not upon the merits, but upon the technical objection that he had included in one suit lands in two separate villages. He thereupon, on the 15th of November, 1814, instituted a fresh suit to recover the 251 beegahs, parcel of Rampore, and, on the 11th of May, 1816, obtained a decree in his favour, which was upheld on appeal by the Sudder Court, on the 8th of December, 1818.

In this suit Mohun Singh and Chuttur Singh filed plans. By these plans, it appeared that the 251 beegahs then in dispute lay to the west of Baugh Jhujree, and to the north of a point in a stream called Nudder Purwana.

Shortly after the institution of the above suit by Mohun Singh for the recovery of the 251 beegahs [203] Chuttur Singh, in January, 1815, brought a cross suit in the Zillah Court of Tirhoot against Mohun Singh to recover 400 beegahs of land, alleged by him to be parcel of Gopaulpore. The 400 beegahs were, however, held by that Court to belong to Rampore, and this decision was confirmed on appeal by the Patna Court of appeal, on the 8th of December, 1818.

On the 5th of January, 1818, Mohun Singh was put into possession of the disputed lands; and he shortly afterwards brought them into cultivation by his villagers from Rampore, and it appeared that he and his descendants since that time, and until the institution of the suit, out of which the present appeal arose, had, with one exception, in 1834, when another attempt was made to encroach upon Rampore, held undisputed possession.

The Mouzah Maholee appears to have become the property of the wives of one Tej Narain Singh; and, on their obtaining a decree in their favour as to that village, they laid an attachment upon 200 beegahs, part of Rampore. The then Zemindar, Chintamun Singh, the son of Mohun Singh, instituted proceedings in the Criminal Court of Zillah Tirhoot under Ben. Reg. XV. of 1824, to preserve his possession to those beegahs, decreed to him as being part of Rampore; and the Magistrate having examined the decree of 1816, and compared the boundaries, found that the 200 beegahs were part of those included in the suit brought by Mohun Singh for 251 beegahs, and by an order made on the 24th of May, 1834, maintained Chintamun Singh's possession.

On the 5th of August, 1845, Roodur Singh, the then proprietor of Nursingpore Koorah, instituted [204] the present suit in the Zillah Court of Bhagulpore against Chintamun Singh and the Respondents, for possession and mesne profits, claiming the lands which were the subject of the suit of 1814. He, however, denied their identity, and alleged by his plaint, that possession was forcibly acquired by Chintamun Singh after the proceedings in 1834. In order to account for the delay since that time, he set up certain conversations and admissions, which he alleged were made by the Respondents, that they agreed to restore the land to him; and, in order to destroy the identity of the lands, he misplaced the old bandh and the old tank of Gopaulpore (substituting Bodhee Singh's tank for it), and thus drew a boundary considerably to the north and west so as to exclude the lands from Rampore.

The Defendants in their answer denied these allegations, and insisted that the Plaintiff's claim was barred by the provisions of Ben. Reg. III. of 1793, secs. 12 and 16, as the Plaintiff sought to recover the possession of land pertaining to their Zemindary mentioned in both the decrees of the 11th of May, 1816, and the 8th of December, 1818, which decrees, as they admitted in their answer, had laid down the boundaries of Mouzah Rampore, and of Mouzah Gopaulpore, agreeably to the award of Khoda Yaar Khan.

A replication and rejoinder having been filed, an order was made on the 5th of May, 1847, that Sheeb Loll, the Record Keeper of the Court, should proceed to the spot and draw a plan; and he accordingly, on the 9th of June, 1847, made his report, filing with it a plan, which contained the assertions of both sides, as to the position of the different [205] points bearing or supposed to bear upon the point at issue. Besides this plan, plans of the villages of Rampore and Gopaulpore were also filed. The plaintiff also filed a plan, containing his allegations as to the boundary, and copies of the two plans filed in the suit of 1814, were also given in evidence. Witnesses were examined upon the question of possession by the Respondents. Their evidence was of a conflicting character, the effect of which is mentioned in their Lordships' judgment.

On the 28th of December, 1849, the Principal Sudder Ameen, without laying down issues, as required by sec. 10, of Ben. Reg. XXVI. of 1814, gave judgment in the Plaintiff's favour.

The Defendants appealed from this decree to the Sudder Dewanny Court at Calcutta. Upon the appeal coming on for hearing, a preliminary objection was raised on their behalf that the Court below had not, according to the Law of pro-

cedure, drawn up and recorded any issues. The Sudder Court held that this objection was fatal, and ordered that the decree appealed from should be set aside, and the case remanded to the Principal Sudder Ameen, with directions to lay down the issues and call upon the parties for proofs and refutations, and then to try the case *de novo*.

In accordance with the order of the Sudder Court, a proceeding took place before the Zillah Court, on the 4th of December, 1852, when the Principal Sudder Ameen recorded the issues as follows:—First, were the lands at issue within the boundaries of Mouzah Rampore, the property of the Defendants, as laid down by the decree of Court, dated 11th of May, [206] 1816, agreeably to the *kyfrut* of Khoda Yaar Khan, or apart from them? Secondly, was the Plaintiff's suit within the period limited for the cognizance of the Court, or not?

No evidence was gone into upon these issues, the Plaintiff having declined to do so, and asking for judgment on the evidence already filed, and, on the 13th of December, 1852, the Principal Sudder Ameen gave judgment to the same effect as the former one. The Defendants appealed from this judgment to the Sudder Dewanny Adawlut at Calcutta.

The hearing of the appeal took place before Messrs. Sconce, Trevor, and Torrens, three of the Judges of the Sudder Dewanny Adawlut. The Judges differed in opinion, Messrs. Sconce and Trevor agreeing to reverse the decree of the Principal Sudder Ameen. The remaining Judge, Mr. Torrens, was opposed to that course, being of opinion that the Court should remand the case for re-trial by the Principal Sudder Ameen.

The judgment and decree pronounced by Messrs. Sconce and Trevor, forming the majority of the Judges, was as follows:—"We might take objection to the form in which the Principal Sudder Ameen's decree has been passed, for in his latest decision, he has confined himself to such points as the remand involved, and, upon the merits, has adopted in general terms, without repeating details, the decree of December, 1849. The last and final decree should have been complete in itself, and should not have been made to rest on a decision which has been set aside; but, as the grounds of the latest judgment taken in connection with the first have been sufficiently intelligible to the litigants, and are so to the majority of this Court, we think it inexpedient again, upon this point of form, to re-transfer the case to the Lower Court. For the better understanding of the issue submitted to us, we have fully heard the parties, both as regards the line of boundary, which, by the decree of 1816, should determine the extent of their villages, Gopaulpore and Rampore, and as regards the enjoyment by the Plaintiff of the disputed land within a period which renders this suit admissible. That the several parties have had every opportunity before the Lower Court to present their case complete, is not denied by them; nor before ourselves have they indicated, if it were optional to them to indicate, any other sources of available evidence than that already adduced. And thus we cannot hesitate to adjudicate upon the proceedings as they came before us. The Principal Sudder Ameen has remarked, shortly, that Plaintiff's witnesses prove that he was in possession of the disputed land before 1242, F.S.; and connecting the presumed dispossession of that year with the boundary laid down nineteen years before, he found Plaintiff's claim to be established. But, it appears to us, that the evidence of the Plaintiff is wholly inadequate to sustain the specific allegations, or to justify the large claim which he has preferred. Plaintiff's witnesses say, generally, that he was dispossessed in 1242, F.S., but we required more detailed information to prevent the act of forcible dispossession characterized by the circumstances with which it must have been attended. Seven hundred beegahs—nearly all, as is said by the Plaintiff's witnesses, under cultivation—could not have been transferred from his occupancy without the occurrence of some [208] event sufficiently conspicuous to be presented to us in evidence; nor is it to be presumed that his long asserted enjoyment of his Ryots' rents, previous to 1242, F.S., could become suddenly interrupted, without some attempt on his part to enforce, with the aid of summary laws, the payment of rent for 1242, F.S., which, up to 1241, F.S., he had collected. Nor, further, is it intelligible to us that Plaintiff (Respondent), without an application to the Magistrate, should have suffered the order passed by that Officer, under Reg. XV. of 1824, to have been executed to his prejudice, had he not been a party to the summary proceeding in which it was issued.

We think that, at all events, throughout some portion of the line, the Principal Sudder Ameen's endeavour to trace the boundary decreed in 1816 A.D. has not been unsuccessful; but in this suit we cannot *per saltum* pass from 1242 to 1223 (1816), as if to find in that year the link of Plaintiff's right, from which he subsequently became dissevered. What we have said of the evidence of dispossession in 1242, F.S. is equally applicable to the evidence for possession in 1241, Fuslee, or any previous year. We have, in fact, no specific evidence that the Plaintiff (Respondent) exercised the rights of proprietor between 1223, Fuslee (1816) and 1242: it is not, for example, shown what rents he realized from the 700 beegals, and yet the realization of rent is the strongest evidence of possession. If we were to grant that in the decree of 1816 A.D., to a greater or less extent, an inceptive right is traceable, we have no evidence of the effect given to the decree, and, as already intimated, none to establish the enjoyment of an appropriated right between 1816 (1223) and the asserted date of dispossession in 1835 (1242). [209] It is, therefore, ordered, that the decree of the Principal Sudder Ameen be reversed, and the suit dismissed with costs: that the Appellant recover from the Plaintiff (Respondent), the costs of this Court, with interest, to the day of realization, agreeably to the account prepared by the Accountant of costs of this Court; and that, in order to realize the expenses of the Zillah Court, they present a petition in the Zillah whence a proper order will be passed, in accordance with the purport of the Circular Order, dated 4th March, 1836."

The third Judge, Mr. Torrens, recorded his opinion as follows:—"In a case circumstanced as the present, both as to the character of the claim, and the mode in which the proceedings of the Lower Court were conducted, I am unable to agree with my colleagues in the reversal of the decree passed, simply on the ground of the record, as now before us, not containing fuller proofs of the alleged act of dispossession. The latter part of the issue, which the pleaders of both parties, certainly with the permission of this Court, have agreed to, cannot, it appears to me, be satisfactorily tried without first considering whether the map prepared by the orders of the Lower Court shows, as stated in the decision, the true boundary between the two villages, as determined in the suit between the fathers of the litigant parties in 1816. If it be as the Lower Court has now decided, it was surely for the Appellants in some way to show how, in direct opposition to a former judgment, they had passed the line of boundary and acquired possession of land held on such strong title against them as a final decree of Court. The Principal Sudder Ameen's decision may in effect be wrong or not; but it has been based, I [210] consider, purely on comparison of the map, which he had prepared by his Amlah with the boundaries as laid down in the decree of 1816 A.D. He has taken two fixed points indicated in the map as those betwixt which a line running in a northern and southern direction was drawn under the decision of that year, which line fixed the boundary of the Plaintiff's, (Respondent's,) village of Gopaulpore, and the Appellants' village of Rampore. The Appellants assent to one of these points, the most southern, as the true point—contending that the map, as laid down, has shifted the northern point from its real position. To show this, they refer to copies of former maps filed or agreed to by the Respondent, and to the relative position as there given, and as now existing in the Mofussil, of certain known landmarks and village boundaries, bearing on the disputed sere of the northern point fixed in 1816 A.D. The investigations of the Principal Sudder Ameen have been mainly directed to these obligations; and having concluded that the map prepared by his Amlah set them aside, and that it had defined the true boundary as laid down in 1816 A.D., without ever holding any proceedings, as imperatively required by law, under sec. 10, Reg. XXVI., 1814, he first determines the case chiefly on this conclusion, but also on oral evidence of dispossession. On an appeal the Sudder Court, seeing the illegality of the decision without the proceedings referred to, remanded the case. On the 4th of December, 1852, the Principal Sudder Ameen went through what he considered the form of proceeding, and on the 13th, decided that the points then settled for adjudication had already been proved and disposed of by his first decision; and so; without indicating [211] the necessity of any further proof, and without the Defendants having preferred any further objection than that the deputation of an unsworn Amlah to make a map was opposed to rule, he decided the case merely by reference to his former judgment. This mode of proceeding

entirely defeats the object of clauses 3 and 4, sec. 10, Reg. XXVI., 1844, and the Plaintiff (Respondent) has thus necessarily rested throughout on the Lower Court's view of the map and boundary, and has not been, as I think, ever in a position to bring forward more substantial proof on the point of dispossession. That which he had given on this point in the informal trial, the oral evidence of a few ignorant Ryots, is quite as good as any evidence given by the Defendants as to their ever having remained in undisturbed occupancy of the lands. Neither party, in fact, from having directed their chief attention to the principal Sudder Ameen's investigation and judgment on the boundaries, have adduced the best evidence which might be procured on the questions of possession and dispossession; and it is to be observed in this country, before the recent revenue survey, where disputes exist respecting tracts of land on the confines of two contiguous Zemindaries, which tracts, as in this instance, are not shown to be held by resident Ryots, the Ryots of one Zemindar cultivate one part of the disputed land one year, and those of the other Zemindar another part of the next year, so that there is no very defined possession until some act occurs on the part of either which drives the other into Court; and, I, therefore, think, in this case, without authentic collection papers produced, or without the evidence of more respectable witnesses, that even on the question of dispossession, the bound-[212]-dary line, if the Principal Sudder Ameen's decision on it be correct, is our most certain guide. Be that as it may, I conceive that his irregular proceedings, as before noticed, gave no opportunity for Plaintiff's bringing fuller proof as to the act of dispossession; and I certainly would say, with much deference to my colleagues, that without determining the correctness or otherwise of the map and boundary line as compared with the former decision, the Court is in no position to set aside the decree on the grounds assigned. The petition of plaint does not appear to me to imply simply one single act of dispossession; it states that the Defendants had first, on plea of a decision passed in their favour in a case under Reg. XV. of 1824, with other parties, contrived to obtain possession of 200 beegahs within the old boundary in 1242, F.S., and then, working on this, encroached on, or took possession of, the whole 700 beegahs now claimed. The Plaintiff, finding they had done so, sent for them, and called on them to retire from beyond the boundary; and on their persisting in not doing so, at length brought his present action, so as to be within the period of limitation. In the first decision of the Principal Sudder Ameen, he states that the map of his Anilah, on which he has adjudicated the case, is supported by the Revenue survey map, prepared whilst the case was pending; and, under all circumstances, instead of finally reversing the order passed, I would return the case to the Principal Sudder Ameen for re-trial, after having an intelligible map prepared, such as prescribed by the Circular Order of this Court, No. 173, of the 5th of May, 1852, A.D., which would show distinctly the relative positions and distances of the points by which the [213] boundary line of 1816 was laid down: and on the question of possession or dispossession, I would require that further and more substantial evidence should be taken, by enforcing the provision of Act, No. 19 of 1853. Such a course, I think, would be most equitable, and most likely to put an end to litigation, which, to judge from some of the statements made, would appear to have been going on respecting the same boundary, in greater or less degree, ever since 1199, B. S., notwithstanding numerous decisions passed."

The present appeal was brought from the decree of the majority of the Court.

The appeal was argued by Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant, and Mr. Forsyth, Q.C., and Mr. W. Field, for the Respondents.

The material arguments are stated and referred to in their Lordships' judgment, which was delivered by

The Lord Justice Turner (July 30, 1860).—The parties to this cause are the proprietors of two contiguous Zemindaries in Zillah Bhagulpore. For many years the Zemindary called Pergunnah Nursingpore Zoorah, which includes the village called Mouzah Gopaulpore, has been held by the Appellant, or his ancestors; whilst the family of the Respondents has been in the possession of the Zemindary called Naredegur, which includes the village called Mouzah Rampore.

That litigation concerning the boundaries of the two estates has been frequent, if not incessant.

[214] In the year 1792, there was a suit to settle the disputed boundaries of Mon-

zah Surseeah, part of the Appellant's Zemindary, Nursingpore Koorah, and Mouzah Jyepore Puckree, part of the Zemindary of Naredegur. This was determined in accordance with the award of an Ameen, appointed with the consent of both parties, named Khado Yaar Khan, which fixed, or ought to have fixed, the boundaries between the two Mouzahs, and so far, those between the two Zemindaries. It may be proper to mention, though the circumstance is not now material, that this suit was between an ancestor of the Appellant and one Deo Raj Singh, who appears to have dispossessed at that time the Respondents' ancestor of Naredegur.

In 1816, two suits were pending between Mohun Singh, the grandfather of the Respondents, and Maharajah Chutter Singh, the grandfather of the Appellant. In one of them Mohun Singh, as Plaintiff, claimed as part of Mouzah Rampoor, two hundred and fifty-one beegahs of land, which the Maharajah, as Defendant, insisted formed part of Mouzah Gopaulpore. In the other, the Maharajah, as Plaintiff, claimed as part of Mouzah Gopaulpore, four hundred beegahs of land, lying to the north and west of the lands in question in the other suit, and Mohun Singh, as Defendant, insisted that they were comprised in Mouzah Rampoor. In the first suit the Zillah Judge, proceeding in part upon the old award of Khoda Yaar Khan, of which both parties admitted the accuracy, drew a boundary line between the two Mouzahs, and gave to the Plaintiff so much of the land claimed as fell within Mouzah Rampoor thus defined. The suit of Chutter Singh he simply dismissed, inasmuch as the whole of the four hundred beegahs [215] claimed by him were clearly within Mouzah Rampoor as defined by the other decree. Both decrees were, on the appeal of Maharajah Chuttur Singh, confirmed in 1818, by the then Court of appeal at Patana.

In 1834, there was a summary proceeding in the Criminal Court under Regulation XV. of 1824, touching the possession of two hundred beegahs of land which were claimed on the one side by the then proprietors of Naredegur as part of Mouzah Rampoor, and on the other by two widows who had acquired an interest in Mouzah Maholee, a village forming part of Nursingpore Poorah, and either identical with or contiguous to Mouzah Gopaulpore, which, in these proceedings, is sometimes called Gopaulpore Maholee. The decision of the Magistrate was to the effect, that the proprietors of Naredegur were in possession of the lands in question, and ought to be maintained in it. To this proceeding, which bears date the 24th of May, 1834, no person whom the Appellant represents was directly a party. He has, however, produced it for a particular purpose, and made it part of his case. It is unnecessary, at least for the present, to go more fully into those earlier proceedings, because, if material at all, they can only be material as evidence upon one or other of the issues raised in the present suit.

This suit was instituted in August, 1845, by the father of the present Appellant. It was for the recovery of seven hundred beegahs of land, alleged to have been part of Mouzah Gopaulpore, but admitted to have been in the possession of the Respondents, though by wrongful title, since May, 1834, or for a period commencing soon after that date. The case made by the Plaintiff on his pleadings was shortly this:— [216] That the seven hundred beegahs in question were within Mouzah Gopaulpore as defined by the decree of 1816; that the Defendants had taken possession of them, under colour of the award of the 24th of May, 1834, some time in the year 1835, and had ever since continued in possession; but that during these ten years, and in order to prevent the institution of a suit against them, they had repeatedly admitted the Plaintiff's title, and promised to restore the land.

The Defendants' case, on their pleadings, was to this effect:—That the seven hundred beegahs claimed were within the boundary of Mouzah Rampoor as defined by the decree of 1816; that they were, in fact, the aggregate of the two hundred and fifty-one beegahs and four hundred beegahs, which were the subject of the two suits finally determined by the confirmation of that decree in 1818; that the title to them was, therefore, *res judicata*; and further, that in any case, the Plaintiff and his father had been out of possession of them for upwards of twelve years next before the institution of the suit, which was, therefore, barred by the Regulation of Limitation.

On the statements, therefore, of the two parties, it appears that the substantial questions of fact in dispute between them were:—

First. What was the boundary-line laid down by the decree of 1816, to which both appealed?

Second. Was the Plaintiff, or his father, Chuttur Singh, in possession of the lands claimed at any time within the period of twelve years next before the institution of the suit?

The words of the decree of 1816 are: "It is, therefore, ordered, that from the edge of the old [217] bandh eastward, which is in the map of the Plaintiff, and from the old pokhur, which is in the map of the Defendant, and all along to Lullahee Ghaut southward, which is in the map of the Plaintiff, and which the Defendant states to be Ghaut Suspattee, the boundary is fixed of Mouzah Rampoor, the Milkem of the Plaintiff, from Mouzah Gopaulpore Maholee, the property of the Defendant."

The parties to the present suit were agreed as to the position of Ghaut Suspattee, or Lullahee, but differed materially as to the position of the two other points. It might well be supposed that this contention could be settled by the production of the two maps referred to in the decree. Unfortunately, the Appellant impugns the genuineness of the map which is put in by the Respondents, as that produced by Mohun Singh, the Plaintiff in 1816; and on the map put in by the Appellant as the map produced by Chuttur Singh, the Defendant in 1816, there appear to be several Pokhurs or tanks and an oval mark which, though it contains no description but the words "Peepul tree," the Appellant now contends, denoted the old Pokhur referred to in the decree. Hence the common appeal to the decree of 1816 does nothing more than settle one of the termini of the boundary line, and resolve the general issue of the boundary line into the two particular issues, where was the old bandh? and, where the old Pokhur?

The Principal Sudder Ameen, before whom this suit was pending, took the evidence which each side tendered, touching either the possession of the disputed land or the boundary question. He also, by a proceeding, dated the 5th of May, 1847, directed one [218] Lallah Sheeb Lall, the Record Keeper of his Court, to visit the spot and make a plan of the disputed land in the presence of both parties. To the character and mode of proceeding of the Lallah objection is no longer taken. He visited the spot and made a map or plan, and a report. Upon these materials and the evidence taken previously, the Principal Sudder Ameen made his first decree in favour of the Appellant. It is dated the 28th of December, 1848. From that decree the Respondents appealed to the Sudder Dewanny Adawlut. In the appellate Court a preliminary objection was taken to the decree on the ground that the Principal Sudder Ameen had omitted to draw up the issues in the suit in conformity with cl. 3, sec. 10, of Regulation XXVI. of 1814; and the Court saw fit to remand the cause to the Judge below, with a direction to lay down the issues in the regular way, and "having called upon both parties for proofs and refutations of those issues, to try and determine the cause *de novo*." The cause went back; and the Judge laid down the issues, which were, substantially,—Whether the lands in question were within the boundaries of Mouzah Rampoor, as defined by the decree of 1816, and whether the Plaintiff's suit was within the period of limitation or not. By the same proceeding, which was dated the 4th of December, 1852, he ordered that the parties should be called upon for their proofs. The Appellant took no advantage of the opportunity thus afforded to him of giving fresh evidence; but, by petition, prayed for judgment on the evidence, oral and documentary, already given. The Respondents only filed certain judgments of the Sudder Dewanny Adawlut, given in other cases, for [219] the purpose of showing the invalidity of Lallah Sheeb Lall's investigation and report,—a point now given up. The Principal Sudder Ameen, therefore, made upon the old evidence a second decree in favour of the Plaintiff in the suit. Against it the present Respondents renewed their appeal to the Sudder Dewanny Adawlut.

The appellate Court was divided, not so much on the merits of this case as upon the proper method of determining them. Two of the Judges, without entering into the boundary question, or impugning the decision of the Court below on that point, were for reversing the decree, and dismissing the suit on the ground that the Plaintiff had failed to prove his possession of the disputed lands at any time between 1816 and the commencement of the suit, or his alleged dispossession of them at any time in or after May, 1834. The dissentient Judge did not go the length of saying that the decree below ought to be affirmed. He seems to have thought that the finding of the Court as to the boundary line might shift the burden of proof as to the time and manner of dispossession on the Defendants; that on both issues

there had been a mis-trial, and that it was proper to remand the case for another trial after the preparation of a more intelligible map, and taking further and better evidence on the question of possession, particularly that of the parties under the provisions of Act, No. XIX. of 1853. The opinion of the majority of course prevailed, the decree of the Court below was reversed, and the Appellant's suit dismissed. Against that decree of the Sudder Court, the present appeal has been preferred.

The learned Counsel for the Appellant have not [220] strongly contended that the proper order to be made on this appeal, is one remitting the case for re-trial in the manner suggested by Mr. Torrens in the Sudder Court. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the Principal Sudder Ameen, affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sudder Court was right in treating the cause as ripe for final decision. The Appellant had had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance, or with his consent. And the suspicion, however probable, of the Judge, that a party who has failed to prove his case, may be more successful on a second and fuller investigation, is no sufficient ground for directing a new trial.

Again, their Lordships concur with the majority of the Sudder Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The Appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of Defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) [221] on a dis-possession within twelve years next before the commencement of the suit; and, therefore, that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships, therefore, propose to consider in the first place, what evidence there is that the Appellant, or any person through whom he claims, was in possession of the lands in question at any time within twelve years next before the commencement of the suit.

There are eight witnesses examined on the part of the Appellant. They all agree in stating that his grandfather, Chuttur Singh, was in possession of the lands in question until some time in the Fuslee year 1242 corresponding with 1835, A.D., and was dispossessed under colour of the Magistrate's order of May, 1834. All of them, with the exception of the second, Baboo Ram Mundur, speak of this dispossession as "forcible"; as effected with more or less of violence, and in the face of opposition on the part of the occupiers of the land. They do not agree as to the fact whether or no a Peon from the Magistrate's Court was present to give effect to the order of May, 1834. They are pretty well agreed that the disputed land was, before the alleged dispossession, for the most part under [222] cultivation; that the cultivated portion of it was rented at from Rs. 2 to Rs. 2. 6a. per beegah, and yielded from Rs. 1100, to 1300, per annum. Some of them give the names of the cultivators; some, but not all, speak as if the whole land had been farmed by one Tajaen, who, in such case, would have paid a gross rent to the Zemindar, and have made the collections from the Ryots on his own account. No such person was produced as a witness; nor is the oral testimony supported by the production of any paper purporting to be lease, Pottah, Kaboolyat, or receipt for rent,—the usual adminicula of proof in such cases. Again, most of the witnesses concur in saying that, before the alleged dispossession, there was but one hamlet on the disputed lands, the inhabitants of which

deserted it upon the dispossession; and that the Defendants had, year by year, since 1835, established three or four new hamlets upon them.

The Appellant's witnesses are contradicted by some nine or ten on the part of the Respondents. The general scope of this latter testimony is to show that the disputed lands are within the boundary of Rampoor as defined by the decree of 1816, and have ever since that date been in the possession of the Respondents' family; that they are identical with the 400 and 251 beegahs which were the subjects of the two suits of 1816; that the 251 beegahs, or part of them, were also the subject of the dispute with the widows of Tej Narain Singh, which was settled by the order of May, 1834; and that there are three hamlets on the lands in question in the suit, of which the latest in date had, in 1847, been established for [223] upwards of twenty years. This testimony is also unsupported by documents: but the last of the witnesses seems to be somewhat more respectable in point of station than the Appellant's witnesses. Let it be granted, however, that the oral evidence on the part of the Respondents is no better than that on the part of the Appellant: it must still lie on the Appellant to make out his case; and their Lordships have next to consider whether he has done so, by the greater probability of the tale told by his witnesses.

Their Lordships are of opinion, that the balance of probabilities is decidedly against him. His witnesses agree that the land was for the most part under cultivation, and yielded a considerable revenue. They treat the dispossession as a single and forcible act. These admissions exclude the hypothesis, which was sometimes suggested in the course of the argument, that the Respondents' possession may have been gradually acquired by squatting on waste land. Again, the theory is, that possession was gained under colour of the order of May, 1834. The 200 beegahs which were the subject of that order, are either included in the 700 beegahs now in dispute, or are distinct from them. On the latter assumption it is not easy to see (and this difficulty is wholly unexplained) how an order maintaining one man in the possession of certain lands can be made an instrument for turning another man out of the possession of other lands. The former assumption implies that 700 beegahs were taken under an award for only 200 beegahs: that the proceeding before the Magistrate, who had only jurisdiction to determine the fact of possession, was had [224] between two parties, neither of whom was really in possession; and that he, in whose favour the order was made, successfully used it to eject the actual possessor of the lands, who being no party to the proceeding, was not bound by it. Such doings may not be without example in India; but those aggrieved by them do not ordinarily acquiesce in them. Lastly, in any view of the evidence there was a palpable, if not violent, invasion of Chuttur Singh's possession, known to him at the time. Is it conceivable that one so prone to litigation as he is shown to have been, would not immediately have sought redress, either by a summary proceeding under Reg. XV. of 1824, or by regular suit? To account for his unnatural acquiescence, the Appellant and his witnesses have recourse to a very common subterfuge of falsehood. They say that the Respondents admitted their adversary's title, and promised to restore the lands. The plaint alleges that there were repeated assurances of this kind. The witnesses only depose to one *ante litem motam*; but add that ten years afterwards, when the suit had been commenced by Chuttur Singh's son, the Respondents again offered to relinquish the lands on being released from the claim for mesne profits. Their Lordships consider this part of the Appellant's case simply incredible. And, on the whole evidence, they are of opinion, that he has failed to give that proof of the alleged possession of Chuttur Singh which is essential to the maintenance of this suit.

This being so, it is unnecessary to go into the boundary question. Upon that, although sensible of the force of Mr. Palmer's observation that questions of that kind are presumably best determined by [225] local Judges, their Lordships are by no means satisfied that the Principal Sudder Ameen has come to a correct conclusion, or that the lands in question are within the limits of Mouzah Gapaulpore as defined by the decree of 1816. But they do not decide this question. Their decision of the other question is of itself sufficient ground for the recommendation, which they propose to make to Her Majesty, that this appeal be dismissed with costs.

THE GOVERNMENT OF BENGAL. —*Appellant*; MUSSUMAT SHURRUFFUTOON-NISSA (after her death, SAYYUD SHAH ASSAD OOLAH, her son and heir), and SAYYUD SHAH ENAYET HOSSEIN.—*Respondents* * [June 25, 1860].

On petition from the Sudder Dewanny Adawlut, at Calcutta.

Under the provisions of the Statute, 3rd and 4th Will. IV. c. 41, and the Order in Council of the 4th September, 1833, an appeal from the Sudder Court in India was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council, and, by an Order in Council made on the appeal in 1836, the costs incurred in prosecuting the appeal were directed to be paid to the East India Company by the respective parties to the appeal, or their representatives, as provided by the Order in Council of the 18th of November, 1833. On a suit brought by the Government in 1852, against the representatives of one of the parties to the appeal, to recover part of the costs incurred by the East India Company in bringing the appeal to a hearing. Held:—

First, that the recovery of the costs incurred by the East India Company, being in the character of agents to prosecute the dormant appeal, under the Statute, 3rd and 4th Will. IV., c. 41, sec. 22, and Order in Council of the 4th September, 1833, did not constitute a “public right” within the provisions of cl. 2, sec. 2, of Ben. Reg. II., of 1805, which gives the Government a period of sixty years for bringing a suit; and,

Secondly, that the claim was barred by sec. 14 of Ben. Reg. III. of 1793, and the Court in India prohibited from entertaining the suit, as it had not been brought within twelve years, the time limited by that Regulation.

The Respondents appeared by Counsel at the hearing to argue the appeal, without having lodged a printed case. Their Lordships refused to hear the appeal, until a printed case was lodged [8 Moo. Ind. App. 230, 231].

This appeal arose under the following circumstances:—

Some time previously to the year 1833, an appeal was preferred to His late Majesty in Council, by Shah Assud Oolah, the father of Sayyud Shah Enayet [226] Hossein, one of the present Respondents, against Mussumat Emamun, as Respondent, from a decision of the Sudder Dewanny Adawlut in Bengal.

Under the provisions of Statute, 3rd and 4th Will. IV., c. 41, sec. 22, and the Order in Council of the 4th September, 1833, that appeal was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council; and on the 7th of December, 1836, the Judicial Committee reported to His late Majesty, that the decree of the Sudder Dewanny Adawlut should be affirmed; and their Lordships directed that there should be paid to the East India Company, or their agent, by the Appellant and Respondent respectively, or their respective representative or representatives, certain sums for costs of bringing the appeal to a hearing. This report of the Judicial Committee was confirmed by an Order in Council, dated the 22nd of December, 1836.

Previously to the decision upon the above appeal, Shah Assud Oollah died, leaving Sayyud Shah Enayet Hossein his only son and heir, who succeeded to his father's estate.

[227] Early in the year 1837, the Government of Bengal proceeded to adopt measures for the realization of the sum of Rs. 31,019 0a. 12p., the amount of the costs due to the East India Company under the Order in Council founded upon the decision of the Judicial Committee; and, upon the application of the Government, orders were issued by the Judge of Zillah Bhagulpoor for the sale of certain Mouzals and other property, real and personal, of Shah Assud Oollah, which had descended

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

to Sayyut Shah Enayet Hossein; but, previously to the execution of such order, Mussumat Shurruffutoonnissa, the wife of Sayyut Shah Enayet Hossein, and one of the present Respondents, presented a petition to the Zillah Judge, stating that a deed of gift of the real property advertised for sale had been executed by Shah Assud Oollah, in favour of Sayyut Shah Enayet Hossein, in the year 1811, and had been assigned to her by her husband in lieu of dower by a deed of sale, and that she had obtained a decree from the Provincial Court of Moorshedabad, dated the 17th of May, 1830, for the property embraced in the deed of sale. Syed Willayat Hossein, and others, also presented a petition to the Zillah Judge, stating that they had a half share in the Mouzahs advertised for sale.

The objections raised by the petition of Mussumat Shurruffutoonnissa were disallowed by the Zillah Judge; and the consideration of the other petition postponed. On the 29th of December, 1837, an order was passed for sale of half of the real property of Sayyut Shah Enayet Hossein. Mussumat Shurruffutoonnissa being dissatisfied with the order of the Zillah Judge, preferred a summary appeal to the Sudder Dewanny Adawlut; and, on the 31st of January, 1839, that Court reversed such order and [228] ordered all the property comprised in the decree of the Provincial Court of Moorshedabad to be released, upon the ground that, on the face of the documents filed by Mussumat Shurruffutoonnissa, no summary order disturbing her possession could be passed.

A sum of Rs. 25 only was realised by the sale of the moveable property of Shah Assad Oollah, left to Sayyut Shah Enayet Hossein.

Several efforts were afterwards made to recover from the surety of the original Appellant the money due to the East India Company; but it was found that his landed property had already been sold, partly for arrears of Government revenue, and partly in execution of decrees enforced by decree holders; and nothing could be obtained from him. The Government, then, at various dates, presented petitions to the Court of the Principal Sudder Ameen, praying for the arrest of Sayyut Shah Enayet Hossein, and for the sale of other property belonging to him. But upon certain objections being taken to the proposed sale, an order was made by the Sudder Dewanny Adawlut, on the 15th of May, 1849, prohibiting the sale. Afterwards, in conformity with the directions of the Sudder Court, contained in a letter from that Court, dated the 3rd of September, 1850, an order was made by the Zillah Court on the 6th of December in that year, whereby an apportionment was made of the sum of Rs. 31,019 0a. 12p. due for costs, as specified in the Order in Council; and it was declared that of that amount, the sum of Rs. 26,027 8a. was due from the original Appellant, Shah Assud Oollah, and the sum of Rs. 4,991 9a. 2p. was due from the original Respondent, Mussumat Enamun. The whole of the latter sum was subsequently realized by the Government.

[229] In the meantime, frequent attempts had been made to arrest Sayyut Shah Enayet Hossein for the debt due from him, but without success.

The Government then petitioned the Zillah Court, praying for the attachment and sale of the property of Sayyut Shah Enayet Hossein, but this petition was rejected by the Court.

Upon this, the Government filed a plaint on the 25th of June, 1852, in the Court of the Principal Sudder Ameen of Zillah Bhagulpoor, against Mussumat Shurruffutoonnissa and Sayyut Shah Enayet Hossein stating the facts above mentioned, and charging that the deed of gift to Sayyut Shah Enayet Hossein and the assignment to the Defendant, Mussumat Shurruffutoonnissa were fraudulent and collusive, and praying that the sum of Rs. 26,002 8a., the sum declared to be due from Sayyut Shah Enayet Hossein, under the apportionment made by the order of the Zillah Court, dated the 6th of December, 1850, after deducting the sum of Rs. 25, and also the sum of Rs. 19,750 1a. 9p., for interest thereon, might be awarded to them, and that an order of sale be issued of the landed property specified in a schedule annexed to the plaint, which was the same property as was claimed by the Respondent, Mussumat Shurruffutoonnissa.

The Respondents put in separate answers to the plaint, and thereby pleaded, amongst other things not material to the question raised in the present appeal, that the Government's right of action was barred by the Regulation of Limitations, Ben. Reg. III. of 1793, sec. 14, more than twelve years having intervened between

the date of the summary order of the Sudder Dewanny Adawlut, of the 31st of January, 1839, and the date of the institution of the suit.

Replications to the answers were filed by the [230] Government which, amongst other things, insisted that the rule of limitation pleaded by the Respondents was not applicable to the claim of the Government.

On the 19th of June, 1855, Mr. Colin Macdonald, the Principal Sudder Ameen, decided that the deeds on which the Respondent, Mussumat Shurruffutoonnissa, relied, were fraudulent and void; and that, in conformity with the provisions of clauses 1 and 2, sec. 2, Ben. Reg. II. of 1805, the claim of the Government, being for a public right, could be preferred within sixty years, and he accordingly made a decree in favour of the Government.

The Respondents appealed to the Sudder Dewanny Adawlut, and the appeal was heard before the full Court, consisting of Messrs. Trevor, Loch, and Bayley, and, on the 30th of April, 1858, Mr. Trevor and Mr. Loch, in opposition to the opinion of Mr. Bayley, made a decree reversing the decree of the Principal Sudder Ameen, upon the ground that the claim of the Government was not for a public right, as provided by cl. 2, sec. 2, Reg. II. of 1805, and, therefore, that the suit was barred by sect. 14, Reg. III. of 1793, as the suit had not been brought within twelve years.

From this decree the present appeal was brought.

An appearance was entered for the Respondents, but no case was lodged by them. When the appeal came on for hearing (June 19, 1860) their Lordships * refused to hear the Respondents' Counsel unless a printed case was [231] lodged. Upon the Respondents undertaking to lodge a case, the hearing of the appeal was adjourned. A case having been lodged by the Respondents the appeal came on for hearing.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Government of Bengal, and, Mr. Leith, for the Respondents.

On the part of the Government, it was insisted, first, that their claim to be reimbursed the costs paid by the East India Company in the appeal prosecuted by them under the Statute, 3rd and 4th Will. IV., c. 41, sec. 22, and Orders in Council of the 4th of September and 18th of November, 1833 (Knapp's P.C. Cases, Appx. pp. xxvii. and xxix.), was "a public right," within the meaning of cl. 2, sec. 2 of Ben. Reg. II. of 1805, and, therefore, could by cl. 2 of the section of that Regulation be preferred at any time within the period of sixty years from and after the origin of the cause of action. Secondly, that the payment of the costs had been demanded within twelve years and admitted, and that as the present claim of the Government was substantially a claim for the sale of land of which possession had been acquired by the Respondents by fraud, therefore, that the suit instituted by Government was not barred by sec. 14 of Ben. Reg. III. of 1793, and was within the exception contained in that section, there being "good and sufficient cause" shown why the Government had been precluded from obtaining redress. Upon these points they cited *Troup and Dyce Sombre v. The East India Company* (7 Moore's Ind. App. Cases, 104), *Prannath Roy Chowdry v. [232] Rookea Begum* (7 Moore's Ind. App. Cases, 332), *Rup Chand Sahu v. Jivan Lal Ray* (5 Ben. Sud. Dew. Rep., 168), and it was further argued that by analogy to the Statute of Limitations, 21st Jac. I. c. 16, sec. 3, the suit was not barred, as the claim for costs was made under an Order in Council which made the Government a decree holder, *Mildred v. Robinson* (19 Ves., 585).

For the Respondents, it was submitted, first, that as the claim was for costs incurred by the East India Company, under the Statute, 3rd and 4th Will. IV. c. 41, sec. 22, and the Orders in Council made thereon, and not by the Government of India, which was distinguished from the East India Company by Statute, 3rd and 4th Will. IV. c. 85: therefore, that the suit had been improperly brought in India in the name of the Government instead of the East India Company. Secondly, that the East India Company's claim for reimbursement of the costs incurred by them being in the character of agents appointed by the Crown, under the Statute, 3rd and 4th Will. IV., c. 41, to prosecute the appeal (an agency which the Crown

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could, under that Statute, have delegated to any other person), did not, therefore, constitute a "public right" so as to bring the suit within the exception of sixty years provided by cl. 2 of sec. 2 of Ben. Reg. II. of 1805; and, thirdly, that as the period of twelve years from the time the cause of action accrued had elapsed before the suit was commenced, the Court in India was precluded, Ben. Reg. III. of 1793, from hearing and trying the suit by sec. 14. The cases of *Pudarat Dass v. Fattel Ali* (7 Sud. Dew. Rep. N.W.P., 158), *Sheroj Singh v. Mansookh Rao* (7 Sud. Dew. Rep. N.W. P., 337), were referred to.

[233] Their Lordships' judgment was delivered by

The Right Hon. Dr. Lushington.—It will be necessary in this case merely briefly to advert to some of the circumstances which have given rise to the questions discussed at the bar. It appears that there was a suit of very old standing; of such great antiquity that even the parties do not attempt to state at what period an appeal to His late Majesty in Council was lodged against a decision of the Sudder Dewanny Adawlut at Calcutta. Some time prior, however, to the year 1833, an appeal had been preferred by Shah Assud Oollah, the father of one of the present Respondents, against Mussumat Emamun, as Respondent.

In virtue of the Statute, 3rd and 4th Will. IV. c. 41, that had passed, giving authority to the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing, the appeal was heard; the Appellant was condemned in costs; and the decree of the Court below affirmed. Previous to the hearing it seems that Shah Assud Oollah had died. It does not appear from any of the proceedings in this case that the present Respondent (his son) had anything to do with that appeal whatever individually; but his father having been condemned in the costs, proceedings were taken against the son, as possessing the property of his father, for the realization of the sum due for costs.

In the year 1837, the first proceedings in the present case were adopted, and the mode of proceeding was this:—The East India Company, in virtue of the rights they had acquired to recover the costs, proceeded against the son, and also against the wife. They proceeded for the purpose of rendering certain property, which was claimed by the wife as having [234] been conveyed to her by deed of gift of her husband, amenable to the payment of those costs. These proceedings went on, and by a decree of the Zillah Judge, which was made on the 29th of December, 1837, a sale of half the real property of Shah Enayet Hossein was directed to be made. But Mussumat Shurruffutoonnisna was dissatisfied with this order, and appealed to the Sudder Dewanny Adawlut, and on the 31st of January, 1839, that Court reversed the order of the Zillah Court, and ordered all the property comprised in the decree of the Court below to be released, upon the ground, that no summary order could, in the existing state of things, disturb her possession.

Now, it is important to see what was really the tenor of that order as set forth in the judgment of the Sudder Dewanny Adawlut, which states the facts more particularly. It appears that this property had been registered in the Collectorate in the name of the Respondent; that it had been alleged to have been given up by deed of sale in lieu of dower, and that she had rightly or wrongly obtained a decree on the 17th of May, 1830, in her favour. Now, the Sudder Adawlut in that case very clearly intimated what was the state of things, namely, that it was impossible that the Order of the Judge of the Court below could be affirmed, because the only mode of proceeding was that which they directed to be adopted, namely, to proceed regularly to bring the property to sale, and they held that no summary order disturbing her possession could be passed.

This took place, as has been stated, on the 31st of January, 1839, and no further proceedings were taken on the part of the Government to realize the payment of these costs by means of the sale of this particular property, until the year 1852, after a lapse [235] of thirteen years. When the case came to be prosecuted in 1852, the only objection we need notice was an objection made on behalf of the present Respondents, that the suit could not be heard on account of its being barred by the Regulations of Limitations.

We will address our attention, therefore, to that question at once.

Two Regulations of Limitations have been adverted to by the Counsel for the

parties before us, namely, Regulation III. of 1793, and Regulation II. of 1805. Assuming that it was possible that this suit might be governed by Regulation III. of 1793, Mr. Forsyth raised a question that it was excepted, by virtue of certain words found in that Regulation, from the operation of that Regulation, without reference to Regulation II. of 1805; and he stated that, the money had been demanded by the Government for the matter in question, and that the Defendants admitted the correctness of the demand. Now, that the money was demanded may be perfectly true, and that the Defendants might have admitted that the demand was claimable from some quarter or other, may be perfectly true: but that, according to the intent and meaning of the words of the Regulation, they admitted that there was a claim as against the property in question, there certainly is not one atom of evidence before their Lordships.

Their Lordships think, therefore, that that clause in the first Regulation can have no operation upon this case.

Let us, then, consider the further question raised. There is indeed this exception in the Regulation of 1793, "when, either from minority or other good and sufficient cause, he had been precluded from obtaining redress." We will not say that "other good and [236] sufficient cause" are not words so comprehensive that they might by possibility extend to anything that may in the ordinary meaning of those words constitute "a good and sufficient cause" but is there any good and sufficient cause shown upon the present occasion? Here, in the month of January, 1839, there is an express warning given to the Government, who had then sought to make this property amenable for the costs, that the proper course was to commence a regular suit, and not to proceed in a summary mode. They had the proper course pointed out to them; they had pointed out to them the only course by which they could make this property amenable; and they neglected for the whole period of thirteen years to take any such measure. It is, therefore, quite clear, giving the most extensive meaning to the words, "other good and sufficient cause," that it is impossible to say that, "either from minority or other good and sufficient cause," they were precluded from obtaining redress.

We now come to what is certainly a very important point, namely, whether Regulation II. of 1805, extends to the present case, so as to enable the Government to sue, notwithstanding the lapse of time. Undoubtedly, the great object of the Regulation of 1805 was to prevent vexatious suits, in consequence of the litigiousness that generally prevails among the natives of India, and, in all probability, it was not intended at that time to embarrass the East India Company, or the Government of India. But, be that as it may, Regulation II. of 1805, sec. 2, cl. 2, expressly declares that this Regulation of Limitations should not be considered applicable to any suit for the recovery of "the public revenue," or for "any public right whatever" which might be instituted by or on behalf of Govern-[237]-ment, with the sanction of the Governor-General in Council, or by direction of any public Officer or Officers who might be duly authorized to prosecute the same on the part of Government: or, secondly, to any claims on the part of Government, "whether for the assessment of land held exempt from the public revenues without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or for any other public right whatever."

Now, the question turns on the meaning that ought properly to be attached to these words, "any other public right whatever." Perhaps it would be too strict a construction to say that these words shall be construed precisely to be *ejusdem generis* with those matters which are mentioned before, namely, "the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment:" but, although they may not be construed with that degree of strictness, yet they must be taken to depend upon the same principles, otherwise the word "public" would have no meaning.

This brings us to the consideration of the question, whether the recovery of these costs does or does not constitute a public claim? The Statute, 3rd and 4th Will. IV., c. 41, has been read, and we need not go through it again. By virtue of that Statute, His Majesty in Council might give such directions as He thought fit to the East India Company, or other persons, for the prosecution of these suits,

and also might make such orders for security and for the payment of costs as His Majesty in Council should think fit. Accordingly, it appears that an Order in Council was issued, with a view to carry into effect this Statute, and that Order in Council [238] directed the East India Company to appoint agents and Counsel for the different parties in the appeals then pending, to do all such matters and things as had been usually transacted and done by agents in the prosecution of appeals. Now, we are of opinion, that these were all private acts between individuals, and that they had not originally in their nature anything of a public character to be ascribed to them. It appears that His Majesty, by another Order in Council, directed that the East India Company should be "entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the said Act, to such amount and from such party and parties, and shall have a lien for the said costs on all monies, lands, goods, and property whatsoever which may be recovered in such appeals, and upon all deposits which may have been made, and all securities which may have been given in respect of such appeals." In other words, that Order in Council placed the East India Company in precisely the same place and position as the winning party would have been in if an appeal had come on in its ordinary course. It appears to their Lordships that the nature of this transaction was originally of a private character. It continued to be of a private character, and the only distinction that can be drawn is this, that the East India Company are the agents to assert the right of the originally successful party to the costs incurred in the appeal.

It has been observed in the course of this discussion that other persons might have been appointed, and nobody can for a moment say that, if it had pleased His Majesty in His wisdom to appoint anybody else to conduct these proceedings and to realize the costs, the parties so appointed would not have sued as [239] private individuals. It pleased His Majesty, however, to appoint the East India Company. Can the appointment of one particular agent change the whole character and nature of the transaction from beginning to end, and convert that which was originally a private transaction, and nothing but a private transaction, into a transaction of a public character so as to bring it within the terms of the Regulation on which we have commented? Their Lordships think that it did not.

Their Lordships are of opinion, therefore, that the decision of the Court below was right, and they will, therefore, humbly recommend Her Majesty to affirm that decision, with costs.

RAM GOPAL MOOKERJEE,—*Appellant*: SAMUEL MASSEYK and THOMAS J. KENNY,—*Respondents* * [June 28 and 29, 1860].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Pending the execution of decrees in suits between A., lessee, and B., under-lessee, for the balance of rent, C. purchased B.'s interest in the under-lease. For the protection of the property suits were then brought by C. against A. An Ikrarnamah, or agreement, was afterwards entered into by A. and C., to put an end to the litigation. This agreement recited that C. was indebted to A. in a certain sum which C. agreed to pay, upon a remission by A. of part of his claim, by two instalments at specified dates; and the agreement then provided that, if default was made by C. in paying the instalments then that the remitted money was to be held due to A. by C., and secured upon certain property comprised in the underlease, as well as by making C. himself liable. No place was specified, nor was there any custom established by the evidence, where the money was to be paid. The instalments were

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paid, but not until some time after the day specified in the agreement. The money had been tendered to A's Mookhtar, but refused by him from the fact of A. being absent, and also on the ground that interest was not tendered. A. afterwards brought an action against B. and C. to recover the sum remitted by the Ikrarnamah, on the ground that by the conditions of that agreement, the instalments should have been punctually paid upon the specified days, which had not been done, nor had any legal tender been made. Held by the Judicial Committee (affirming the decree of the Sudder Dewanny Adawlut), (1) that although A. had agreed to remit part of his demand on condition of receiving payment on specified days, or in default that the remitted sum was to be paid, yet that there was nothing in the agreement which made the payment of the instalments on the days fixed the essence of the contract, and that the Judicial Committee would not apply the technicalities of the English law with respect to breach of contracts to such an agreement, (2) that the penalty could not be enforced, as there was a *bona fide* endeavour to pay the money on the specified days, and (3) that the agreement was substantially performed by the payments, and that a strict legal tender was not necessary.

In this case the Appellant brought a suit against the Respondents to recover the sum of Rs. 12,829. 2a. 7p. for principal and interest due to him under an Ikrarnamah (deed of agreement), dated the 23rd of [240] September, 1850, executed by the Respondent, Masseyk.

The Appellant had a lease of a share of the Pergunnah Mahmood Shahee, appertaining to the Zillah Jessore, in Bengal; and the Respondent, Kenny, who possessed indigo factories in the neighbourhood, held an underlease of some of the lands comprised in the Appellant's lease.

The Appellant instituted actions and obtained decrees in the Civil Court of Jessore, against the Respondent, Kenny, for balance of rent due on the underlease, took out execution, and procured the attachment of the indigo factories in his possession, together with their appurtenances; and also procured the attachment of certain decrees obtained by the Respondent, Kenny, against divers of the debtors of his indigo concern, and adopted measures for effecting a sale of the attached property, and sold three of the decrees against debtors and received the proceeds.

The Respondent, Masseyk, purchased the entire [241] right of the Respondent, Kenny, to the concern, taking over the debts and credits, and obtained from the Zillah Judge in the different suits, orders for the release of the attached factories, from which orders the Appellant appealed to the Sudder Dewanny Adawlut in Calcutta, while, in three other cases, proceedings were still pending in the Zillah Court; and, on the other hand, four actions had been brought by the Respondent, Masseyk, against the Appellant, for matters connected with the above transactions.

In this state of affairs, and after the hearing of one of the appeals by the Sudder Dewanny Adawlut had commenced, the Respondent, Masseyk, came to an amicable settlement with the Appellant; and, on the 25th of September, 1850, a deed of agreement, called an Ikrarnamah, was executed at Calcutta. This instrument, after reciting the facts above stated, proceeded in the following terms:—"Now, considering the sums in the said decrees obtained by you (the present Appellant) on account of the concern which I (the Respondent, Masseyk) have purchased, to be justly due to you, and being desirous to come to an amicable settlement for the money due to you, an account has been made of all the decrees that you have obtained against Mr. Kenny, up to the 30th June, 1850, and it has been proved that the sum of Rs. 33,589. 15a. 3p. is due to you, out of which, under an amicable settlement, I have agreed to pay you Rs. 25,000, and you have agreed to receive the said sum and make a remission. Out of the said sum of Rs. 25,000 you have received from the Court, Rs. 2281, by the sale made to you of three summary decrees obtained by the said Mr. Kenny against Kishen Chund Chuckerbutty. After [242] giving a deduction for this, the debt becomes Rs. 22,719, out of which this day Rs. 10,000 have been paid to you through your Mookhtar, Jaggut Chunder Mitter, and the Rs. 12,719, that remain due after the payment of the said sum (10,000) have been stipulated to be paid under these conditions:—That

Rs. 6000, out of the principal and interest on the said Rs. 12,719, whatever may become due from the 1st of Bhadoon last, will be paid on the 10th of Magh of the current year, by entering payment thereof on the back of this document; that the remaining Rs. 6719, I will pay on the 10th of Chayte, together with interest, enter payment thereof on the back of this Ikrar, and obtain the return of the said Ikrar and release; that whatever amount of money I may at any time pay, I will have payment thereof made on the back of this Ikrar: and no objection whatever in regard to payment is to be admitted, with the exception of payments recorded on the back of the Ikrar; and whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal. As security for the payment of the said money, the whole of the indigo factories, with their appurtenances, etc., that you had cause to be taken in seizure, in execution of decrees, that is to say, the factory of Dhunnuggur, the factory of Lukhpoore, the factory of Cheechooa, the factory of Puddundee, and the factory of Shalghur Muddhoora, together with my person and heirs, are held bound. If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good; and the [243] said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said factories, from the said purchasers; and you will file Dustburdaree (a petition for leave to withdraw a suit) in the cases in which you have had decrees enforced. You will also file Dustburdaree in the purchase made on your part in consequence of the sale ordered by the Judge, who had rejected the receipt filed regarding the payment of the amount of summary decree in No. 291, due by the judgment debtor, Hur Soondrea Debea, of Turruff Subonee. I give up my claims to the action instituted against you in the Dewanny Adawlut of Zillah Jessore, for excess of rent of Dehee Kuppoorhaut, and to the actions that I have instituted to set aside the three summary decrees against Kishen Chunder Chuckerbutty, which you have realized by causing sale to be made; and I will file Dustburdaree in the said suits, and whatever costs and expenses may be incurred in the said matter will be borne by me. Should Mr. Kenny hereafter prefer any claims against you in any other way, I will become answerable for the same, and they will have no connection with you, therefore I have executed this Ikrar."

The Ikrarnamah contained no stipulation as to the place where the instalments were to be paid, nor did it appear from the evidence that the Appellant intimated his wishes on the subject in writing.

Upon the day of the execution of this instrument, the Appellant and the Respondent, Masseyk, severally presented petitions for withdrawal of the suit to the Sudder Dewanny Adawlut, at Calcutta, stating the par-[244]-ticulars of the amicable settlement which they had made with each other, and praying that the Ikrarnamah, and petitions of Dustburdaree should be admitted, and the suit be struck off the list of pending cases, and that the Ikrarnamah, together with the Mookhternamah, or power of attorney, under which it was executed (both of which were filed with the petitions), should be delivered to the Appellant, all which was accordingly ordered by the Court.

The Appellant resided in the Zillah of Nuddea, at some distance from Jessore. The Mooktar, or agent of the Appellant, one Deb Coomar Rae, resided at Jessore, and held a general power to conduct on the part of the Appellant the cases relating to Ijarah Mehals, to which the Appellant was a party in the Civil Courts of Jessore, and to receive and to grant receipts in the Appellant's name, for any moneys due to the Appellant that were deposited, whether in the Civil Courts or in the office of the Collector. Accordingly, on the 10th Magh, 1257 (22nd of January, 1851), the day fixed by the Ikrarnamah, the Respondent, Masseyk, tendered to Deb Coomar Rae payment of Rs. 6000, the amount of the first instalment of the portion still unpaid of the sum of Rs. 25,000, which the Appellant had agreed to accept in satisfaction of the decrees which he had obtained against the Respondent, Kenny. Deb Coomar Rae refused to receive the Rs. 6000, alleging that the Ikrarnamah was not with him, but was in the house of the Appellant; but he promised at the same time, that he

would send for the Ikrarnamah, and receive the money, and said that no interest should be charged after the day of tender.

Deb Coomar Rae not having performed this pro-[245]-mise, the Respondent, Masseyk, on the 8th of February, 1851, presented a petition to the Civil Court of Jessore, stating that he had been tendering payment since the 10th Magh to the Appellant's Mooktar, in the Zillah of Jessore, of the Rs. 6000, that were payable upon that date, but that the Mooktar had not taken the money, and that the object was not to take the money in accordance with the conditions of the deed, but thereafter to increase the interest.

As there was no suit pending before the Court concerning this matter, the Court refused to make any order upon the petition.

On the 12th of February in that year, the Appellant presented a counter petition, in which, without denying that payment of Rs. 6000, had been tendered to his Mooktar, alleged that if the Respondent, Masseyk, had intended to pay the money, there was nothing to have prevented his paying the money to the Appellant at Beernugger, and having the payment entered on the back of the deed; and he expressed his readiness to receive the money from the Respondent, Masseyk, in the presence of the Court, and to file a petition of relinquishment in the cases in which the Ikrarnamah bound him to do: but he did not offer to produce the Ikrarnamah, and enter the payment on the back of it, as required by the Ikrarnamah; and he intimated an intention to require payment of the remitted sum of Rs. 8589 15a. 3p., in consequence of the Rs. 6000 not having been paid to himself on the 10th Magh.

On the 19th of February, 1851, the Respondent, Masseyk, again petitioned the Court, insisting that the intended payment should be entered upon the back [246] of the deed, and praying that notice should be given to the Appellant to attend the Court, either in person or by Mooktar, or a Vakeel of the Court, to receive the Rs. 6000, and to permit the payment to be entered on the back of the deed. The Judge thereupon ordered that notice should be served, for the Appellant to receive the money from the Respondent, Masseyk.

The Appellant took no steps in the matter till after the 10th of Cheyete, when the second instalment became due. Then, on 12th Cheyete, 1257 (24th of March, 1851), he produced the deed to the Court, along with a petition, in which he expressed his willingness to receive the whole of the money of the instalments due 10th Magh and 10th Cheyete, with interest, and to allow them to be entered on the back of the deed; but he insisted that the money remitted by that instrument had become payable in full, and reserved his right to demand it. In this petition he asserted that at the time when the Ikrarnamah was executed, the Respondent, Masseyk, agreed that he would send the money to the house of the Malyamindar, or surety of the Appellant's lease, and have entry of payment made on the back of the deed.

On the 28th of March, the first instalment of Rs. 6000 was paid in Court to Deb Coomar Rae, the Mooktar of the Appellant, and the payment was entered on the back of the deed.

The second instalment, which had become due on the 10th Cheyete, before the Appellant thought fit to receive the first instalment, was paid under the following circumstances:—Upon the 14th Cheyete the day on which the first instalment had been received [247] by Deb Coomar Rae, the second instalment, consisting of Rs. 3245 in bank notes, and Rs. 4208. 11a. in cash, making in all Rs. 7453. 11a., was tendered on behalf of the Respondent, Masseyk, to Deb Coomar Rae, who said that his dwelling was in the midst of a jungle, that he had not people with him, and that he could not receive so large a sum in cash without sending to his employer at Beernugger, and obtaining thence Beerkundazes, or armed servants, to convey it, and requested that the money might be kept for four days, stating that the interest would cease from that day. Five days after this, and on the 2nd of April, 1851, he said that the Respondent might give him what money he wished to pay, and enter payment on the back of the Ikrarnamah; that he was willing to receive the money, but that he would not be able to return the deed, having been forbidden by his employer to do so.

The day after this communication, the Respondent, Masseyk, presented a petition to the Court, in which he complained of the refusal to take the money and return of the deed, and then tendered the money, praying that Deb Coomar Rae

should be sent for, and return to him the Ikrar Kistbundee. On the next day the Appellant presented a petition to the Court, in which, without denying the statements of the Respondent, Masseyk, in his petition, he insisted that the whole of the remitted money had become due, with interest, through the default of the Respondent, Masseyk, and offered to return the deed on receiving payment of it in full; but expressed himself willing to allow him to pay whatever money he might consider to be due, and to enter the payment thereof on the back of the [248] deed, after which he would sue for the remitted money.

After some delay the Respondent, Masseyk, on the 5th July, presented another petition to the Court, and tendered Rs. 7540. 10a. Sp., with an account, showing that this sum constituted the whole principal payable by him, with interest up to the 14th Cheyte, the day on which the tender was made; and he prayed that the money should be received by the Court and paid to the Appellant, and payment entered on the back of the deed, and that the deed should be ordered to be returned to him. That sum was paid to the Mooktar of the Appellant, and payment endorsed upon the original deed, which, however, was not given up to the Respondent, Masseyk.

The Respondent, Kenny, afterwards purchased back the indigo concern from the Respondent, Masseyk, taking over the debts and credits.

On the 21st of December, 1853, the Appellant filed his plaint in the Civil Court of Zillah of Jessore, against both the Respondents, for the amount of the remitted money with interest. In the pleadings, he, for the first time, objected to the tender made to Deb Coomar Rae, on the ground that the latter was not authorized to receive any money, except that which was in deposit in the Civil Court.

The Respondent, Kenny, alone appeared to the suit, and, by his answer, admitted his possession of the factories, and also the execution of the Ikrarnamah of the 25th September, 1850, but contended and submitted that the real intent of the condition therein was not as contended for by the Appellant, and averred that the Appellant had not been put to, or [249] suffered any, trouble or loss in that behalf. He further alleged, that the Appellant had been guilty of fraud in not receiving the money, stating that the first instalment was Rs. 6000 only, and had been duly tendered to the Mooktar of the Appellant at Jessore; and the answer also averred that the second instalment due on the 22nd of March, 1851, had also been duly tendered to the same Mooktar by a tender made on the 26th of March, 1851, when the Mooktar stated that no interest would be charged from that date; and after stating the ultimate payment of the above two sums to the Appellant, he denied the Appellant's right to recover any further sum under the Ikrarnamah.

The Appellant by his replication denied that the Respondent, Kenny, had rightly interpreted the condition in the deed. He also denied that any tender had been made within the stipulated time, and contended that, even if made to the Appellant's Mooktar at Jessore, the same would not have been a sufficient tender, as it ought necessarily to have been made to the Appellant himself, and not to his Mooktar, who had no authority in that behalf from the Appellant. He also expressly denied that any tender had been made in respect of the second instalment, and contended that, if made as alleged, it would not have been a good tender, the money having previously become due on the 22nd of March, 1851.

No witnesses were examined by the Appellant. The Respondent produced as evidence on his part an attested copy of the Mookhtarnamah granted by this Appellant to Jeb Coomar Rae, his Mooktar at Jessore, and he also examined several witnesses. The evidence of these witnesses was to the effect, that the [250] money due for the two instalments was tendered on two occasions to the Appellant's Mooktar at Jessore, and that such money belonged to and was sent by the Respondent, Kenny, by whose agent the tenders were alleged to have been made; that the sum first tendered was Rs. 6000, only; that the tender of the second sum was on the 25th or 26th of March, the second instalment being fixed on by the Ikrarnamah as payable on the 22nd of March; that on both occasions the Appellant's Mooktar declined to receive the money, and stated that he had not the original Ikrarnamah, and that on the second occasion he stated that he had no means of securing the money, and could not receive it till he had procured people for that purpose from the Appellant, but that on both occasions the agent declared that the tenders should have the effect

of preventing the interest continuing to run. The Appellant's Mooktar was summoned as a witness by the Respondent, but he did not appear.

The hearing of the suit took place on the 30th of June, 1855, when the Principal Sudder Ameen (Baboo Opendur Chunder Nayerutton) dismissed the suit. By this judgment the Principal Sudder Ameen found that the Respondent, Kenny, had proved the tender and payment of the instalments to the Mooktar. On the question as to the nature of the condition in the deed, the judgment of the Court was as follows:—"In the next place, even had there been any fault on the part of the Defendants in respect to this, yet the Plaintiff cannot obtain the said money, because had the Defendants failed to pay the instalment, the condition of the Ikrar would have been rendered null, and the Plaintiff would have become [251] entitled to the whole of the amount that had been due on the decrees. It was incumbent on him not to have taken the money that the Defendants had deposited, and to have resorted to such measures as were necessary for the realization of the entire sum of money. By his not having so done, and by his having taken the money deposited by the Defendants without his consent, it is to be considered that he himself had set aside the said condition, and realized the money; otherwise it was proper for him, at the time of taking the said money, to have made the Defendants admit their fault in not having paid the money (in accordance with the specified time), and then to have taken the said money. When the Plaintiff did not so act, but took the money according to his pleasure, it is to be concluded that he had taken the money, having himself relinquished the claim to receive the money that he had remitted. With regard to the sentence that he has written in his petition to the Judge with a view to his own benefit, that he will hereafter institute an action on a claim for this very money, that cannot remedy his defect; it is, therefore, ordered that the suit be dismissed, and that the Plaintiff pay the Defendants' costs with interest from this date to the date of realization."

The Appellant appealed to the Sudder Dewanny Adawlut at Calcutta, submitting, as grounds of appeal, first, that the whole of the original debt was recoverable, the two several instalments not having been paid in conformity with the conditions in the Ikrarnamah, and within the stipulated time; secondly, that having expressly, by his petition filed in Court, reserved his rights, and received the two sums paid to him as aforesaid in part payment only, and without prejudice to his right to recover the whole original [252] debt, he could not be barred thereby from recovering the balance.

To these grounds the Respondent, Kenny, who alone appeared to the appeal, by his answer, contended, first, that the Appellant having fraudulently and purposely neglected to receive the money at the appointed times, the Respondents were never in default, and the whole original debt could not, therefore, be claimed; and, secondly, that Appellant's claim was barred by his having received the two instalments paid to him.

The hearing of the appeal took place on the 22nd of January, 1857, when the Judges of the Sudder Court, consisting of Messrs. Colvin, Sconce and Torrens, unanimously dismissed the appeal, with costs.

From this decree of affirmance, the present appeal was brought.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant.—No legal and sufficient tender of the first or second instalments has been proved to have been made to any one who had the authority and legal capacity to receive the same for the Appellant. Now, the Ikrarnamah expressly provides, that if default be made in paying the balance due with interest thereon, according to the particular conditions prescribed by that instrument, the sum of money which had been agreed to be deducted from the original debt should become, *ipso facto*, due and recoverable. Here the interest was not tendered. Then as default was established, and neither of the two instalments of the balance due having been paid at the date, or at any time in full according to the conditions, the Respondent was, upon the breach, entitled to the sum sued [253] for. In *Davies v. Penton* (6 Bar. and Cress. 216), it was held that as an agreement had not been complied with, a condition annexed, that in the event of non-compliance, the remission was not to be allowed was a penalty which could be recovered at law. *Ford v. The Earl of Chesterfield* (19 Beav. 428) is on all fours with the present case. There a mortgagee agreed to take a portion of

his debt, in lieu of the whole, upon payment upon a given day, and that not being done, the Court of Chancery refused to give relief against the effect of its non-payment on that day. [Lord Kingsdown. — That case differs from the present. Here it was not a debt for which Masseyk was liable.] Time was the essence of the contract, and punctual payment the very consideration for the remission of part of the debt. *Davis v. Thomas* (1 Russ. and Myl. 506). It is an idle excuse to say that as there was no place mentioned in the Ikramamah where the money was to be paid, that he could not pay the Appellant himself. The answer to that argument is, that where there is no agreed place of payment, the residence of the creditor or his place of business was the proper place, which ought to have been found out by the debtor, and the principal and interest then due paid to him, which has not been acted upon here.

Mr. Rolt, Q.C., and Mr. W. Macpherson, for the Respondents. — The full amount secured by the Ikramamah, with interest, has been received by the Appellant. That instrument does not specify any place of payment, nor did the Appellant ever appoint a place either for payment or for the production of the deed, nor was [254] payment on the day an essential part of the contract. The facts differ from *Ford v. The Earl of Chesterfield*, which does not apply. The Respondent, Masseyk, was ready with the money, and used all reasonable means to compel the Appellant to receive the same at the time appointed. The sum of Rs. 33,589. 15a. 3p. mentioned in the Ikramamah was intended merely as a penalty to secure the payment of Rs. 25,000 with interest. There was a substantial effort to pay on the part of the Respondent, while the Appellant avoided the receipt of the money, for the purpose of founding his claim to the larger amount. If the conditions of the Ikramamah have not been literally performed, such non-performance was owing to the conduct of the Appellant himself. It was not necessary to tender a specific sum, *Ashmole v. Wainwright* (2 Q. Ben. Rep. 837).

Their Lordships' judgment was delivered by

The Right Hon. Lord Kingsdown (July 18, 1860).—This is a suit brought by the Appellant to recover Rs. 12,829, alleged to be due to him from the Respondents under an Ikramamah, or agreement.

It appears that the Appellant was the lessee of certain lands in the Zillah of Jessore, and that the Respondent, Kenny, who was the proprietor of several indigo factories in that District, was under-lessee of a portion of the property.

The Appellant alleged that a large sum was due to him from Kenny for rent, and he brought several actions in the Zillah Court of Jessore to recover the amount, and issued attachments against Kenny's factories and other property.

[255] In 1850, while this litigation was pending, the other Respondent, Masseyk, intervened, and alleged that he had become the purchaser of the interest of Kenny, and he objected to any sale being made under the attachments.

He obtained an order to stay the sale under four of the attachments, from which order the present Appellant appealed to the Sudder Dewanny Adawlut, and that appeal was pending at the time when the engagement on which the question before us was raised, was entered into by Masseyk; besides which three other execution of decree cases were pending for trial in the Zillah, and other actions were brought by Masseyk against the Appellant.

In this state of things the instrument in question was executed by Masseyk, on the 25th of September, 1850.

It is in the Bengalee form and language, and is addressed by Masseyk to the Appellant. It recites the circumstances already stated, and that Masseyk was desirous of coming to an amicable settlement for the money due to the Appellant, that the amount due to the Appellant from Kenny had been proved to be Rs. 33,589 15a. 3p., and of which under an amicable settlement Masseyk had agreed to pay to the Appellant Rs. 25,000, and that the Appellant had agreed to receive that sum and make a remission.

The agreement then states that certain sums had already been received by the Appellant in part of the Rs. 25,000; that at the time of the execution of the instrument Rs. 10,000, more had been paid to the Appellant through his Mooktar, leaving Rs. 12,713; and that Masseyk agreed to pay this sum, with interest, from the 1st

Bladoon (16th August, 1850) by [256] two instalments, one of Rs. 6000, for principal, on the 10th Magh (22nd of January, 1851), and the other of Rs. 6719, for principal, on the 10th Cheyre (23rd of March, 1851). In what way the interest was to be paid we will consider presently. The payments were to be endorsed on the back of the Ikrar; then follow these words:—"And whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal."

The factories are then pledged for the payment of this money, as well as the personal liability of Masseyk. Then follow these words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said factories from the said purchaser." Provision is then made for putting an end to the several suits subsisting between the different parties.

It is to be observed that, although the debt from Kenny to the Appellant might be Rs. 33,589, 15a., 3p., it by no means followed that the property which Masseyk had purchased was liable to the payment of the whole of that sum: and, whatever might be the liability of the property, Masseyk was, previously to this agreement, under no personal liability. By the agreement he made himself personally liable to the extent of Rs. 25,000, for the debt of another; of [257] which sum nearly half was actually paid at the time; and these payments made, and to be made, were part of an arrangement for a general settlement of the various disputes then pending between the parties, and for the dismissal of the suits.

There is nothing in the agreement which makes the payment of the instalments on the days fixed on the essence of the contract, unless that stipulation is to be inferred from the words, "If I fail to pay agreeably to the condition written."

Instead of there being in any other part of the agreement anything to favour this construction, the nature of the engagements on each side, and the clause to which we have referred as to any payments on account being applied first to payment of interest, appear to us to furnish an implication to the contrary.

It being a part of the agreement that the suits in the Zillah Court and the Sudder Dewanny Court should be abandoned, the Vakeels of both parties, on the day of the date of the agreement, brought it under the notice of the Sudder Dewanny Court by petition. It was also, on the same day, brought to the notice of the Zillah Court.

The first instalment of Rs. 6000, became due on the 22nd of January, 1851: it was not actually paid till the 21st of March, 1851.

The second instalment became due on the 23rd of March, 1851, and was not received by the Appellant until the 5th of July, 1851. Under these circumstances the Appellant has brought his action against Masseyk and Kenny, insisting that the agreement has not been performed according to its tenor, and that he is, therefore, entitled to receive the [258] payment of the whole amount of 8,000 and odd rupees, which, he says, were only to be remitted on the condition of the less sums being paid punctually on the specific days mentioned in the agreement.

On the part of the Respondent it is contended, that payment on the day was no essential part of the contract; that this is not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of payment is the only consideration which the creditor receives for his indulgence; that this case does not, therefore, fall within the principle of *Ford v. The Earl of Chesterfield* (19 Bear. 428), relied on by the Appellant, but is a case in which a third person, being under no liability, consents to incur that liability, and binds himself in a penalty for the due performance of his engagement.

The Judges of the Zillah Court, and all the Judges of the Sudder Court, have decided against the claim of the Plaintiff, the present Appellant; and their Lordships have to consider whether any sufficient reasons have been urged for disturbing those decisions.

Their Lordships are of opinion, that they ought not to apply to this case the nice technicalities of English law, that they must look at the agreement with a view to see what the real intention of the parties was, and must inquire whether it appears upon the evidence that there has been any failure by the Respondents in the substantial performance of the contract, and if there has been any default, to whom such default is attributable.

It appears to their Lordships to be sufficiently [259] proved, that on the 10th Magh, the Respondent, Masseyk, through his Mooktar, offered to pay to Deb Coomar Rae, the Mooktar of the Appellant, in the Zillah of Jessore, the sum of Rs. 6000, as the first instalment due under the agreement, and that Deb Coomar Rae declined to receive it, alleging that he had not in his possession the Ikrarnamah on which the receipt of the money was to be indorsed. This instrument is said to have been in the possession of the Appellant himself, who resided at some distance from Jessore.

It is objected, on the part of the Appellant, to this offer: First, that the offer did not include the interest which ought at that time to have been paid. Second, that Deb Coomar Rae had no authority to receive the money on behalf of the Appellant. Third, that the Respondent was bound to seek out the Appellant on the day of payment, and to tender to him the exact amount of principal and interest then due.

First. Their Lordships, on consideration, are of opinion (contrary to the impression which they at first entertained) that by the agreement the interest on the Rs. 12,719, up to the day of payment was to be paid at the same time with the Rs. 6000, and that, therefore, if it were necessary to prove a strict legal tender, such tender was not made; but they are satisfied that the omission to include the interest arose merely from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused, and they think that a strict legal tender was not necessary.

Second. They are by no means satisfied that Deb Coomar Rae had not authority to receive the money. He has not been examined by the Appellant, and he [260] was summoned as a witness by the Respondent and he failed to appear. He was the person through whom, if the attachments against the property had been prosecuted, the money would have been recovered, and to whom it would have been paid in the Zillah Court; and he was, therefore, the person to whom the Respondent might well imagine that the Ikrarnamah, on which the payment of the money was to be indorsed, would be transmitted by the Appellant. There seems no improbability in the statement of the Respondent's witnesses that Deb Coomar Rae said that he would send for the Ikrarnamah that the indorsement might be made upon it.

Third. There seems to have been uncertainty on both sides as to the place at which the Ikrarnamah was to be produced and the money was to be paid. The instrument was executed at Calcutta, where the Appellant had a Mooktar; it related to property at Jessore, where the Appellant had another Mooktar. The deed had been sent from Calcutta to be produced in the Zillah Court of Jessore. The Appellant resided at Beernugger, and had a place of business at Kishnugger. It is stated by the Respondent that it was verbally settled, after the execution of the Ikrar, that the money should be paid to the Appellant's Mooktar in the Zillah of Jessore, and that the Appellant would send the Ikrar to him. There is, however, no proof of this. On the other hand, the Appellant does not allege that there was any place fixed, either by agreement or by custom, or by rule of law, where the payment should be made. He suggested, indeed, at different times in the course of the proceedings, that the payment or tender might have been made to his Mooktar at Calcutta, or to himself [261] at his house at Beernugger, or at the house of the Malzamendar of the Ejarah. To these the place of business of the Appellant at Kishnugger was added in the discussion at our Bar as a proper place for making the tender.

Upon the whole their Lordships are satisfied that there was a *bona fide* endeavour on the part of the Respondent fairly to perform his engagement, and that there is much reason to believe, with some of the Judges in the Court below, that there was a desire on the part of the Appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance.

The principle of these observations applies to the second instalment as well as

the first, and their Lordships have arrived without hesitation at the conclusion that the main ground of the appeal entirely fails, and that if the Appellant has received the full amount of the principal sum of Rs. 12,719, with interest upon that sum till the time of payment, he has received everything which he can justly claim.

They are not, however, satisfied that he has received the full amount of interest which he might reasonably demand; because it appears that with respect to the last instalment there was an interval of several months, during which time no interest was calculated, the delay of payment during that period having arisen, as it is suggested, from the accidental absence of the European Judge from Jessore. It appears, however, that this point is not stated in the reasons of appeal laid before the Sudder Court, nor does it appear to have been suggested below. The sum would, probably, have been allowed if it had been [262] asked, and if it had been refused the amount would have been far below that for which an appeal to this country can be brought.

Under these circumstances, their Lordships think they would not be justified in modifying on this ground the order which they must humbly advise Her Majesty to make, namely, an order that this appeal be dismissed, with costs.

DOORGA DOSS CHOWDRY,—*Appellant*: RAMANAUTH CHOWDRY, and Others,—*Respondents* * [Dec. 5, 1860].

On petition from the Sudder Dewanny Adawlut, at Calcutta.

Costs of suit cannot be added to the principal sum and interest, in calculating the appealable value of Rs. 10,000, the amount restricted by the Order in Council of the 10th of April, 1838.

This was an application by Doorga Doss Chowdry for special leave to appeal from a decree of the Sudder Court reversing a previous decree of the Zillah Court of Rajshahyl, in a suit instituted in the year 1857, by the Petitioner against Ramanauth Chowdry, the executor of one Kallykanth Lahory, deceased, to recover the principal and interest due on a Bond conditioned for the payment of the sum of Rs. 8250, and interest at the rate of eight per cent. per annum, alleged to have been executed by the deceased in favour of the Petitioner.

[263] It appeared that the Petitioner's claim was laid in the plaint at Rs. 9274. 6a., including the interest due, in order to fix the value of the stamp, in accordance with Ben. Reg. IV. of 1793. The cause was heard on the 23rd of October, 1857, when the Principal Sudder Ameen decided in favour of the Petitioner, and decreed that the Petitioner receive the total of the amount of the claim, Rs. 9274. 6a., and the interest on the principal sum during the period the suit was pending trial, and costs, together with interest on the consolidated sum from that date up to the day of realization.

Ramanauth Chowdry, the Defendant, appealed to the Sudder Court at Calcutta, from this decree, and that Court, on the 29th of February, 1860, reversed the decree of the Zillah Court, and allowed the appeal, with costs.

The amount originally laid in the plaint being under Rs. 10,000, the appealable value fixed by the Order in Council of the 10th of April, 1838, no application was made by the Petitioner to the Sudder Court for leave to appeal to Her Majesty in Council, but the present petition was presented for liberty to enter and prosecute such appeal.

Mr. Leith, for the Petitioner, submitted, that the original decree being for a sum of Rs. 9274. 6a., which with the additional interest accrued due and payable thereon since the date of the plaint, under the provisions of the Bond, and the decree of the Zillah Court, together with the costs of suit, would exceed Rs. 10,000, and that sum

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

must be considered as the value of the matter in dispute, which would bring the case within the intent and meaning of [264] the Order in Council of the 10th of April, 1838, and that the Petitioner was, therefore, entitled to appeal.

Mr. W. Field, for the Respondents, *contra*.

The Right Hon. Lord Chelmsford.—The amount absolutely decreed by the Court is Rs. 9274. 6a., the interest added to that for the time specified, at 8 per cent., would, according to the Petitioner's calculation, raise the sum due to Rs. 9310, that is under the appealable sum. It has been determined a short time ago by their Lordships, in the case of *Maharajah Sutterschunder Roy v. Gangeschunder* (8 Moore's Ind. App. Cases, 164-8; see also *Gooroo persad Khound v. Juggutshunder*, 8 Moore's Ind. App. Cases, 166), that the Sudder Courts have no authority under the Order in Council of the 10th April, 1838, to add the interest accruing subsequent to the decree to the capital sum decreed for the purpose of reaching the appealable amount; here the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a suit are no part of the subject matter in dispute, and cannot be used for the purpose you seek; if they were allowed to be added to the principal sum claimed, it would be in the power of every litigant, by swelling the costs, to bring any suit up to the appealable value. Their Lordships are clearly of opinion, that the sum in issue in this suit is not sufficient to bring the case within the Order in Council, and no merits are stated which entitle the Petitioner to the special favour he asks. They refuse the application, with costs.

[See *Nilmadhub Doss v. Bishamber Doss*, 1869, 13 Moo. Ind. App. 85.]

[265] JOYKISSEN MOOKERJEE,—*Appellant*: THE COLLECTOR OF EAST BURDWAN and Others,—*Respondents* * [Dec. 5, 1860].

On petition from the Sudder Dewanny Adawlut at Calcutta.

Special leave to appeal given in a case involving a question of tenure service, called Chakeeran, although the subject matter in dispute was below the appealable value; there being many other suits depending on the decision of the case.

This was a petition for special leave to appeal in a case in which the sum in dispute was laid at Rs. 200 only, but which involved an important question of tenure of certain land, as well as of other lands sought to be resumed, respecting which no less than thirty suits were brought.

The object of the suit in question was to resume and recover possession of 19 Beegahs of land situate in the Mouzah of Gobinpore, of which the Petitioner was the Talookdar from one Ahmud Buksh, alleged to be held by him on a tenure called Chakeeran (lands held by servants in lieu of wages), and which had been originally assigned to him on the condition of his rendering and performing certain services and duties connected with the Petitioner's Talook, such duties being to guard the house of the Talookdar, the [266] Mal-cutcherry, and the village; and that as he had ceased to perform those duties, the Petitioner was entitled to resume the land; but, nevertheless, the Defendant retained possession of the land, insisting that the land which the Petitioner claimed was Malguzary, by reason of which, and other Government claims, the Petitioner was compelled to make the Collector of Burdwan, the Zillah in which the lands were situate, a co-defendant.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Dr. Lushington. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

It appeared that this suit was only one out of thirty which had been commenced about the same time, and under similar circumstances, by other Talookdars, in respect to the Chakeeran lands, against other parties, for having been deprived of similar services by their tenants.

The Petitioner obtained decrees in his favour by the Principal Sudder Ameen in two of the suits, which declared that Petitioner had authority to resume the lands in question under sec. 14 Ben. Reg. VIII of 1793.

From these decrees the Government obtained special leave to appeal, and the suits were remanded for trial on certain issues then fixed, which the Petitioner alleged were not properly adhered to by the Judge of the Zillah Court, to whom the cause was referred: and who by his decree dismissed the Petitioner's suit. The Petitioner appealed from this decision to the Sudder Court, the Judges of which affirmed the decree of the Court below, stating their opinion, on the question of tenure, against the Petitioner's right to resume.

Under these circumstances, and the case being one involving a question of tenure on which many holdings depended, and in which there were other suits already pending, the Petitioner prayed for liberty to appeal.

[267] Mr. Leith, for the Petitioner, relied on the circumstances above stated, and the importance of the question at issue, and the number of suits involving the same right. Upon the question of value, *Spooner v. Juddow* (4 Moore's Ind. App. Cases, 353; see also *Sumbhoolall Girdhurlall v. The Collector of Surat*, ante, p. 17) was cited; and the public importance of the nature of the tenure, *Raja Lelanund Sing Bahadoor v. The Government of Bengal* (6 Moore's Ind. App. Cases, 101) referred to.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, on behalf of the Collector of East Burdwan and the Government, opposed the application, insisting, first, on the extreme smallness of the amount at issue as precluding an appeal; and, secondly, the want of sufficient evidence that the other suits involved the same question, or would be governed by any decision in this case. They contended that the Petitioner ought to have produced an affidavit of that fact.

The Right Hon. Lord Kingsdown.—Their Lordships are of opinion that this is a fit case to advise the allowance of a special appeal. They reserve the question of costs; security to the amount of £300, must, however, be given by the Petitioner.

[For subsequent proceedings, see S.C. 10 Moo. Ind. App. 16.]

[268] GOURMONEY DEBIA.—*Appellant*: KHAJA ABDOL GUNNY,—*Respondent* * [Dec. 5, 1860].

On petition from the Sudder Dewanny Adawlut at Calcutta.

Appeal admitted from the Sudder Court at Calcutta, in a case where the land sued for was laid in the plaint as under Rs. 10,000; upon evidence stating the value of the property much to exceed that sum.

This was an application for special leave to appeal from a decree of the Sudder Dewanny Adawlut, of Calcutta, affirming a previous decree of the Principal Sudder Ameen in a suit instituted by an alleged mortgagee against the Petitioner, a purchaser for valuable consideration in possession of certain lands, the possession of which was sought to be obtained by the suit.

It appeared that the value of the property was laid by the Plaintiff at Rs. 7182 odd, three times the amount of the annual jumma of the land, in order to fix the amount of the stamp to be used on the plaint, although the purchase-money paid by the Petitioner amounted to Rs. 19,000.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Dr. Lushington. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The decrees in both Courts being against the Petitioner she presented a petition for leave to appeal to Her Majesty in Council, praying, under the circumstances, for liberty to appeal from the decree of the Sudder Court.

The application was supported by depositions taken in India as to the value of the property in question, made by two native residents, who stated that the actual value of the property was of much larger amount than Rs. 10,000. The statements in the petition were verified by the affidavit of the Solicitor in the appeal, who deposed to their being taken from the record of the proceedings in the suit.

Mr. Leith, for the Petitioner.

Their Lordships allowed the appeal, on security being given by the Appellant to the amount of £300, subject, as the application was *ex parte*, to the Order admitting the appeal being dismissed, on application by the Respondent.

[270] SALIK RAM and HURARAM.—*Plaintiffs*: AZIM ALI BEG.—*Defendant* *
[March 24, 1862].

On petition from the Court of the Judicial Commissioner for the Province of Oude.

No provision by Statute, or Charter, being made for appeals to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of Oude, created on the annexation of that Kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal, under Statute, 3rd and 4th Will. IV., c. 41.

This was a special application for leave to appeal from a judgment of the Judicial Commissioner for the Province of Oude, pronounced in a suit in which the Petitioners were Plaintiffs, and Azim Ali Khan, Defendant.

The facts which gave rise to the application were these:—

In the month of February, 1856, the Kingdom of Oude was annexed to the territories of the East India Company, and became the Province of Oude, belonging to the Government of India.

By a despatch of the Governor-General in Council, dated the 4th of February, 1856 (Parl. Papers relating to Oude, 1866, p. 257), Courts of Justice were established in the Province of Oude, including, amongst others, the Courts of the Judicial Commissioner, and of the Deputy-Commissioner for that Province; and it was ordered that the Judicial Commissioner should be charged with the direction and control of the administration of civil and criminal justice, and that he should be the ultimate Judge in all cases of a judicial character and that the Deputy-Commissioner should try all original suits for property real or personal exceeding in value Rs. 1000, and that an appeal should lie from his decision in such cases to the Commissioner, whose order was ordinarily to be final.

On the 7th of August, 1860, the Petitioners instituted a suit in the Civil Court of Lucknow, in the Province of Oude, before the Deputy-Commissioner, to recover the sum of Rs. 18,630, for principal and interest upon a bond. The point turned upon a question of limitation of time in bringing the suit; and that Court upon that question decided against the Plaintiffs, who appealed therefrom to the Court of the Judicial Commissioner for that Province, who, by his judgment, affirmed the decision of the Deputy-Commissioner. The Petitioners were desirous of appealing from such judgment of affirmance to Her Majesty in Council as being erroneous in law, and took the necessary steps by presenting a petition of appeal, within the ordinary time limited for appealing from the Courts in India. After inquiries by the Judicial Commissioner to the Government officer Mr. Campbell, as to his power to allow such an appeal, and a reference upon that point to the Advocate-General (who in a letter, dated the 9th of January, 1862, referred to the opinion of the Advocate-General to

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the Under-Secretary to the Government of India), the Judicial Commis-[272]-sioner refused to allow an appeal to Her Majesty in Council from his judgment (a).

(a) The following was the opinion given by the Advocate-General (Mr. W. Ritchie), and acted upon by the Judicial Commissioner:—

1st. In my opinion it is not competent to the Judicial Commissioner of Oude to allow a petition of appeal to Her Majesty in Council from any decision passed by him in any case, civil or criminal, or to suspend execution pending, or to take security regarding any such appeal, unless an Order to that effect shall have been obtained from Her Majesty in Council. But that it is quite competent to the Judicial Committee of the Privy Council to entertain a petition from any person aggrieved by a judgment of the Judicial Commissioner in any civil case of whatever amount, praying for leave to appeal from such judgment, and if such leave be granted, to order the transmission to the Privy Council of transcripts of the proceedings, and to hear and finally dispose of the appeal as fully as in the case of ordinary appeals.

2nd. It is true, as stated by Mr. Campbell, that appeals from the Supreme Courts and Sudder Courts of India, are regulated by positive Statute, and that there is no Statute, or positive law applicable to appeals from the Judicial Commissioner's decision, which are, for all ordinary purposes and so far as the constitution of his Court by the Governor-General in Council could make them, final. But the Queen in Council possesses by virtue of the Royal Prerogative, a clear appellate jurisdiction over the judgment of all Courts of Justice established in any of the British dominions beyond the seas, and notwithstanding the express statutory rights of appeal from the decisions of the Supreme Courts and the Sudder Courts, it has been repeatedly held that, notwithstanding the Statutes which prescribe the time and mode of appealing and the limits in point of amount, the power of the Queen in Council to entertain petitions, for leave to appeal where the conditions imposed by the Statute have not been complied with, remains in full force. Thus it is quite discretionary with the Judicial Committee to admit an appeal from the Supreme or Sudder Courts, in cases far below the appealable amount mentioned in the Statutes, and long after the period prescribed by the Statute for filing a petition of appeal in India has expired, such petitions have frequently been admitted, and have led to a reversal of the judgment of the Courts below. But these Courts have no power to allow or entertain a petition for leave to appeal, or to stay execution, or to take security for the costs of an appeal, except strictly in accordance with the terms of the Statute, or with any Order the Privy Council may make in the particular case.

3rd. Thus the course of any person wishing to appeal from a judgment of the Judicial Committee, will be to send to his agents or legal advisers in England, a copy of the judgment, and of so much of the proceedings as may suffice to render his case intelligible, and to show what his grounds of appeal are, and to instruct such agents to apply, by petition, to the Judicial Committee for leave to appeal from the judgment complained of. If the Judicial Committee think fit to grant such leave, it will cause notice to be given to the Judicial Commissioner's Court and to the Respondents in the cause, and all proceedings in the cause must then be translated and transmitted by the Court to England, in the mode usual in ordinary appeals from the Sudder Court, unless the Privy Council make any special Order as to the mode of transmission, or the documents to be sent. Until an order is made by the Privy Council, the Judicial Commissioner will have no jurisdiction to interfere in any way with the appeal, either in transmitting the record, staying execution, or otherwise. There can, however, be no objection, I apprehend, in cases which appear to him of sufficient magnitude to warrant an appeal, to his authenticating the copies or translations of the proceedings about to be sent home by persons contemplating an appeal.

4th. The Privy Council, in determining whether to admit or reject an appeal, will not be restricted to the amount which, in the Supreme and Sudder Courts, is the ordinary appealable amount, viz., Rs. 10,000, or to any particular limits of time, but it probably will require a very special case to be made out *prima facie* to its satisfaction, in order to induce it to admit an appeal for a lower amount than Rs. 10,000, or after the expiration of the ordinary time allowed for appealing.

[273] In consequence of this refusal the Petitioners, the original Plaintiffs, presented a petition to Her Majesty in Council, which after setting forth the above facts, and that the matter in dispute exceeded the sum of Rs. 10,000, and that important questions of law were involved in the suit, prayed for special leave to appeal from the judgment of the Court of the Judicial Commissioner, and that that Court might be ordered to [274] transmit forthwith the transcript of the proceedings and the evidence in the suit.

Notice of the application for leave to appeal was served on the Secretary of State in Council of India.

Mr. E. J. Lloyd, Q.C., and Mr. L. W. Cave, in support of the petition.

Leave to appeal was refused by the Judicial Commissioner upon the ground that no power has been conferred upon him to allow an appeal. Upon this point they referred to the Parl. papers relating to Province of Oude, 1856, p. 257, par. 3; p. 267, pars. 44, 45, 46, 49; p. 273, pars. 80, 81. There is no positive Statute Law, Regulation, or Order in Council applicable to the admission of appeals from the Court of the Judicial Commissioner to Her Majesty in Council, and our application is for the exercise of the prerogative of the Crown to admit an appeal to prevent a denial of justice. Such power is conferred by Statute, 3rd and 4th Will. IV., c. 41, sec. 4. There is no question as to the appealable value. By the 21st Geo. III., c. 70, sec. 21, the appealable value in civil suits was limited to £5000, but by the Order in Council of the 10th of April, 1838, the appealable value is reduced to Rs. 10,000. The question of law involved is with respect to the operation of the Limitation Act, No. 14, of 1859, to suits brought before the Judicial Commissioner upon bonds, and is most important.

The Lord Justice Knight Bruce.—Their Lordships think this a fit case for allowing an appeal to Her Majesty in Council. Security for £300 must be lodged for costs. A similar application was made on the 4th July, 1862, in the case of *Yamab Tajdur Bohoo v. Mirza Jehan*, and leave to appeal granted. [For subsequent proceedings see 10 Moo. Ind. App. 252].

[S.C. 14 Moo. P.C. 329. Appeals now lie to Judicial Committee from Court of Judicial Commissioner of Oudh on same terms as from Indian High Courts; see Act X. of 1897, s. 3 (24); and Act XIV. of 1882, s. 595. As to appeals by special leave in civil cases generally see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125. For subsequent proceedings see 10 Moo. Ind. App. 114.]

[275] GASPER GREGORY, executor of the Will of CATHERINE ARATHOON, deceased,—*Appellant*; JOHN COCHRANE and VERTANNES TER MARTI-ROSE,—*Respondents* * [Dec. 6, 8, 1860].

On appeal from the Supreme Court at Calcutta.

Specific performance decreed of an agreement in the English form, made between husband and wife (Armenian Christians), in the nature of a family compromise, respecting the wife's separate property.

In the answer of the wife it was alleged, that property purchased by the husband had been concealed by him from her when she executed the agreement; held, in the circumstances, that that fact if proved was not sufficient to entitle the wife to treat the agreement as a nullity.

Held further that if the property said to have been concealed by the husband had been purchased by him out of moneys belonging to the wife's separate estate, which was clothed with a trust for the children of the marriage, the wife's

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remedy was, to enforce her own and children's rights by Bill, to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement.

This was a Bill filed in the Supreme Court at Calcutta, by the Respondent, Cochrane, the Official assignee of the estate and effects of one Arathoon Hyrapret Arathoon, an Insolvent, against Catherine Arathoon, his wife, since deceased, and Vertannes Ter Martyroze, her trustee, to compel specific performance of an agreement, in the nature of a family compromise, entered into by her with her husband; and also to set [276] aside an execution under a decree, taken out by her subsequent to such agreement, whereby a house and premises belonging to her husband, was seized; and further to restrain her from receiving any dividends in respect of a debt proved by her against his estate, as being in contravention of such agreement. The defence was, first, that the agreement was vitiated by fraudulent misrepresentations, concealment, and suppression of facts by her husband, and in particular that at the time of the execution of the deed he was possessed of the house and premises, which fact he had concealed from her; and, secondly, that the house and premises were fraudulently purchased by the husband, out of the wife's separate estate entrusted to him as her legal guardian, she being a minor at the time of her marriage.

The facts and circumstances of the case are fully stated in the judgment.

Sir Hugh Cairns, Q.C., and Mr. Leith, appeared for the Appellant; and Mr. R. Palmer, Q.C., and Mr. Maude, for the Respondents.

The cases of *Attwood v. Small* (6 Cl. and Fin. 232); *Dietrichsen v. Cabburn* (2 Phill. 52), were referred to in the argument.

Judgment was delivered by

The Right Hon. Lord Kingsdown (Feb. 6, 1861).—In this case the original appeal was brought by Catherine Arathoon, since deceased, against a decree of the Supreme Court at Calcutta, on the Equity side, which in effect set aside an execution issued by the original Appellant, and directed a reconveyance of the property seized and sold under it. Mrs. Arathoon [277] having died, the suit has been revived by the present Appellant, who is her personal representative.

The Respondent, Cochrane, is the Official assignee under the Insolvent Act of Arathoon Hyrapret Arathoon, the husband of the late Appellant, against whose property the execution in question was issued.

The husband and wife were both Armenian Christians. The marriage took place in the year 1836, the lady at that time being little more than twelve years of age, entitle to a large property, both real and personal, and under the wardship and protection of the Provincial Court of Dacca, where she resided.

Previously to the marriage, the future husband, at the instance of an aunt of the wife, signed an Ikrarnamah, or agreement, by which provision was made for some settlement of the real and personal estate of the wife. The instrument itself was destroyed by Arathoon, after the marriage, in a fit of passion, as he alleges, and the contents of it do not distinctly appear.

Though the marriage took place without the sanction of the Court, the husband was put into possession of the real and personal property of the wife. It is suggested in the Appellant's case, that he was so put into possession as the tutor and guardian of his wife during her minority, and that this was done in conformity with the Armenian law, by which their rights were to be governed. It does not appear that on this occasion the Ikrarnamah was brought under the notice of the Court.

There were several children of the marriage, which proved a very unhappy one; there were continual quarrels between the husband and wife; and at last they separated in 1845.

[278] In June, 1845, Mrs. Arathoon brought a suit against her husband, in the Zillah Court of Buckergunge, in which she stated that she had attained her majority; charged him with ill-treatment and malversation of her property; and prayed that he might be decreed to account for the same, and that she might be put into possession of the whole of her real and personal estate, which had been, as she alleged, entrusted to him as her legal guardian.

The husband, by his answer, insisted that the rights of the parties were to be

governed by English law, and that by such law the proprietary right to his wife's real and personal estate had vested in him, and that the instrument which he had executed was not binding upon him.

On the 22nd of September, 1845, the suit was heard before the Judge of the Zillah Court, who held that the Armenian law was to prevail; that the husband by his conduct had put an end to the state of tutelage in which the Plaintiff was placed, and that her right to the control of her own property, which he stated to be undoubted according to the law, could no longer be withheld. He then declared that the wife was entitled, both by law and by virtue of the agreement entered into before the marriage, to have delivered up to her the whole of her real and personal property, and also to have an account of the bygone rents and profits, subject to a deduction in respect of the sums which the Defendant could prove that he had expended in the maintenance of the family during the time that the wife resided with him. The decree then, as we understand it, though the matter is not very clear, charged the Defendant with the value of all the real and personal property of the wife which [279] he was shown to have possessed, amounting to Rs. 3,99,510, of which about Rs. 1,86,000 was the value of the real, and the remainder the value of the personal estate.

Against this decree there was an appeal to the Sudder Court at Calcutta, by which the judgment of the Court below was affirmed on the 17th of August, 1848.

It is obvious that this decree involved the consideration of several important questions; whether the Armenian or the English law was to regulate the rights of the parties; and if the Armenian, whether by that law the wife was entitled to the whole of her real and personal estate, as if she were a *feme sole*, exempt from all claims on the part either of her husband or children (a notion not entirely consistent with the fact that the husband had been required before the marriage to execute an agreement renouncing or limiting his right); and, if so, whether the agreement had contained a provision limiting the wife's powers, and securing the property after the death of the parents to the children. If, on the other hand, the rights of the parties were to be regulated by the English law, it would be difficult upon any principles to maintain the decree.

It is insisted by the Appellant that this decree not having been made the subject of appeal within six months to Her Majesty in Council had become final, before the compromise which is the subject of the proceedings now before their Lordships was made, but their Lordships think that what afterwards took place removes any bar which could have been caused by lapse of time.

The decree in question had been made in the [280] absence of the children, who were not parties to the suit. There were, at this time, four children, all, of course, by our law, infants. Three were residing with their father, and one, the youngest, with the mother.

On the 2nd of August, 1848, a few days after the affirmance of the decree, a bill was filed in the Supreme Court of Calcutta in the names of the infant children of Mr. and Mrs. Arathoon, by the brother of Arathoon, as their next friend, against the father and mother. This Bill stated that by the terms of the agreement, or *Ikrarnamah*, executed by the husband before the marriage, the children were entitled in reversion to the whole real and personal property of the wife; that such agreement had been destroyed by Arathoon; that he was totally unable to pay the large debt awarded against him in his wife's suit; that he would be thrown into prison, and the children, who were residing with him, would be left to starve. The Bill prayed that the contents of the agreement might be ascertained, and that the rights of the children might be secured, and that the wife might be restrained by injunction from executing the decree which she had obtained, and by which the whole property in which the children were interested would be swept away.

It is suggested by the Appellant that the object of the children's suit was to defeat, without any appeal, the execution of the decree obtained by the wife, and that the suit was instituted in collusion with the husband, which is very possible. But however this may be, on the institution of the second suit, further proceedings in both suits were stayed, negotiations for an amicable settlement of the disputes between [281] the husband and wife were entered into, the parties came together again, and cohabited till the 30th of April, 1849.

It is clear that the time which elapsed during this interval could have no effect in barring Arathoon's right of appeal against the decree of the 17th of August, 1848.

On the 30th of April, 1849, the parties again separated. Mrs. Arathoon thereupon sued out a writ of execution under the decree of the 17th of August, 1848, and was put into possession of her real estates, in the receipt of the rents and profits of which her husband had been up to this time.

On the 12th of May, 1850, Arathoon sued out of the Supreme Court a writ of *habeas corpus* against his wife to recover possession of her youngest child, then a little more than three years old, who was living with his mother, and an order was made by the Chief Justice for the delivery of such child to the father.

On the 15th of May, 1849, Mrs. Arathoon filed her separate answer in the suit of the children. She denied that the Ikrarnamah signed by the husband contained any provision for the children, or any restriction upon her rights, or that she was at all bound by it if it did. She stated that, under the decree of August, 1848, she had obtained possession of her real estate, but that all her personal estate, and the mesne profits of her real estate, still remained to be recovered from her husband.

To enforce these claims she issued two writs of execution out of the Zillah Court, by one of which, dated the 21st of May, 1849, the Zillah Judge directed the Nazir of the Court to apprehend [282] Arathoon, unless he paid the sum of Rs. 1,15,620. 8a. 10p.; and by the other, dated the 29th of the same month, the Judge directed the same officer to levy of the lands, goods, and chattels of her husband the sum of Rs. 1,16,236. 8a. 9p., besides costs of suit.

How these sums were made out does not very distinctly appear, nor do we understand upon what principle the two writs were issued, one against the person and the other against the property of the husband, for different amounts, nor whether they were for different portions of the same debt, or whether the one was included in the other.

For the purposes of the present appeal, however, these questions are not very material. It is clear that both these writs were founded on the decree of the 17th of August, 1848; that the real estate awarded by that decree had been delivered up; and that the sum found due for personal estate, and rents and profits of the real estate, alone remained to be accounted for, subject to an allowance in respect of sums expended in maintenance.

In this state of the litigation in this unfortunate family, negotiations were entered into for the settlement of all their disputes. Agents and friends were employed on both sides: and at length, after a long interval of discussion, the terms were agreed upon, and were embodied in a deed in the English form, dated the 17th of July, 1849, which was made between Mrs. Arathoon of the first part, her husband of the second part, the next friend of the infants in their suit of the third part, and a formal party of the fourth part.

This deed contained a very full recital of the [283] disputes subsisting between the parties, and a statement of the personal property of the wife disposed of by the husband, or remaining in his hands, by which it appeared that Rs. 70,000, had been laid out in the purchase of a real estate in the Old China Bazar at Calcutta in his own name, and that Government promissory notes to the amount of Rs. 21,000, were still in his hands: and it then provided that all the suits and litigation should be terminated upon the terms subsequently stated. These were, in effect, that upon the children's suit being compromised by order of the Court, Mrs. Arathoon would enter up satisfaction on the judgments which she had obtained against her husband, and in the mean time suspend their execution; that the promissory notes in the hands of the husband should be made over to her; that the property situate in Calcutta should be vested in trustees, to be approved of by the Master, upon trust to pay the rents to Arathoon, he maintaining three of the children, who were to remain with him, and after his death to pay the rents to the wife, if she survived, and after the death of the husband and wife, in trust for all the children, and the issue of such as should die. It was then provided that one of the children already born, and the child of which the wife was then pregnant, should reside with her, and that the husband and wife should, in future, live separate, and a deed of separation and mutual releases were to be executed. The next friend of the infants was to obtain a reference to the Master, to inquire whether it would be for their benefit that their

suit should be compromised on these terms, and the wife was to pay her own costs, and also the costs of the infant Plaintiffs in their suit.

[284] An order was accordingly obtained in the infants' suit for a reference to the Master, as provided by the agreement. The Master seems to have doubted whether he could sanction on their behalf, the proposed compromise, and he required, before he did so, that Arathoon should put in his answer. By his answer Arathoon admitted that the Ikrarnamah was to the effect stated in the Bill, and that in a fit of passion he had destroyed it; he said that at the time of the marriage he was a person of independent, though small, property, and he admitted that he was wholly unable to pay the large amount for which execution had been issued against him, or adequately to maintain the children.

The Master ultimately approved the compromise. His report was confirmed by the Court, which, on the 18th of February, 1850, made an order directing the compromise, as regarded the children, to be carried into effect, and a proper deed to be executed for conveying the estate in the Old China Bazar to trustees, upon the trust proposed by the agreement.

A deed was accordingly prepared and executed, bearing date the 25th of December, 1850, by which this estate was conveyed to two gentlemen of the names of Bagram and Voss. The promissory notes of the Government described in the deed of compromise, were transferred to Mrs. Arathoon. She remained in possession of her real estate; she lived separate from her husband without any interference by him, and she had the custody of the child who was to be retained by her, and also of that which was born subsequently to the agreement, and the suit of the children was put an end to. In short, she received the full benefit of every stipulation contained [285] in her favour in the deed of compromise, which, as regarded her interests, was in substance fully and completely executed.

She did not enter up, and probably was not called upon to enter up, satisfaction on the judgment which she had obtained against her husband, and on which writs of execution had been issued; this was a mere formal act.

The amount of the Government promissory notes which had been handed over to her, and the value of the Old China Bazar estate, now settled on the children, were included in the sums for which the executions had been issued, and by the transfer and conveyance under the terms of the compromise, these judgments had been actually satisfied.

Availing herself, however, of the circumstance that satisfaction had not been entered up, Mrs. Arathoon, on the 21st of January, 1853, while she was enjoying the benefits secured to her by the compromise, adopted the extraordinary proceeding of putting in force one of the writs of execution which had been thus satisfied, and seizing under it a house in Free School Street, Calcutta, as property belonging to her husband, and liable to her execution. The husband's interest in this house was sold by the Sheriff, and the house was purchased by Mrs. Arathoon, and in May, 1854, was conveyed to a trustee for her.

Arathoon hereupon took the benefit of the Insolvent Act. The Respondent, Cochrane, was appointed assignee, and, in the month of September, 1855, he filed against the late Appellant and the trustee for her, to whom the house in Free School Street had been conveyed, the Bill out of which the present appeal arises. This Bill insisted on the terms of the compromise, and [286] prayed that it might be declared binding upon the Defendant, Mrs. Arathoon, and that she might be decreed to enter up satisfaction on the decree or judgment in her suit, and that the house in Free School Street might be conveyed to the Plaintiff, as assignee of Arathoon.

The Defendant, by her answer, admitted the agreement, but alleged that she had been induced to enter into it by the positive statement of her husband, that except the Old China Bazar estate, he was possessed of no property whatever; while, in fact, he was at that time possessed of the house in Free School Street, which had been conveyed at the same time with the Old China Bazar estate to the same trustees; that the fact of such right of her husband to this property had been fraudulently concealed from her at the time of the compromise; and she insisted that, under the circumstances, she was well justified in seizing the Free School Street house under her writ of execution, and in refusing to enter up satisfaction on her judgment. She appended to her answer the copy of a notice which she had received from the

trustees under the deed of the 25th of December, 1850, already referred to, in which it was stated that, by a deed of the same date, the house in Free School Street had been conveyed to them by Arathoon upon certain trusts for the benefit of himself, his wife, and children, which do not appear to differ very materially from those to which the Old China Bazar estate was subject.

Evidence was gone into, and at the hearing the Court was of opinion, that the defence was not made out in point of fact, and that if it had been it could not have been sustained in point of law.

[287] The decree ordered satisfaction to be entered on the judgment, and the estate in question to be conveyed to the Plaintiff, subject to any claims which might be established against it by the Trustees under the conveyance in trust, alleged to have been executed by Arathoon.

Their Lordships agree with the Court below in their opinions on all the points which they had to consider.

There is no evidence that Mrs. Arathoon in entering into the agreement of compromise acted under the belief that her husband was possessed of no real estate beyond that in the Old China Bazar. If she really was acting upon that assumption it was necessary, in order to make the fact of any importance, that it should have been communicated to her husband; for otherwise there could be nothing to require him to make any discovery of his property, or to subject him to any imputation of bad faith for omitting to do so. But no such communication appears ever to have been made, and there is no sufficient proof that Arathoon ever made, or was ever called upon to make, any disclosure as to the amount or particulars of his property, except as to purchases made with the money of his wife. There was no statement in his answer in the suit of the children that he had no real property except the Old China Bazar estate; and he had, and his wife could not be ignorant that he had, a share in a house in Calcutta which had belonged to his mother.

The grounds of the compromise are fully stated in the recitals of the deed. It is not pretended that such recitals are inaccurate, and from the beginning to the end there is no trace of the alleged statement [288] of the husband, nor of the pretence now set up that his state of destitution was any consideration for the wife entering into the compromise. He had, indeed, stated, what was equally true, whether the Free School Street house belonged to him or not, that he was unable to satisfy the judgment obtained by his wife. This lady received ample consideration for abandoning her writs of execution. She secured a separation from her husband. She got rid of any claim by him and by her children to any part of her real or personal estate, except the property in the Old China Bazar. She prevented any appeal against the decree which had been pronounced in her favour in the Sudder Court, and she secured the custody of two of her children.

That the inquiry as to Arathoon's property was confined to purchases made with the money of his wife, is clear from what took place in the month of March, 1850.

At that time Mr. Templeton, the solicitor of Mrs. Arathoon, supposed that Arathoon was the owner of the house in Free School Street; and he insisted that this house had been purchased with Mrs. Arathoon's money, and ought to be included in the settlement on the children. He wrote to this effect to Mr. Denman, the solicitor acting for the infants; and it is clear from the evidence, that both Mr. Denman and Mr. Templeton considered that the principle of the arrangement for the compromise was that all real estate which had been purchased with Mrs. Arathoon's money should be the subject of the settlement. This is perfectly consistent with the recital in the deed, and with the commission of a fraud by Arathoon in misrepresenting or concealing the fact that such pur-[289]-chase had been so made. But there is no trace of any claim being made on behalf of Mrs. Arathoon on the property at this time, supposing it to be the independent property of the husband, not purchased with her money, nor is there any complaint of misrepresentation or concealment by him, if that was the case. There was full opportunity of inquiring into the circumstances between the month of March, when the claim in question was brought forward, and the subsequent month of December, when the compromise was carried into effect; and the lady at that time acquiesced in the arrangement previously made, and accepted the benefits thereby given to her in satisfaction of her claims under the judgment.

On the whole, their Lordships are satisfied that no such fraud as is the foundation of the defence in this case has been established against her husband. If it had been it could not have been used as a defence in this suit, which is not one for the specific performance of an agreement remaining *in fieri*, and in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law. It is a Bill to set aside an act done in plain violation of an agreement which, in all its material parts, had been executed, and all the benefits of which the party violating it retained on her part, while as against the other party she treated it as a nullity.

There may be reason to suspect from the evidence that the house in Free School Street was purchased with the wife's money, and that if so purchased it ought to have been included in the settlement, and that it was kept out of the settlement by the fraudulent misrepresentations or concealment of the hus-[290]band. But on that hypothesis the proceedings of the wife are equally irregular. If the house was bound by a trust for the children it could not be subject to a writ of execution for her private debts. Her proper course would have been not to treat the agreement as a nullity, but to act upon it, and enforce it by a Bill to compel a settlement of the property which had been improperly withheld.

In truth, however, it appears that a settlement had been made of the house on trusts pretty much the same with those applicable to the property in the Old China Bazar.

On the whole, their Lordships agree both with the decision in the Court below, and with the reasons assigned for it in the extremely able judgment of the Chief Justice, and they must advise Her Majesty to affirm the decree complained of, with costs.

[291] LUCKMEE CHUND, and Others,—Appellants: ZORAWUR MULL, and Others,—Respondents* [Dec. 3, 1860].

On appeal from the Sudder Dewanny Adawlut at Agra in the North-Western Provinces.

Heard *ex-parte*.

A contract was entered into at Rutlam, in the independent State of Malwa, between the firm of L., who resided and carried on business at Muttra, within the jurisdiction of the Zillah Court at Agra, and the firm of Z., carrying on business at Rutlam, and elsewhere; for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership business was carried on principally at Muttra, and the business was conducted there by means of the capital advanced in the concern, by the firm of L., in which place the partnership books were kept. At the close of the partnership, which was attended with loss, a balance was struck at Muttra, which showed a debt due by the firm of Z. to the firm of L. In an action brought by the firm of L. against the firm of Z. in the Zillah Court of Agra, for recovery of the amount of this balance, it was pleaded by Z. that as the contract was made at Rutlam, where the firm resided, the Zillah Court at Agra had, by Ben. Reg. II., of 1803, no jurisdiction to entertain the action, which objection the Zillah Court allowed, and afterwards the Sudder Court at Agra, on appeal, sustained.

Upon appeal such decision was reversed by the Judicial Committee on the ground, that the cause of action arose in Muttra, and was, by Ben. Reg. II., of 1803, within the jurisdiction of the Zillah Court of Agra.

First, because Muttra was the established place of business of the co-partnership, where the books were kept for the purpose of the partners ascertaining the state of the transactions between them, and

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel and the Right Hon. Sir James W. Colville.

Secondly, as it was there that the balance was struck, and payment of the balance due.

The sole question in this appeal was, whether the Zillah Court at Agra had jurisdiction under the provisions of Ben. Reg. II. of 1803 to entertain the suit.

[292] The case was not heard upon its merits, but on a preliminary point, whether the Zillah Court at Agra had jurisdiction to hear and determine the suit under the provisions of Ben. Reg. II. 1803, sees. 3, 4, 5 (a). The Appellants were non-suited by the Zillah Court, on the ground of want of jurisdiction, and that Court's decree was affirmed on appeal by the Sudder Dewanny Adawlut.

The facts of the case were these:—

The Appellants resided at Muttra, within the ambit of the Zillah Court of Agra's jurisdiction, carrying on a banking and mercantile business by themselves [293] and by Gomastahs, or agents, in houses of business established in the principal cities throughout India. One of these houses established at Muttra, was carried on by the Appellants. Another was established at Rutlam, in the independent State of Malwa, and the business carried on by agents only. The respondents were also Bankers and merchants, carrying on business at Rutlam.

The dealings between the parties to this appeal began in the month of March, 1846, when one Salig Ram went to Muttra, and had an interview with the Appellants, at their house of business there, to whom he was previously known, at one time as the partner, and at another as the Gomastah of the Respondents. At this interview, Salig Ram stated that he had been commissioned by the Respondents to effect a partnership between them and the Appellants in the purchase and sale of opium.

The terms and conditions of the partnership were, after some delay, finally agreed to at Muttra by the Appellants on the one part, and by Salig Ram, acting on behalf of the Respondents on the other part. The authority of Salig Ram, as agent, was afterwards confirmed by the Respondents, both verbally and by a letter sent by them to the Appellants. That letter was as follows:—

“Dear brethren, brother Radhakishen, and brother Rughonath Doss, accept the salutations of the Rutlam Walas and Dan Mull, and Indur Mull, and know that the Rutlam Walas assigned over the opium business to brother Salig Ram. The transactions conducted by Salig Ram, wherein he made purchases at Muphul, Bathama, Buja, [294] Rutlam, Burnugar, and Mundisore, you will be pleased to close. In future your and our joint transactions you will be pleased to enter into with the consent of both parties, opening a separate set of books. The profit or loss shown by these will consist of 21 shares, that is to say, one share shall belong to God, $12\frac{1}{2}$ shares shall belong to yourselves, and $7\frac{1}{2}$ shares shall be our property. It is agreed that this shall be the distribution of the 21 shares. The former loss of three and a quarter lacs of rupees brother Salig Ram has taken upon himself, and until your loss is reimbursed the share shall continue as above stated. When your loss shall have been recovered, then the shares shall be divided half and half alike. In these transactions your capital at Muttra shall be embarked, and interest at the rate

(a) These sections enact as follows:—

“3. The jurisdiction of the Zillah Courts shall extend to all civil suits arising within the Districts and places which are, or shall be, included in the Zillahs in which they are respectively established.

“4. All natives, and other persons not British subjects, are hereby declared to be amenable to the jurisdiction of the Zillah and City Courts.

“5. The Zillah Courts are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally, of all suits and complaints of a civil nature, in which the Defendant may come within any of the descriptions of persons mentioned in section 4: provided that the landed or other real property, to which the suit or complaint may relate, shall be situated, or in all other cases the cause of action shall have arisen, or the Defendant at the time when the suit may be commenced shall reside, as a fixed inhabitant, within the limits of the Zillah over which their jurisdiction may extend.”

of 6 annas per cent. per mensem will be allowed. Salig Ram will conduct the business, and he will act with the consent of both parties. Salig Ram will discharge his duties towards both parties conscientiously."

It appeared that separate sets of books were opened, and kept at Muttra, where the co-partnership business was carried on at the house of business there of the Appellants. The moneys used as the capital in the co-partnership dealings were, also, supplied by the Appellants at Muttra, and debited in the books kept there, to the amount of Rs. 57,31,865. Salig Ram alone expending and employing the same in the purchase of opium for the co-partnership. The opium was sold at Bombay and in China, and the account sale and proceeds were all remitted to the Appellants' house at Muttra, where the business and accounts [295] of the co-partnership were kept by the Appellants, and where the books containing those accounts were retained.

It further appeared that losses were sustained in the business, and when the co-partnership dealings and accounts were closed, a balance was struck at Muttra, against the co-partnership, amounting to Rs. 22,67,962.

The Appellants informed the Respondents of the state of the co-partnership accounts, and the balance at debit, and requested them to come to a settlement and pay their share of the balance.

The Respondents having neglected to pay the same, an action was brought by the Appellants in the Zillah Court of Agra, against them to recover their share of the balance, amounting to the sum of Rs. 10,75,156. 1a., including interest as well as the principal. Amongst other things set forth in the plaint, the terms and conditions of the co-partnership verbally agreed to at Muttra, by the Respondents through Salig Ram, were stated, and a letter received by the Appellants from the Respondents was set out, which was in these terms:—"The Defendants (the Respondents), according to mercantile custom, addressed a letter to the house at Rutlam, under date the 2nd Katik Soodee Sumbut, 1903, containing all the conditions in respect to the partnership which Salig Ram had previously proposed and settled with the Plaintiffs (the Appellants), which letter, along with other letters of the Defendants, the Plaintiffs now hold."

The answer of the Respondents, among other things, stated that they were residents of Oodeypore [296] Kotah Jehsumore and of Rutlam, places situated in a Foreign territory, and they raised two objections to the action: first, that the action was not entitled to be heard in the Company's Courts, and especially in the Agra Court; and, secondly, as to the incorrectness of the claim itself. As to the first objection, it was alleged, that Salig Ram was neither the agent nor partner of the Respondents, nor did they depute him, but that he was the agent and confidant of the Appellants; and secondly, that the Respondents were not residents in the British territory, nor did the transactions and accounts declared to have taken place by the Appellants occur in a British territory. That, according to Reg. II. 1803, there were two points which defined the District in which a suit could be instituted. One of them was to the effect, that it should be instituted in the place where the transactions occurred with Defendants; and the other, that it should be presented in the District of which, at the time of presenting the complaint, the Defendants were permanent residents; and they insisted that the institution of the suit in the Company's Court was a violation of the Treaties existing between the British Government and Native States, an account of which was given in the letter addressed by the agent to the Judge of the Zillah, dated the 4th May, 1850, and which was filed with the misl; and the Appellants relied upon the letter, dated 2nd Katik Soodee Sumbut, 1903, received from the house of Rutlam, situate in a Native State, in connection with the partnership, the cause of action in the present suit—when, according to the Appellants' own showing, that letter related to Rutlam, and could not, [297] therefore, be inquired into by the Zillah Court at Agra.

By the replication it was insisted that the Respondents were residents and had property, both moveable and immoveable, within the territories of the East India Company; but that being mercantile men they occasionally travelled to other places; and it was further insisted that suits might be heard against those who were residents in a Foreign territory, under the rule laid down in section 36 of the Despatch of the Honourable Court of Directors, dated 27th of May, 1835; and, that the Treaties alluded to in the answer were not applicable to this case. The replication also stated that the letter alluded to in the answer, was not the ground of action, but only a

verification of the conditions of the co-partnership which had been concluded previously at Muttra, through Salig Ram, the authorized agent of the Respondents; and that he had been for a long time a partner, and subsequently the Gomastah of the Respondents.

The Zillah Court of Agra, directed, among others, the following issues to be tried. First, whether the Court was legally competent to hear the suit; and secondly, whether any defect existed in the claim which rendered the Plaintiffs liable to be non-suited. The issues of facts arising from the pleadings were stated to be,—First, whether the partnership contract in the opium speculation was actually entered into as stated by the Plaintiffs; secondly, if the contract was proved, whether the amount claimed was due; and thirdly, whether Salig Ram was the accredited agent and partner of the Defendants, and entered into the terms of the contract on their behalf.

[298] Witnesses were examined on the part of the Appellants. It was proved that the alleged co-partnership was effected through Salig Ram at Muttra, as the agent of the Respondents; and the subsequent verbal confirmation of his acts by one of the Respondents, Bhuboottee Sing. The letter written by him in the name of his firm to the Appellants' firm was also proved, and that the accounts were kept, and payments made, and the proceeds of the opium received at Muttra on account of the co-partnership. No witnesses were examined by the Respondents.

On the 24th of July, 1851, judgment was pronounced by Mr. Henry Byng Harington, the Officiating Judge of the Zillah Court of Agra. By that judgment the Appellants were non-suited, on the ground that they had failed to establish that the Respondents were subject to the jurisdiction of the Court in respect to the claim, either on the ground of the cause of action having arisen, or on the Respondents being constructively or otherwise residents, at the date of the institution of the suit, within the limits of the Court's jurisdiction.

The Appellants appealed from this judgment to the Sudder Dewanny Adawlut of the North-Western Provinces at Agra.

The appeal was heard before Messrs. Begbie, Browne, and Harington, the Judges of that Court, and a decree was pronounced on the 7th of June, 1852. The material parts of this decree were as follows:—"Apart from the facts involved in it, the question of jurisdiction itself lies within a narrow compass. It is not denied that a party entering into a partnership engagement with a firm in the British territory, [299] and carrying on transactions elsewhere with the funds advanced by it, is liable to the jurisdiction of the tribunal of the locality where the cause of action, or in other words the partnership contract arose; nor, on the other hand, is it contended that a party, resident in the British territory, who embarks his capital in trading speculations with residents of a Foreign territory, on a contract entered into and to be executed within that territory, has any power by law to summon the other contracting party before his own Courts. The Appellants, in fact, throw the grounds of their suit on the contract which Salig Ram is said to have concluded with them on the part of the Respondents within the Agra jurisdiction; and although the cause of action has not been set forth in the plaint with the distinctness required by law, it may be gathered from the pleadings at large with sufficient clearness to constitute the determination of this fact; the test of the jurisdiction. On the pleadings, the proof of Salig Ram having been the accredited agent of Respondents, and of the contract alleged, must be first considered, and as these must be drawn from the oral and documentary evidence, and from general probabilities, the Court consider the first objection raised by the Appellants in their reasons to be of no weight, no more of the facts of the case having been entered into by the Court below than were necessary to enable it to arrive at some certain conclusion on the preliminary issue. The Court first note the ambiguous character in which Salig Ram is said to have appeared at Muttra, and the want of any satisfactory proof of the real position held by him in relation to the Defendants in their general business. [300] In the pleadings he is stated to have been both partner and agent. In the oral evidence the witnesses adduced by the Appellants depose on their knowledge, derived from common and credible rumour, that he was the confidential friend and agent of the Defendants' house of business, that he had also a share of his own in several houses of business in Malwa, and that the Defendants, on being questioned, had themselves stated that he was one of them. But in the petition presented by Salig

Ram himself to the Resident of Indore, he represents that his partnership with Defendant had been dissolved some time before, and that a 'Farigh-kuttee,' or deed of release, had been exchanged, whereby it was agreed that a yearly allowance of Rs. 6000. should be paid to him in satisfaction of all claims. The petition was presented for the purpose of obtaining the aid of the Residency authorities in the payment of the allowance; and although the presenter of it had an obvious motive in exaggerating his services, no mention is made in it of any direct and continued connection with Defendants, in the way of situation of service, subsequently to the dissolution, or of any power having been committed to him, either as an agent or friend, to open the negotiation referred to therein. This evidence is, in the opinion of the Court, wholly insufficient to prove that Salig Ram had established himself as an accredited agent in the general business of Defendants' firm so as to dispense with the formality of credentials, and the Appellants do not affirm that any special letter of introduction was brought by him authorizing his proposals. It is, on the contrary, abundantly clear [301] from the circumstances, no less than from the ambiguities and contradictions above noticed, that the Appellants were quite at a loss in what manner they were to receive the communications of Salig Ram; and that after deputing a confidential servant for the purpose of observing his proceedings, and instructing their correspondents at the branch firm at Rutlam to make full inquiries on the subject, they took no further steps in the matter until the receipt of the letter which had been transmitted to them by the Rutlam house. The correctness or otherwise of the inference drawn by the Judge from the question proposed to the witness, Puna Lal, appears to the Court to be of no material consequence either way. The facts still remain, that Salig Ram, after his lengthened stay at Muttra, did not repair, on his return, to his alleged principals; that nearly six months, according to the Appellants' own showing, elapsed between the arrival of Salig Ram at Muttra and the date of the letter, which period had been spent in inquiries, and that the books were not opened in the interim. The circumstances are strongly opposed to the statements put forth by the Appellants, and afford no indications of the tender and acceptance of formal proposals regarding the partnership, and of the postponement of the opening of the books until the terms of the contract had been ratified by the principals of the Defendants' firm, as asserted by them. There is, it is true, some oral evidence to the particulars of the negotiation between Salig Ram and the Appellants at Muttra, but no value can be allowed it when weighed against the opposite presumptions, and the Court view it on other grounds with much distrust. Negotiations of so delicate and [302] important a character between large and opulent firms are not usually conducted in the presence of witnesses, and proof of such transactions is not sought for by the Courts, or by the commercial usages recognized by the Courts in oral testimony. It is at the same time remarkable, considering the advantages in point of jurisdiction which the completion of the contract at Muttra would have conferred, that the Appellants, who are thoroughly versed in the practice of our Courts, should have neglected to guard their own interests, by securing some unquestionable documentary proof of the fact, in aid of their present allegations. The letter remains to be considered, a translation of which is to be found in the decision appealed from. Each party placing a different construction on this document, the Appellants urging that its terms convey a ratification of the previously-completed contract of which it was merely the evidence, whilst, according to the statements of the Defendants, and under the view of its purport taken by the Judge, it formed the original and basis of the partnership agreement, and constituted the real cause of action. The letter in question refers to some past opium transactions between the parties, which had been conducted by Salig Ram, and under the distribution of the shares in the new venture the writers agree that Salig Ram should work off the loss of three and a quarter lacs incurred by the Rutlam house in the former transactions from the five shares in excess, which are assigned to the house for that purpose, the business being conducted by Salig Ram as before. There is also a mention of the capital of the Muttra house being embarked in the speculation, [303] but beyond this there is nothing in the letter to indicate a foregone contract in the matter with the head firm at Muttra, or to warrant any presumption of the transfer of the locality of the agreement from Rutlam. It is addressed by the Defendants' house at Rutlam to the Appellants' house at the same

place, and the plain terms of the document, in the opinion of the Court, afford no grounds for an inference that the contracting parties were other than the two houses there. It would, in fact, appear from its tenor as if the Defendants had endeavoured to guard against any other possible interpretation of their meaning at the time of writing. The Court, therefore, consider that the purport of the document assists the conclusions from the other evidence; and, as there is no evidence that the Defendants acknowledged afterwards, by act or letter, the existence of any partnership transactions with the Muttra house direct during the three years of their alleged continuance, they hold that the Agra Court has no jurisdiction in adjudicating between the parties, and dismiss the appeal."

The present appeal was from this decree.

As the Respondents did not put in an appearance the appeal was set down for hearing *ex-parte*.

Mr. Leith, for the Appellants.—This decree cannot be maintained. It is founded upon an entire misconception of the effect of the co-partnership agreement. The only question that the Court below had to consider was, whether the contract between the parties, of the cause of action arising out of the contract, occurred within the juris-[304]-diction of the Zillah Court of Agra. First. By the terms and conditions of the contract between the parties the carrying on of the co-partnership business was to take place, and, as a fact, did take place at Muttra; the *locus contractus*, was, therefore, at Muttra. There the partnership accounts were kept, in respect of which the liability of the Respondents arose; moreover, the balance was there ascertained and taken, and it was for the recovery of the balance so struck there that the present action was brought, the breach being for non-payment there. Now, the Respondents were either actually or constructively subject to the jurisdiction of the Zillah Court at Agra, for first, the action arose within the jurisdiction of that Court within the meaning of sec. 3 of Ben. Reg. II. of 1803; and, secondly, the cause of action arose within that jurisdiction by sec. 5 of that Regulation. It has been so decided by the Courts in India, *Wilayat Ulee Khan v. Mirza Ubdoolah Shah* (11 Sud. Dew. Rep. N.W.P. 646), *Chowdhree Juggernath v. Bunseedhar* (8 Sud. Dew. Rep. N.W.P. 159), *In re Sunken Mahter* (10 Ben. Sud. Dew. Rep. 280). The general rule upon this point is conclusively laid down by Story. "Conflict of Laws." (Edit. 1841.) In sec. 282, when treating of the conflict of jurisdiction, he says, that "if no place of performance is stated, or the contract may be indifferently performed anywhere, it ought to be referred to the *lex loci contractus*." So Burge, "Commis. on For. and Col. Law," vol. iii. p. 752, observes, that "when the parties do not reside in the place where the contract is made, and it is effected by agents or letters, the place in [305] which the final assent is given by the party to whom the proposition was made, is that in which the contract is considered to have been made." The authorities fully sustain this proposition. *Albion Fire and Life Assurance Co. v. Mills* (3 Will. and Shaw, Sc. Reps. 233; S.C. on appeal, 1 Dow and Cl. 342), *Whiston v. Stodden* (8 Martin's Amer. Reps. 95), *Cox v. The United States* (6 Peters' Amer. Reps. 172), *Robinson v. Bland* (2 Burr. 1079).

Secondly. It is a principle well recognized that if a contract is made by an agent without orders, and the correspondent ratifies it, such contract is binding on the principal, *Boyle v. Zacharie* (6 Peters' Amer. Reps. 644). Here Salig Ram had authority previously to bind the Respondents by the co-partnership agreement entered into by him at Muttra on their behalf; but, even if he had not that authority, then the subsequent adoption and ratification of his acts by the letter of one of the Respondents gave the same effect to the agreement as if he had previously obtained such authority from them.

The Right Hon. Lord Chelmsford.—The proceedings of the Plaintiffs in this cause have not been particularly expeditious, as we are now dealing with a decree of the Sudder Court made in the month of June, 1852, affirming a decree of the Zillah Court, by which the Plaintiffs' suit was dismissed on the ground of want of jurisdiction.

The only question which their Lordships have to determine is, whether the contract which was entered into between the parties, or the cause of action arising

[306] out of that contract, occurred within the Jurisdiction of the Zillah Court of Agra.

If this question had depended upon the authority of Salig Ram to enter into any contract by which he could bind the Respondents, probably their Lordships would have determined that there was no evidence whatever to show that he possessed any such authority, because in the petition which he had presented to the Resident of Indore, and which was put in by the Appellants themselves and made part of their evidence, Salig Ram distinctly states that no partnership existed between him and the Respondents; and if he were merely the Gomastah of the Respondents, he could have no power in that character alone, to bind them to any such partnership as it is alleged he entered into. But whether this is so, or not, it is quite clear that the letter which was put in evidence by the Appellants, and which was written by one of the Respondents, amounts either to a contract of partnership or to a ratification of what had been previously done by Salig Ram. Now, although that contract was entered into at Rutlam, yet it was for the establishment of a partnership which was to be carried on principally at Muttra, where all the transactions were to be conducted by means of the capital embarked in the concern at that place.

The partnership having been thus established, advances were made from time to time, according to the terms of that partnership. Money was transmitted to Indore and other places. So far as those advances were from time to time made, though they did not constitute any debt upon which there would [307] be any cause of action arising to the Appellants, yet they were made in pursuance of the partnership contract, and if the speculation had been a successful one, the profits would, of course, have gone to countervail the advances. But it turns out that the undertaking was unprofitable, and that losses were incurred, and the claim which is now made being the cause of action alleged by the Appellants, is for a balance of ten lacs of rupees arising out of these partnership transactions.

Now, where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muttra was, undoubtedly, the central place of business: at Muttra the partnership books were kept; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them; and if, in the result a balance was due to the Appellants, Muttra would be the place where the payment of that balance would have to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra.

Under these circumstances, it is quite unnecessary for their Lordships to make any further observations upon the case; indeed, they are anxious not to touch, in the slightest degree, upon the merits of the question between these parties. They must assume, of course, but merely for the purpose of the determination of this question, that there is a balance due to the Appellants arising out of the partnership that was established.

[308] Their Lordships are, therefore, of opinion that both these decrees must be set aside, but, as there are two decrees in favour of the Respondents, their Lordships are of opinion that this should be without costs.

[For subsequent proceedings, see 13 Moo. Ind. App. 365.]

DOORGAPERSAUD ROY CHOWDRY.—*Appellant*; TARAPERSAUD ROY CHOWDRY,—*Respondent* * [Dec. 5, 1860].*On Appeal from the Sudder Dewanny Adawlut, at Calcutta.*

A suit was instituted in 1827, by A. against B., to recover a moiety of real estate in the possession of B. In the year 1829 the suit was compromised and a partition agreed upon. The Razenamah, or deed of compromise, provided that, in the event of either of the parties not agreeing to act, according to the terms of the compromise, the Court was to enforce the same. B. refused to carry out the agreement, and A. applied to the Court to enforce the compromise; the Sudder Court in 1832 confirmed the agreement, and ordered possession to be given to A., directing the suit to be struck off the file. No directions were given by the order of the Court respecting the mesne profits. In the same year A. presented a petition to the Sudder Court, founded on the order for possession, for Wasilat or mesne profits of his share of the real estate. This petition came before a single Judge of the Sudder Court, who made an order awarding Wasilat from the date of the decision of the Court to the date of possession. This order was appealed from, and in the year 1853, the Sudder Court held that the order of a single Judge decreeing Wasilat was *ultra vires*. In consequence of this decision, A. brought a regular suit against B. for Wasilat. In defence it was pleaded that the Plaintiff's claim was barred by Ben. Reg. III. of 1793, sec. 14, as the mesne profits claimed accrued beyond twelve years from the date of the institution of the suit. The Sudder Court decided, that, in the circumstances, the Regulation did not apply. Such decree affirmed, on appeal, by the Judicial Committee of the Privy Council by reason—

First, that the cause of action did not arise upon the suit instituted in 1827, or upon the agreement to compromise, and

Secondly, that the conduct and acts of A., from the date of the order striking the cause off the file of the Sudder Court, in endeavouring to recover the Wasilat showed an intention to carry out the compromise, and the proceedings before the Court to recover the same took the case out of the operation of Ben. Reg. III. of 1793, sec. 14.

A single Judge of the Sudder Court is not competent to make a supplemental order for Wasilat, upon a decretal order of the Court merely decreeing possession.

This suit was brought for the recovery of Wasilat, or mesne profits of real estate, and the sole question [309] raised by the appeal was, whether the Respondent was entitled to Wasilat from the period of twelve years next before the institution of the suit, according to sec. 14 of Ben. Reg. III., of 1793, or, whether he was entitled to go back to the year 1829, the date at which by certain deeds of Razenamah and Safeenamah, and an order of Court made thereon, his title to the moiety of the property became perfected.

The facts are fully stated in the judgment.

The appeal was argued by Mr. R. Palmer, Q.C., Mr. Leith, and Maude, for the Appellant, and Mr. W. Field, for the Respondent.

The authorities cited upon the question of the limitations of the suit, under Ben. Reg. III., of 1793, sec. 14, and Ben. II., of 1805, secs. 1 and 3, cl. 3, to the Wasilat, were *Group and Dyce Sombre v. The East India Company* (7 Moore's Ind. App. Cases, 101), *Rajah Enayet Hossein v. Sayud Ahmed Reza* (Ib. 238), *Pran-nath Roy Chowdry v. Rookda* [310] *Begum* (7 Moore's Ind. App. Cases, 323), *Sheoraj Singh v. Munsookh Rai* (7 Sud. Dew. Rep. N.W.P. 337), *Pudirrut Dap v. Futteh Ali* (7 Sud. Dew. Rep. N.W.P. 158).

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Their Lordships' judgment was delivered by

The Right Hon. Lord Kingsdown (Dec. 20, 1860).—A suit was instituted by the present Respondent in 1853, and the only question in the case is, whether the Respondent is barred from the prosecution of his claims in this suit by the Indian law of limitation.

It is necessary to the correct understanding of this case to state some of the circumstances under which the suit was commenced and the decree pronounced.

It appears that both the Appellant and Respondent are brothers; their uncle died without issue in 1810; their father died in 1821, having succeeded to the property of their uncle, and he left the Appellant and Respondent, his two sons, joint heirs-at-law. The property which so devolved upon them was very considerable, and much litigation ensued as to the division and possession of that property, which was situated in various Districts; to recover each portion of the property lying in various Districts, it would be necessary to institute proceedings in the various Courts having local jurisdiction.

On the 29th of January, 1827, the present Appellant instituted a suit against the Respondent, in the Provincial Court of Calcutta, to recover a certain share in Zillah Jessore, which was, in fact, a very [311] small part of the estates in question. Whilst this suit was pending, the parties to it came to an agreement to compromise their claims, and on the 4th of April, 1829, deeds of compromise were executed and filed in the Zillah Court—they agreed to divide the estate in certain proportions; and it was further stipulated that, in the event of either of the parties not agreeing to act according to the terms of the compromise, they had no objection to the Court's insisting upon and enforcing the observance of the said compromise.

The Respondent applied to the Collector for an Ameen to make a partition in terms of the above deeds.

On the 24th of April, 1829, the Appellant, who was the Plaintiff in that suit, presented a petition to the Provincial Court, praying that the suit might be struck off the file of the Court, on the ground of the compromise being effected. The Respondent, on the 25th of April, 1829, objected to this petition, and alleged that the compromise was not binding, undue influence having been exercised by the Collector to bring about the same.

The Provincial Court of Calcutta, however, on the 2nd of September, 1829, made the following order: that the case be struck off the file and that the parties conform to their respective engagements; in the event of their not conforming to the same this Court shall insist on and cause them to conform to the conditions of the compromise. The suit was removed from the file on the 2nd of September, 1829, and the value of the stamp returned to the present Appellant.

The present Respondent appealed to the Sudder Adawlut. On the 21st of June, 1832, Mr. Walpole [312] decreed that the appeal should be dismissed, and that the decree of September the 2nd should be confirmed. He further stated, that the parties were entitled to take possession according to their respective rights under the compromise. On the 5th of July, 1832, Mr. Ross, another Judge of the same Court, declared his concurrence with Mr. Walpole.

Now, as these decrees were never appealed from, they are, to all intents and purposes, binding decrees. But, before proceeding further, it may be expedient briefly to consider the effect of the proceedings just recited. It is quite clear that the suit commenced on January 29th, 1827, was entirely at an end; and having been struck off the file, and the value of the stamp returned, no further proceedings could be had in that suit. But the Provincial Court were of opinion that, by the consent of both parties, they were entitled to take cognizance of the deed of compromise executed on the 4th of April, 1829, and to enforce the observance of the same, notwithstanding that the deed of compromise embraced property out of the Zillah Jessore, and in the Zillah Twenty-four Pergunnahs, and other places, which properties were not sued for in the original suit. Whether this proceeding was strictly regular or not cannot now be made a question. Of that opinion are all the Judges of the Sudder Adawlut which had cognizance of the present suit, including Mr. Raikes, who thought that there was an error in the first instance in the Court so taking cognizance.

We will now return to the consideration of what was done by the present Respondent upon the decrees of the Sudder Adawlut of June the 21st, 1832, and July the 5th of the same year. He lost no time in [313] resorting to the Court for the purpose of recovering the mesne profits: for in September of the same year (1832), he presented a petition, in what is called the Miscellaneous Department of the Sudder Adawlut, praying for mesne profits, agreeably to the Circular Order of September the 11th, 1829, which is in the following terms:—"The Court are of opinion that in all cases where money liable to bear interest is payable under the decree of a Court, a clause should be inserted in the decree providing for the allowance of interest until the decree is carried into final execution, and that in the event of such provision being omitted in a decree, the Court, by which the same may have been passed, is competent to order at any future period the payment of the interest on the amount decreed which may have accumulated subsequently to the date of the decree without referring the party to a new suit for the recovery of such interest; and that the same principle is applicable to profits in cases of decrees for landed property."

The Sheristadar of the Court reported on the back of the petition that no Wasilat had been decreed to the Respondent by the said decree of the Sudder Adawlut, notwithstanding that it had been applied for. In consequence of the objection so raised by the Sheristadar on the 10th of September, 1832, the matter was again brought by petition before Mr. Ross, one of the Judges of the Sudder Adawlut, and Mr. Ross, then sitting alone, made an order that the Respondent was entitled to mesne profits, from the 5th of July, 1832, to the date of his obtaining possession; and on September 18, 1832, Mr. Ross made another order, again sitting alone, whereby he ordered that a copy of the Appellant's [314] petition, with the decision of this Court, be sent to the Judges of the Court of Appeal at Calcutta, with an order that if the Appellant should not have already obtained possession of his proper share under the deed of compromise, possession should then be awarded to him in execution of the decision of this Court; and, further, that after awarding Wasilat to the Respondent from the date of the decision of this Court to the date of the recovery of possession, a report that this order has been carried out, accompanied with the decision forwarded herewith, should be transmitted to this Court.

We do not find that the Judges of the Court of appeal at Calcutta took any further notice of these proceedings, and we might, perhaps, be at some loss to discover why, if there was any error in them, some observation respecting that error, some suggestion as to setting it right, should not have been made: however, nothing of this sort was done; various proceedings were had for the purpose of recovering this wasilat before several Judges in the Zillah Court of the Twenty-four Pergunnahs, and these proceedings were in the Miscellaneous Department.

This Court is not very accurately informed what is included under the term "Miscellaneous Department," but for the purposes of the present appeal the Department may be taken to include the carrying into effect decisions made by the Court of Sudder Adawlut, as contra-distinguished from the commencement of an original suit. In one of these proceedings, an order made by one of the Judges was carried up to the Sudder Adawlut, when that Court, on the 21st of July, 1853, decreed that the [315] order by Mr. Ross passed on the 10th of September, 1832, in favour of Tarapersaud, for wasilat, was, without the concurrence of Mr. Walpole, incomplete and not binding by law, and its execution not obligatory on the Court.

Now, this decree not having been appealed from, must be considered as containing a correct statement of the law, but we may observe that the Court did not pronounce the decree of Mr. Ross to be null and void, and that the defect, such as it was, was never discovered during the whole of the preceding litigation for one-and-twenty years; though, of course, if this had been a palpable defect, there were very numerous opportunities for its discovery. The consequence of this decree of the Sudder Adawlut of the 21st of July, 1853, was that the present Respondent was thrown back upon the decrees of June 21st and July 5th, 1832, which decrees had ordered him to be put in possession of his proper share of the property, but had not decreed wasilat.

It might, perhaps, have been a question, whether, under those decrees of June 21st and July 5th, coupled with the Circular Order of September 11th, 1829, the Respondent had not obtained a decree giving him a right to wasilat accruing. But, how-

ever that might be, in the same year, 1853, the Respondent instituted the present suit, praying that his demand for wasilat should be admitted. One of the defences to that suit was, that his claim was barred by the law of limitation for all wasilat accruing at a period beyond twelve years from the institution of that suit. The Principal Sudder Ameen, amongst other matters which were decided by his decree, pro-[316]-nounced that the law of limitation did apply. The other matters were decided in favour of the present Respondent. Both parties appealed from this decree to the Sudder Adawlut, and on the 17th of June, 1857, that Court pronounced its decree, whereby it decided, by a majority of two out of the three Judges, that the law of limitation did not apply, and remanded the case to the Zillah Court for further consideration.

The question now for their Lordships to advise Her Majesty is, whether the majority of the Sudder Adawlut were right in their view of this case, and it may be first expedient to state, so far as is necessary, the Indian law of limitation. It is to the following effect:—"The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of August 1765, or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress." (Regulation III. of 1793, sec. 14.)

Now, it appears to their Lordships to be clear, that [317] this cause of action cannot be said to arise upon the suit which was struck off the file in 1832, neither do we think that it can be properly said that the cause of action arose upon the agreement of compromise alone; for it is obvious that all the proceedings have been founded upon the decrees of the 21st of June, and the 5th of July, 1832, decreeing possession to the Respondent. In fact, all the subsequent proceedings are subsidiary proceedings in the same suit, and all for the purpose of carrying into full effect those decrees which, though they did not in terms do more than decree possession, yet, taking into consideration the order of September, 1829, and the justice of the claim, gave the Respondent a right to wasilat up to the time when the Appellant did justice, and obeyed those decrees by allowing the Respondent to have possession of the property justly belonging to him. All these proceedings are connected together from the time that the rights of the parties were finally settled by the decree of July 5th. The Respondent was never remiss in the prosecution of his claims; he resorted to the proper tribunals for that purpose, and, year after year, legal investigations were going on for the purpose of ascertaining the amount to which he was justly entitled. None of the many Judges engaged in these investigations detected any error or irregularity in these proceedings till 1853, when the Court of Sudder Adawlut for the first time discovered that the order made by Mr. Ross was ineffectual by reason of its not being confirmed by a second Judge.

Admitting that such order was ineffectual, and that proceedings to enforce it could not avail, we think that such erroneous proceedings did not operate as a [318] total abandonment of the rights under the decrees of June and July, 1832. We think that it may be fairly said that the Respondent was continually endeavouring, by resort to competent Courts, to recover his rights, and that he is not ousted from availing himself of the exception in the laws of limitation by reason that part of the proceedings was erroneous.

We concur with the majority of the Court, and deem it most expedient to found our concurrence upon the reasons we have stated, and do not take into consideration other matters which might admit of more doubt.

We shall humbly advise Her Majesty to affirm the decree of the 17th of June, 1857, with costs, feeling assured that it is consistent with a just construction of the law of limitation and with the justice and equity of the case.

[319] CHETTY COLUM COMARA VENCATACHELLA REDDYER.—*Appellant* ;
 RAJAH RUNGASAWMY STREEMUNTH JYENGAR BAHADOOR.—*Re-*
spondent * [Feb. 12, 1861].

On appeal from the Sudder Dewanny Adawlut at Madras.

A bond executed by a Hindoo widow and guardian of an adopted son, during his minority, the object of which was, first, to pay off a debt due by her deceased husband, charged upon the Zemindary, and next to discharge certain debts contracted by her in the management of the Zemindary, the validity of which was recognized by the adopted son after he became of age, upheld: without determining the question raised of the power of a Hindoo widow, as guardian of a minor, to create a charge on the Zemindary during the minority of her adopted son.

The object of this suit, which was brought by the Respondent against the Appellant, the Zemindar of Terriore, and his adoptive mother, Dhurmavurdany Unmal, was to recover the sum of Rs. 32,000, for principal and balance of interest due on a bond executed by Dhurmavurdany Unmal during the minority of the Appellant.

The facts of the case material to the issue are so fully detailed in their Lordships' judgment, that it is not requisite to repeat them here.

[320] The principal question raised at the hearing of the appeal was as to the power of a Hindoo widow in possession of a Zemindary, as guardian during the minority of an adopted son, to execute the Bond in suit, and charge the Zemindary for the payment of debts alleged to have been incurred in respect of the Zemindary, so as to bind the Appellant, after he had attained his majority. Upon this point, *Hunoomapersaud Panday v. Mussumat Babooee Munraj Koonweree* (5 Moore's Ind. App. Cases, 271), Strange's "Hindu Law," p. 18 (2nd edit.); and as to the debts of the deceased Zemindar forming an equitable charge upon the Zemindary, *Douglas v. The Collector of Benares* (6 Moore's Ind. App. Cases, 393), Strange's "Hindu Law," p. 166 (2nd edit.), were relied on.

The appeal was argued by Mr. R. Palmer, Q.C., and Mr. Speed, for the Appellant; and Mr. Giffard, Q.C., and Mr. Pontifex, for the Respondent.

Judgment was pronounced as follows, by

The Right Hon. Lord Kingsdown (March 13, 1861).—In this case an action was brought by the Respondent against the Appellant, upon a bond for Rs. 17,000, dated the 27th of August, 1841.

The Respondent obtained judgment for the amount of the Bond, with interest, in the Civil Court of Trichinopoly, on the 10th of March, 1857.

This judgment was affirmed on appeal by the Sudder Adawlut, on the 5th of May, 1858, the Judges being unanimous.

From this decree the present appeal is brought.

[321] The Appellant is the adopted son of the late Zemindar of Terriore. He was adopted by the widow of the Zemindar after his death; and he is in possession of the Zemindary.

It appears that the widow, after the adoption of the Appellant, and during his minority, remained in possession of the Zemindary.

The death of the Zemindar took place in 1835. The lady seems, some years after the adoption, to have repented of what she had done, to have endeavoured to repudiate the act, and to have insisted on retaining the possession of the estate against the adopted son after he came of age. In fact, she continued in possession till July, 1851.

While she was so in possession, and on the 27th of August, 1841, she executed the

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Bond in question for Rs. 17,000, to Rungasawmy Jyengar, the natural father of the Respondent.

That this sum was advanced by Rungasawmy Jyengar is not disputed, but it is said that it was advanced on the personal security of the widow: that the bond did not purport to bind the Zemindary, and that the widow had no power to bind it; that the Appellant at that time had attained his majority, and that the widow was holding possession adversely to him, and could not, therefore, as guardian or manager of the estate, charge it with any debt which she might contract.

On the other hand, it is said that the amount of the Bond consisted in part of the balance due on a bond executed to the same creditor by the late Zemindar himself, the husband of the obligor, in his lifetime, and that as to the remainder, the money was raised to pay other debts of the Zemindary, binding the Zemindar: that the bond, therefore, constituted [322] a charge on the Zemindary, which the Appellant, as the owner, was liable to pay, and that he had, in fact, acknowledged his liability to do so after he came of age, both verbally and by a letter written in the year 1845, long after he had obtained his majority.

The Bond purports to be made on the settlement of an account between the widow and Jyengar, and to be given for moneys partly due from the late Zemindar, and partly advanced to the widow herself.

The consideration for it is stated to be—

1. A balance due on a Bond from the late Zemindar, dated in July, 1832-33	Rs. 8700
2. A balance due on a Bond executed by the widow herself on the 27th May, 1840	3445
3. Cash received by the widow, through Pillay, her agent, on the 19th August, 1841	3031½
4. Cash received on the execution of the bond	2000
Total	Rs. 17,176½

from which the sum of Rs. 176½ being relinquished by the obligee, there remain Rs. 17,000.

The Bond proceeds:—"This being the amount of debts incurred by my husband and myself, I shall pay the same, with interest at 1 per cent, per mensem, by yearly instalment of Rs. 2000, payable in cash, from this year, and enter such payment at the foot of the Bond."

The Bond itself purports to bind nobody but the [323] widow, and the statement of the account could not of course bind the Appellant, who was no party to the instrument. On the other hand, it is plain that, from the contents of the Bond itself, the Appellant, if he saw it, would know for what causes it purported to have been given. But it consisted partly of moneys alleged to be due from his father, and partly of moneys admitted to have been advanced to the widow personally.

Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they of course could constitute no charge on the Zemindary.

There is produced in evidence, and proved, a Bond from the late Zemindar, dated in 1832, for Rs. 5000, bearing interest at 12 per cent., on which, after deducting the sums appearing by the Bond to have been paid, there would remain due for principal and interest, a sum exceeding Rs. 8700, stated in the Bond for Rs. 17,000.

This Bond of 1832 is proved to have been produced at the time when the Bond in dispute was executed, and the amount settled of the sum due to Jyengar.

With respect to the sums advanced to the widow, their payment is regularly proved, and, indeed, that the transaction as between the lender of the money and the widow was a fair one is not in dispute.

As to the purpose for which these advances were made, it is sworn that the widow told the lender that she wanted money to discharge debts contracted by her husband with two persons named, and to pay [324] maintenance to the widow of her husband's elder brother.

The fact that the money was required, and was advanced for these purposes, is

stated by another witness who had been in the service of the late Zemindar and also of the widow, and who had been acquainted with the circumstances as they occurred.

The same fact is sworn to by other witnesses.

With respect to the evidence generally, it appears to their Lordships to be less open to suspicion than usually happens in appeals from India.

At the time when the debts were contracted for which the Bond for Rs. 17,000 was executed, and at the time of the execution of the Bond, the widow was in possession of the Zemindary, and the Appellant was living there under her protection.

It is said that the Appellant had before this time attained the age of sixteen years; his legal majority; and that he was entitled to the estate and was wrongfully kept out of it by the widow.

It is not very distinctly proved at what time the Appellant attained his majority. That disputes did take place between the widow and the Appellant with respect to the right of possession of the Zemindary sufficiently appears, but the period at which they commenced is not in evidence. The important matter is free from doubt, that during the period of these transactions and subsequently, and up to the time when the letter of the Appellant, to be presently referred to, was written, the Appellant was living on the Zemindary, and had, therefore, probably full means of ascertaining the real truth of the case with respect to these advances.

[325] In this state of circumstances what took place is quite natural. The Appellant was the adopted son of the late Zemindar, entitled, as it seems, to the Zemindary; he was living there, and had attained his majority, and might reasonably be supposed to be in the enjoyment of the revenues.

Accordingly the Plaintiff, who considered that the money due to him was a charge upon the estate, applied to the Appellant for payment of the amount due on the bond.

It is stated by one of the witnesses "that the Plaintiff sent him to the Defendant to demand of him the said sum, and when he went to Torriore, and asked the Defendant, he said, 'I and my mother are at variance, and I can pay the debt only after we come to some settlement.'" The witness then says that he went to the widow and asked her, and she sent by her servant, Jamboovien, Rs. 1000.

There is nothing improbable in his account. The witness says it happened about fourteen years ago. He was examined in August, 1856, and on referring to the bond it appears that Rs. 1000 were paid in May, 1842.

This statement is confirmed by another witness, and other applications to the Appellant, and similar answers by him, are sworn to by other witnesses.

Nothing is more likely, therefore, than the account which is given in the evidence that, in 1845, Rs. 1000 only having been paid in respect of the bond, a written demand of payment should be made on the Appellant, and that he should make in writing an answer to the same effect with that which he had given verbally on several previous occasions. A letter is accordingly produced and proved, dated [236] the 11th of March, 1845, with the signature of the Appellant, which contains a distinct recognition of the Plaintiff's demand, and the same excuse for non-payment which he had previously offered, viz. that his mother was still in possession of the Zemindary, that the dispute between them was not settled, and that he had, therefore, no power to discharge the debt. He then distinctly states that on inquiry he finds that the Bond which the Plaintiff holds is genuine.

Now, it is said that this letter is a forgery, but there does not appear to their Lordships to be any evidence whatever to support the charge, nor any the least improbability in such a letter, under the circumstances, having been written.

The inference drawn from the evidence in both the Zillah Court and the Sudder Adawlut has been that this Bond was given for debts which the Defendant, as owner of the Zemindary, might be liable to pay, and that by his own acts he has admitted that he actually was liable to the payment, and their Lordships entertain no doubt that this is the right conclusion.

It is necessary, under these circumstances, to allude to the law upon these subjects as laid down by this Board on the case of *Hunoomanpersaud Pandey v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), with respect to the power of the manager of an estate on the part of an infant to charge it, for no question of law arises in this case when the facts are understood.

Their Lordships will have no hesitation in advising Her Majesty to affirm the decree complained of, with costs.

[327] An objection was taken as to the Plaintiff's right to sue on the Bond, but that objection was sufficiently answered by the Respondent's Counsel at the hearing.

VENCATASWARA YETTLAPAH NAICKER, *Appellant*; ALAGOO MOOTTOO SERVAGAREN,—*Respondent* * [Feb. 14, 15, 1861.]

On appeal from the Sudder Dewanny Adawlut at Madras.

A Cuttoogootaga tenure (perpetual lease at a low fixed rent payable to the Zemindar, granted in consideration of military services performed by the ancestors of the grantee) of a distance part of a Zemindary in Madras, upheld.

A perpetual lease of a distinct portion of a Zemindary is not within the provisions of section 8 of Mad. Reg. XXV. of 1802, and does not require registration, as it is not a "sale, gift, or transfer" of the whole or any portion of the Zemindary.

Semble: that section applies only to questions between the Zemindar and the Government with a view to prevent a severance of the Zemindary without public notice to the Government.

The question in this appeal related to a claim by the Respondent to hold under a Cuttoogootaga tenure (perpetual lease at a low fixed rent payable to the Zemindar, granted in consideration of military services performed by the ancestors of the grantee) fifteen villages, forming part of the Zemindary of Yettiappooram, in Madras. The Appellant was Zemindar, and had dispossessed the Respondent of [328] the villages. The case set up by the Appellant in defence to the action brought by the Respondent to recover possession of the villages was, first, that the Respondent and his ancestors never had any right to the villages other than as lessees for a term, under temporary leases, and that Zemindars had no power to grant lands included in their Sunnuds on a permanent lease; and, secondly, that the permanent lease set up by the Respondent in support of his claim was a forgery, but even if a genuine lease, still, it could not, by sec. 8 of Mad. Reg. XXV. of 1802 (*a*), operate so as to deprive the Appellant of the proprietary right in any portion of his Zemindary, as it was not registered in the Collector's office. The Respondent relied upon the genuineness of the lease, and in answer to the second branch of the defence, respecting registration, contended that sec. 8 of Mad.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan, Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

(*a*) This section enacts that "Proprietors of land shall be at free liberty to transfer, without the previous consent of Government, or of any other authority, to whomever they may think proper, by sale, gift, or otherwise, their proprietary right in the whole, or any part of their Zemindaries; such transfers of land shall be valid, and shall be respected by the Courts of Judicature, and by the officers of Government; provided that they shall not be repugnant to the Mahomedan or Hindoo laws or to the Regulations of the British Government. But unless such sale, gift, or transfer, shall have been regularly registered at the office of the Collector; and unless the public assessments shall have been previously determined and fixed on such separated portions of land, by the Collector: such sale, gift, or transfer, shall be of no legal force or effect: nor shall such transaction except a Zemindar from the payment of any part of the public land-tax assessed on the entire Zemindary previously to such transfer, but the whole Zemindary shall continue to be answerable for the total land-tax, in the same manner as if no such transaction had occurred."

Reg. XXV. of 1802, did not apply, as the permanent lease of a distinct portion of the Zemindary [329] was not included in the words "sale, gift, or transfer," and he further insisted that, as the Cuttoogootaga tenure of the Respondent's ancestors existed before the Istimzar sunnud, the title under which the Appellant claimed the Zemindary, the objection that the Zemindar had no power to grant a permanent lease of part of the Zemindary could not be supported, as Mad. Reg. IV. of 1822, provided that the Permanent Settlement of 1802, and the granting of the Sunnuds "were not intended to define, limit, infringe, or destroy, the actual rights of any description of landholders or tenants." Evidence was entered into by both parties in the Courts in India; both of which Courts established the Respondent's title, and made a decree in his favour, with mesne profits.

The circumstances of the case, and the material documents relied on, are sufficiently referred to in their Lordships' judgment.

Sir Hugh Cairns, Q.C., Mr. J. B. Norton, and Mr. W. H. Melvill, for the Appellant, and Mr. R. Palmer, Q.C., and Mr. W. W. Mackeson, for the Respondent.

Upon the question of the genuineness of the lease, the Respondent relied upon the concurrent judgments of the Courts of India in his favour, citing *Cheyt Ram v. Chowdree Nowbut Ram* (7 Moore's Ind. App. Cases, 207), and it was submitted, that if any doubt existed the Court had power to order the original lease to be transmitted to England for inspection. *McCarthy v. Judah* (12 Moore's P.C. Cases, 47), *Mussumat Khoob Koonwur v. Modnarain Sing* (6th Feb., 1861).

[330] Their Lordships' judgment was delivered by

The Right Hon. Lord Kingsdown (March 13, 1861).—This appeal arises in a suit brought by the Respondent to establish a claim to hold in perpetuity, at a fixed rent, certain villages forming part of the Zemindary of Yettiapooram, which belongs to the Appellant.

The Civil Court of Tinnevely, in which the suit commenced, decreed in favour of the Plaintiff's title, and that judgment has been confirmed by the unanimous opinion of the Judges of the Sudder Adawlut of Madras.

The Zemindary in question is of great extent, comprising above one hundred villages; the claim of the Respondent extends to fifteen of them.

The case of the Respondent is, that he and his ancestors have had some right or interest in those villages, or the District in which the villages now exist, for a very long period, long antecedent to the establishment of the English authority in the country, and that when the English authority was established in 1803, a grant of the whole Zemindary, without noticing the rights of the Respondent's family, was made at a fixed jumma to the Appellant's ancestor.

That in order to secure such rights, without disturbing the grant of the Zemindary, an agreement was made in the year 1805, between his ancestor and the then Zemindar, by which it was settled that the Respondent's ancestor and his descendants should hold the fifteen villages in question on a Cuttoogootaga lease, or, in other words, should hold them in perpetuity at a low fixed rent payable to the Zemindar, [331] and that such rent was fixed at 1940 pons, being in fact the proportion of jumma which was assessed upon them by the Government.

The Respondent alleges that he and his ancestors remained in possession of these villages under this agreement for many years till he was turned out of possession by the Appellant in the year 1848.

The case of the Appellant is an extremely simple one. He alleges that the case set up by the Respondent is a pure fiction; that the documents which he produces in support of it are mere forgeries; that the Plaintiff's possession began in the year 1814, under an Ijarah lease, or in other words an ordinary tenant lease at a rent agreed upon; that such lease was from time to time renewed for different periods, the last of such leases being made on the 29th of July, 1836, for twelve years, on the expiration of which the Plaintiff, having no longer any right to the property, was turned out of possession.

In support of this case, certain instruments purporting to be counterparts of these leases are produced, and it is admitted that if they are genuine they are quite inconsistent with the right alleged by the Respondent.

There is clearly forgery either on one side or the other; and both of the Courts

below, who had the documents before them, have concurred in attributing the forgery to the leases produced by the Appellant.

It would be a strong measure for their Lordships upon a question of fact to reverse a decision founded, at least in part, upon an examination of the documents themselves, in which all the Judges below [332] came to the same conclusion. At the same time, cases may exist warranting such a course, and one was mentioned at the Bar in which this Board did actually adopt it (see *McCarthy v. Judah*, 12 Moore's P. C. Cases, 47). The question is, whether such a case has been made out by the Appellant.

No doubt the *onus* was on the Respondent, who was the Plaintiff, to prove his case.

Let us see, then, what the evidence on each side was.

The first instrument produced was a deed on copper, dated in 1557, and purporting to contain a grant of the District in question to an ancestor of the Respondent. It was produced by the Respondent, who was the proper person to have it in his custody, and some objections alleged to exist upon the face of it, as if it had borne to be executed by a person not then enjoying the sovereignty of the country, seem to have been removed by the diligence and exact investigation of Mr. Mackeson.

Many other documents were produced, beginning in the year 1712, and bearing different dates in 1747, 1749, 1777, 1779, and 1789, all showing dealings with the property by ancestors of the Respondent.

It is said that there is no proof of these papers; they are all of a date which excludes the possibility of direct proof; but they are proved by the production itself to come from the possession of the Plaintiff, and the want of formal proof that they were found in his muniment-room cannot be regarded as of any importance in a suit of this description.

It is contended, however, that they are, if genuine, inconsistent with the case now made by the Respon-[333]-dent, because the original grant appearing to be rent free, it is improbable that the Respondent's ancestor could ever have accepted a lease charging him with a rent, and yet such is the nature of the lease now set up as the foundation of the Respondent's title.

But the documents produced show, that whatever might be the case originally, there was, in 1712, a certain tribute payable by the whole Zemindary of which one-sixteenth part was appportioned to the Respondent's district.

The Judges below placed no reliance on these documents, not, so far as appears, because they disbelieved their genuineness, which their Lordships see no reason to doubt, but because they held them to be immaterial to the Plaintiff's case. They are, however, of some value as a matter of inducement, showing the probabilities of the statements made by the opposite party.

The next document which the Plaintiff puts in evidence is the instrument on which he rests his claim. It is a paper writing, alleged to be signed on the 5th of August, 1804, by the then Zemindar of Yettiapooram, and addressed to the ancestor of the Respondent in these terms:—"As I have leased out to you fifteen Cuttoogootaga villages," it then enumerates them "attached to Cuttalangoolam division, under a deed for the fixed rent of 1940 pons, you should, without delay, continue to pay, every year, the said amount into the treasury of the Yettiapooram Cutcherry, and yourself, your son, and grandson, can enjoy the said fifteen villages for ever, paying the kist amount thereof."

Supposing this document to be genuine, of course [334] there is an end of the case. It is, however, alleged by the Appellant to be a forgery.

The direct evidence in support of it is not very satisfactory; it is spoken to by several witnesses who profess to have seen it, and to remember its execution nearly fifty years before, on whose testimony, however, no great reliance can be placed; but if the dealing with and possession of the estate has been consistent with the instrument, its date sufficiently accounts for the absence of better direct testimony.

The next document, in point of date, is a mortgage, dated in 1811-12, made by the grandfather of the Respondent, to a person named Pillay, of a portion of this property for a term of ten years.

The mortgage is sworn by two witnesses to have been in possession under this

instrument, and, when the debt was satisfied, to have returned the deed to the mortgagor.

Now, the date of this instrument is more than two years before, as the Appellant alleges, the Respondent's family had anything to do with the property.

In addition to this, there is the testimony of many old witnesses that the ancestors of the Respondent had been in possession of this property for very many years, and long before the period assigned by the Appellant for the commencement of such possession. The office of Servagar appears to be one of authority, implying the command of one hundred men, and it is shown to have been held in this Zemindary for a very long series of years by the family of the Respondent, and it is further shown that the grant of lands in Cuttoogootaga or Java-tha, is a usual mode of remunerating such services.

[335] The case, therefore, of the Respondent is probable and consistent.

But the evidence goes a great deal further, and shows very clearly, in the opinion of their Lordships, that the title of Respondent has been repeatedly admitted by the ancestors of the Appellant.

The lessee seems not to have been very punctual in the payment of his rent, and, in the year 1822, the Zemindar found it necessary to apply to the Collector at Tinnevely to enforce payment, and he presented an arzee on the 27th of November, 1822, to Mr. Huddleston, the then Collector.

The arzee in question comes from the Collector's office; it is open to no suspicion, and it is of itself sufficient to disprove the Appellant's case, and to afford a strong confirmation of the statements of the Respondent. It is to this effect:—"Fourteen villages in Cuttalangoolam division, attached to the Zemindary which was obtained by my late father from the Honourable Company, were given to Alagoo Moottoo Servagaren, son of Alagoo Moottoo Servagaren, of the said Cuttalangoolam, for his maintenance at jumma of pons 1959 a-year which was paid by him, and, after him, by his son, Alagoo Moottoo Servagaren, in fact, up to the 992 Aundoo (this date corresponds with the year 1816); but he had entirely discontinued the payment of the same for the Aundoo 993 and 994, though he was holding out mere promises whenever demands were made for it; the balance due by him from the Aundoo 994 to 997, amounts to about pons 1541, and fanams 53.

This is a statement, therefore, that the villages had been granted to the ancestor of the Respondent for his [336] maintenance at a fixed jumma, and that up to the year 1816 the rent had been regularly paid by the grantee, and by his son, and yet it is now pretended by the Appellant that the Respondent's ancestor first came into possession of the property in 1814, and then under an Ijarah lease. It is clear that this statement refers to the payment of rent for a considerable period, and could not mean a payment for two years. There is evidence, indeed, that the person to whom this grant is said to have been made, and who is represented to have paid rent under it, died in 1808.

The Zemindar then prays that the property of Alagoo Moottoo may be attached to pay this demand.

There is another document less strong, but, as far as it goes, confirmatory of the Plaintiff's case.

It is found in an order of Mr. Bird, the Collector, made in the year 1845, at which time disputes had arisen with respect to the boundaries of some of the villages in the Zemindary, and, amongst others, of villages in the District of Cuttalangoolam, the District claimed by the Respondent.

This order mentioned that the Zemindar had submitted an arzee, stating that he had nothing to do with certain lands therein mentioned, "which are in the enjoyment of the Merassidars of Cuttalangoolam, to whom he had leased it out under Cuttoogootaga tenure."

There is abundant other testimony in support of the Respondent's case, and in direct contradiction of the Appellant's, but it is useless to pursue it further. Their Lordships have not the slightest doubt that the Court below could have arrived at no other conclusion than that the case set up by the Appellant [337] was based in fraud and perjury, and that as far as the facts are concerned the Plaintiff had completely established his claim.

It is hardly worth while to notice the objections taken to the Plaintiff's documents.

First, it was said that the sum mentioned in the paper of 1805 (1904 pons, as printed in the Records) differed from the actual rent of 1959 pons and some fanams actually paid.

It appeared, however, very clearly, that the 1904 pons was a misprint for 1940, and that the difference between 1940 and 1959 odd was accounted for by the addition of shroffage.

The representation of the Appellant that the division of the Zemindary claimed by the Respondent contained only thirteen villages at the period when his title commenced, and that two of them were added afterwards, is clearly disproved by the public accounts for the year 1802, showing that at that time Cuttalangoolam was a known District held on Cuttoogootaga, containing the fifteen villages of which it now consists, and was subject to an assessment of 1000 pagodas.

It is said, however, that whatever may be the Respondent's right in point of fact, he is precluded from recovering by an objection of law, viz. that the Plaintiff's title is not registered according to the Madras Regulation XXV. of 1802, sec. 8; and it is said to have been settled in India that although an instrument not registered may be good against the Zemindar who executed it, the successor is not bound by it.

The language of the Regulation would seem to apply to questions between the Zemindar and the [338] Government, and to have been framed with a view of preventing a severance of the Zemindary without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainder man, or claiming by a title which the ancestor could not defeat, the case, of course, is different.

But their Lordships are of opinion that there is in this case no ground for the objection. This is not an alienation of the Zemindary, or any part of it. It is a perpetual lease of a distinct portion of the Zemindary, which constituted a distinct portion before the Appellant's title to the Zemindary accrued, and such an estate could not, without great violence to the language, be considered as a transfer within the words of the Regulation. The title of the Respondent has been recognized not only by the Zemindar who created it, but by subsequent Zemindars, and there has been a possession under it of above fifty years.

Their Lordships will advise Her Majesty to affirm the judgment complained of, with costs.

[339] MOSES KERAKOOSE.—*Appellant*: BENJAMIN BROOKS.—*Respondent* *
[Dec. 6, 1860].

On appeal from the Supreme Court of Judicature at Madras.

Under the Imperial Statute, 11th and 12th Vict. c. 21, relating to Insolvent debtors in India, the Assignees have a right to subsequently acquired property of an Insolvent, unless the Insolvent has obtained a certificate and discharge, but this title of the Assignees is subject to two qualifications—first, when the Insolvent has acquired property subject to liens and obligations; in such a case the property taken is subject to the equities and charges which effect it in the hands of the Insolvent; and, secondly, when the Insolvent carries on trade at a subsequent period, with the assent of the Assignees, the property which is acquired in the subsequent trade, will be subject in equity to the charge of creditors in that trade, in priority to the claim of the Assignees.

An uncertificated Insolvent borrowed money for the purpose of purchasing goods

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors.—The Right Hon. Sir Lawrence Peel and the Right Hon. Sir James W. Colville.

to carry on a business, and in order to secure the advances made, gave a bond, and agreed in writing, to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of, and without any objection by, the Official Assignee. The lender never had possession of the goods assigned to him by the Insolvent, and the same remained in possession of the Insolvent until his death. Held (reversing the decree of the Supreme Court at Madras) that the Insolvent's after-acquired property was subject to the lien of the lender, and that such lien was paramount to any claim of the Official Assignee under the insolvency.

The sum involved was under the prescribed amount limited by the Order in Council of the 10th of April, 1838. Upon a special application the fact appearing that the question involved the construction of an Act of Parliament respecting the operation of the law of Insolvent debtors in India, leave to appeal was granted [8 Moo. Ind. App. 351, 352].

In the Supreme Court of Madras the following special case was stated:—

A. Cundasawmy Moodelly was on the 23rd of April, 1858, by the Court for the relief of Insolvent [340] Debtors at Madras, adjudged to have committed an act of Insolvency under the 18th Vict., c. 21, sec. 9, and on the same day the usual vesting order was made under the 11th section.

Such adjudication of Insolvency was not questioned by the Insolvent, who afterwards filed his schedule in the matter, and on the 18th of September obtained his personal discharge under section 47.

The insolvent did not file any petition under the 60th section, nor did he obtain his discharge in the nature of a certificate.

The Insolvent previous and up to his Insolvency was the proprietor of an hotel which was known as the "Imperial Hotel," and after his discharge this hotel was kept by T. Soondarum Moodelly and P. Appavoo Moodelly who engaged the Insolvent, on a salary of Rs. 40 a month, to manage as their servant the hotel known as the "Imperial Hotel;" and he did so manage the same down to the 7th of February, 1859.

On the 7th of February, 1859, the Insolvent borrowed from the Defendant, Moses Kerakoose, who was aware of such insolvency, Rs. 10,000, and on the same day he executed his Bond to Moses Kerakoose in the penal sum of Rs. 20,000, conditioned for payment of Rs. 10,000, and interest at 12 per cent per annum, three months after date.

On the same 7th of February, 1859, the Insolvent [341] from and out of the sum of Rs. 10,000, so borrowed and received by him from the Defendant, paid to the said T. Soondarum Moodelly and P. Appavoo Moodelly the sum of Rs. 6500, for the purchase of the furniture, stock-in-trade, and goodwill of the hotel, and expended the remaining sum of Rs. 3500, in the purchase of certain carriages, horses, and harness, to be let for hire.

On the same day the Insolvent, in further performance of his agreement with the Defendant executed to Moses Kerakoose an instrument under seal, in these words:—

"Know all men by these presents that I, Agappah Cundasawmy Moodelly, for the better securing the repayment of the within sum of Rs. 10,000 so borrowed and received by me at the time within mentioned, have granted, bargained, sold, assigned, and set over unto Moses Kerakoose, his heirs, executors, administrators or assigns (Here the items of property, goods, and chattels were inserted, and the instrument then proceeded) and all my interest due and to grow due thereon, and all my right, title, interest, claim or demand whatsoever of, in, or to the same, and should default be hereafter made in payment of the within sum of Rs. 10,000, so borrowed and received by me as aforesaid, when the same shall become due, then I do hereby for myself, and my heirs, executors, and administrators, authorize and empower the said Moses Kerakoose, by giving me three days' notice, to sell and dispose of the said (Here the items of property were inserted over again, and the instrument then concludes in these words) hereby assigned and set over, or intended to be, and to pay and apply the proceeds of such sale in discharge of the principal and interest [342] due on the within bond. Agappah Cundasawmy Moodelly. Signed, sealed, and delivered, where no stamp paper is to be had, in the presence of Satour Lazar, C. Therooven-gadow Moodelly."

The whole of the goods and chattels mentioned in the instrument were purchased by the Insolvent, by and with the sum of Rs. 10,000, so as aforesaid lent and advanced by the Defendant to the Insolvent, and the sum was lent and advanced by the Defendant to the Insolvent, on the express understanding and agreement, that the same was to be laid out by him in the purchase of the goods and chattels, and that the same, when so purchased, were to be mortgaged by the instrument, above set out by the Insolvent to the Defendant to secure to him the repayment of the the sum of Rs. 10,000 and interest.

The whole of the goods and chattels mentioned in the above instrument were contained in, and kept upon, the premises, called the "Imperial Hotel," situate on the road leading to St. Thomas Mount, in which the Insolvent from and after the 7th of February, 1859, with the Plaintiff's knowledge carried on business, as an hotel-keeper, on his own account.

Moses Kerakoose had no possession of such goods and chattels, or of any part thereof; but the same remained in the Insolvent's possession, down to the date of his death.

The Official Assignee had no knowledge of the Insolvent's transactions aforesaid with Moses Kerakoose, or of the purchase of property in the hotel, from T. Soondarum Moodelly and P. Appavoo Moodelly.

The Insolvent departed this life, on the 7th of April, 1859, intestate, leaving a widow surviving him, [343] who declined to administer to his estate, and other debts besides that to the Defendant contracted subsequent to his insolvency.

Moses Kerakoose, immediately after the death of the Insolvent, and on the 7th of April, 1859, instructed Messrs. Ashton, Richardson, and Co. to take possession of all the goods and chattels mentioned and set out in the instrument of the 7th of February, 1859, and they accordingly placed their Peons in charge of the Hotel and of the goods and chattels mentioned in the instrument of the 7th of February, 1859.

The Official Assignee, on the 8th of April, 1859, instructed Messrs. Ashton, Richardson and Co. to take possession of all the goods and chattels contained in or standing on the premises which were reputed to belong to the Insolvent, and thereupon a dispute arose between the Defendant and the Plaintiff as to the right of the Defendant to the property mortgaged by the Insolvent, above set out, and it was ultimately agreed that the property so taken possession of by Messrs. Ashton, Richardson and Co., under the orders of the Defendant, together with all the other property in the hotel, should be sold by them at a public auction.

The nett proceeds of the sale of the property mentioned and set out in the instrument of the 7th of February, 1859, amounted to Rs. 8234. 7a. 9p.

It was agreed that such nett proceeds should represent the goods and chattels, and that no action for damages should be brought by either party against the other, in respect thereof, and that both parties should submit themselves to the judgment of the Supreme Court in this matter.

The question for determination of the Court was, [344] whether such nett proceeds formed part of the estate of the Insolvent, to be distributed amongst the creditors under the insolvency, and if so, then that the same might be declared and decreed accordingly.

The special case was argued before the Supreme Court on the 2nd of September, 1859, and stood over for judgment until the 12th of September, 1859, when the Court decreed that the nett proceeds formed part of the estate of the Insolvent, and passed to the Plaintiff as his Assignee. After stating the above facts, the learned Judge, Sir Adam Bittleston, proceeded as follows:—"The Defendant never had possession of the goods assigned to him by the instrument of assignment of the 7th of February, 1859, but they remained in the possession of the Insolvent, who, from and after that day to the day of his death, the 7th of April in the same year, carried on business as an hotelkeeper on his own account. The case finds that the Insolvent so carried on business with the knowledge of the Official Assignee, but that the Official Assignee had no knowledge of the Insolvent's transaction with the Defendant, nor of the purchase of the property in the whole from Soondrum Moodelly and Appavoo Moodelly. Upon the death of Cundasawmy, the goods in question were claimed by the Defendant under his mortgage, and, his title being disputed by the Official Assignee, the property has been sold; and the question submitted by agreement to this Court is, whether the nett proceeds of such sale form part of the estate

of the said Insolvent to be distributed amongst the creditors under the said insolvency. Now, the language of the Insolvent Act is perfectly clear. It leaves no room to doubt that the effect of the vesting order is to vest in the Official Assignee all the future estate, title, and [345] interest of the Insolvent in any effects which he may purchase after his insolvency, as well as in any property to which he may have been previously entitled. The situation of an Insolvent who has not obtained his discharge in the nature of a certificate under the Statute, 11th and 12th Viet., c. 21, is not materially different from that of an uncertificated Bankrupt under the English Bankrupt Laws; and, as a general rule, it was not disputed at the Bar that an uncertificated Bankrupt has no power of acquiring property for himself, but whatever he acquires passes to his Assignees. In *Everett v. Barkhouse* (10 Ves. 99), the Master of the Rolls, Sir William Grant, says, 'It is clear, being an uncertificated Bankrupt, he could acquire property only for the benefit of his creditors under those commissions, unless, indeed, under very particular circumstances: where the Assignees may by their conduct have precluded themselves from claiming the property, which they have permitted the Bankrupt to acquire in the trade in which he was afterwards engaged, as in *Troughton v. Gitley* (Ambler, 630); but in other cases, without those particular circumstances, it is perfectly clear the Bankrupt, either by himself or a partner, acquires property not for himself or his new creditors, but for the Assignees under the existing commissions.' Accordingly, it was argued, on behalf of the Defendant, that this case fell within the principle of the decision in *Troughton v. Gitley*, and the comparatively recent case of *Tucker v. Hernaman* (1 Sm. and Giff. 394, S.C. 4 De G. Mac. and Gor. 395) founded upon it. But it seems to me that the present case cannot be governed by those decisions. In *Troughton v. Gitley*, the Assignees were parties to the original arrangement, by which the Bankrupt was put into possession of property for the [346] purpose of enabling him to carry on his trade: he was afterwards suffered to trade for four years without interruption or claim, and, upon his death, after he had made profits in his trade, the question arose between the two sets of creditors in an administration suit, and the Court held that the creditors under the commission had, by their conduct, lost their priority. In *Tucker v. Hernaman* (1 Sm. and Giff. 399), V. C. Stuart says, it was decided by *Troughton v. Gitley* that the Assignee of a Bankrupt who has neglected his duty in suffering the Bankrupt to contract debts and amass property, is to be postponed to subsequent creditors. And in the same case upon appeal, 4 De G. Mac. and Gor. 399, L. J. Turner said, 'The case of *Troughton v. Gitley*, is a clear authority for this, that, if creditors under a commission in bankruptcy permit the Bankrupt to carry on his trade subsequently to the issuing of that commission, those prior creditors, as in the case of a prior mortgage standing by and suffering a subsequent mortgage to be made, without giving notice of his security, lose their priority in respect to the debts which were due to them: and that in the administration of the estate of a Bankrupt so circumstanced, the debts of creditors incurred subsequently to the commission must be paid in priority, upon the authority of *Troughton v. Gitley*, thus understood, *Tucker v. Hernaman* was decided. But is this the case of a man having a lien standing by and letting another make a new security? On the 7th February, what had the Official Assignee or the creditors done to preclude them from claiming any property which the Insolvent might acquire by purchase? where is the conduct amounting to a declaration to all mankind [347] that he had sufficient capacity? The case states that he did on that day purchase the goods in question, and the Defendant claims under an assignment from him: neither the Official Assignee nor the creditors under the insolvency had any knowledge of that transaction, and it is difficult to understand how they can be prejudiced on the ground that they permitted that to take place which they had no means of preventing. In the fact that the Insolvent afterwards for two months carried on trade on his own account, with the knowledge of the Official Assignee, I can discover no ground for depriving the creditors under the commission of their priority over the Defendant: and the fact that other debts, besides that of the Defendant, were contracted subsequent to this insolvency, does not seem to me materially to affect the question as between the Defendant and the creditors under the insolvency. It was not discussed at the bar, whether the creditors whose debts were contracted during the two months when the Insolvent was carrying on trade on his own account with

the knowledge of the Official Assignee, would be entitled to priority. Indeed, those creditors are not parties to this case: their interests have not been represented here, and they would not be bound by this decision. But I have given some consideration to that question: and though their case comes much nearer to the case of *Troughton v. Gitley* than the case of the Defendant (so that if the Insolvent had made profits by his trade, even in the short period of two months, I should have been strongly inclined to think that they would have had a prior claim upon the profits acquired in that trade), yet, inasmuch as the property in question was not acquired in the trade, but before [348] the trade was commenced, nor with the concurrence of the Official Assignee or creditors, but without their knowledge, it seems to me that the equity established in *Troughton v. Gitley* does not apply in this case, even in favour of those creditors whose debts were contracted during the trading. It is observable that in *Tucker v. Hernaman*, the fund upon which the subsequent creditors were held to have a prior claim appears to have consisted wholly of the profits realized in the business carried on after the bankruptcy; and though, in *Troughton v. Gitley*, the priority given to the subsequent creditors extended to the original fund with which the Bankrupt commenced trading after his bankruptcy, as well as to the profits realized by him afterwards in that trade, yet there the original fund and the subsequent profits were equally acquired with the knowledge and assent of the assignees under the commission. It might be argued, on behalf of this class of creditors, that though the Official Assignee knew nothing of the transaction with the Defendant, or of the purchase of the goods by the Insolvent, yet, as he knew that possession of them had been delivered to the Insolvent, and permitted him with those goods to trade on his own account, he held out the Insolvent as a trader who might be trusted, and by so doing he has precluded himself from asserting the prior right of the creditors under the insolvency to any part of the property employed in that trade. But the possession which the Insolvent had was not inconsistent with the supposition that the property remained vested in others; and, indeed, the claim of the Official Assignee seems, at first, to have been made upon such supposition, for he directs Messrs. Ashton and Richardson [349] to seize such goods as were reputed to belong to the Insolvent: and I am not aware that it is any part of the duty of an assignee to interpose for the purpose of preventing an Insolvent from carrying on his trade, if any friend of the Insolvent is willing to trust him with the possession of goods for that purpose. I do not see how he could effectually prevent such an arrangement, and the interests of the creditors under the insolvency might often suffer if he did; for, if the trade is subsequently carried on with profit, the fund realized is liable to their debts, after those of the subsequent creditors have been discharged. Therefore, upon the whole, under the very peculiar circumstances of this case, I think that even the creditors whose debts were contracted during the two months, from the 7th of February to the 7th of April, could not, as regards payment out of this fund, claim priority on the creditors under the insolvency. There is one other point of view in which I have considered this case. Lord St. Leonard's in *re Atkinson's Trust* (2 De G. Mac. and Gor. 143), says, 'It may be considered as decided that the Assignee in insolvency represents the Insolvent; he stands in his place, and takes only such interest as he can give, and subject to all equities to which the Insolvent himself is bound; and, under the influence of feeling that the case was one of some hardship upon the Defendant, I have given some consideration to the question whether any equity in the Defendant's favour, binding on the Assignee, could arise out of the agreement between the Defendant and the Insolvent; that the money lent by the one should be applied by the other in the purchase of the specific goods in question; and that they should be immediately mortgaged to the [350] Defendant; but it is clear that the intention was that the property in the goods should vest in the Insolvent: and the Defendant knew that he was dealing with an insolvent, and that circumstance seems to me fatal to any claim for equitable relief on his part. He must be taken to have consented to advance the money upon such security as the Insolvent was legally competent to give, and, if he took a security which was worthless, he took it with full knowledge of the circumstance which rendered it so; and ignorance of the law is not to be presumed; and if presumed, would not afford a title to relief. In the case of *Meur v. Smith* (1 Mount. D. and De G. 396), which I mentioned on the argument, it appears that the Plaintiffs, who, upon deposit of a

lease, advanced £1000 to an uncertificated bankrupt upon the transfer to him of the lease of a public house, were ignorant of his bankruptcy at the time, and that the very same act which gave existence to the lease, viz. the delivery, was the act which constituted the deposit and the lien. I have come to the conclusion that, in this case, the property in these goods acquired by the Insolvent by purchase, passed to the Official Assignee by the operation of the vesting order, and that the proceeds of the sale form part of the Insolvent's estate, to be distributed under the insolvency. In this result there may, at first sight, appear to be some hardship upon the Defendant; but it may reasonably be supposed, that he speculated upon the probability of the Insolvent being able to carry on a profitable trade, and of succeeding in realizing a fund sufficient to pay him as well as his other creditors; at all events, he might, if he had so chosen, have purchased the goods himself, in which [351] case some notice, at least, would have been given that the property in the Insolvent's possession was not his own. And, as was said by Bayley, J., in *Nias v. Adamson* (3 Bar. and Ald., 231), 'there is no hardship in this, for it is clear, that the goods cannot be purchased with money belonging to the Bankrupt himself; and, if purchased by money belonging to a friend, it is as easy for the friend to buy it and to have the legal property transferred to him.'

The Defendant filed in the Supreme Court a petition for leave to appeal to Her Majesty in Council against the judgment of the Court, but as the subject matter was under Rs. 10,000, the Court refused to allow the appeal.

The Defendant then presented a petition to Her Majesty in Council, praying for leave to appeal from the decree of the Supreme Court. The grounds for the application, as stated in the petition, were, that the application for leave to appeal was refused by the Supreme Court solely in consequence of the Order in Council of the 10th of April, 1838, the amount of the nett proceeds being under the appealable value of Rs. 10,000, therein prescribed; that the question at issue was one of general interest in the insolvency beyond the mere amount of the nett proceeds, inasmuch as the other creditors of the Insolvent, subsequent to the Insolvency, were interested in, and the other property acquired by the Insolvent since his insolvency was affected by, the decision, and that the question was also of general importance in India, as involving the construction and working of the Insolvent Act, 11th and 12th Vict. c. 21.

[352] Mr. R. Palmer, Q.C., in support of the petition.

Their Lordships * (Feb. 1, 1860) granted the application, upon the sum of £300 being deposited for costs.

The appeal now came on for hearing.

Mr. R. Palmer, Q.C., and Mr. W. W. Mackeson, for the Appellant.—It is submitted, first, that the loan, bond, and mortgage formed one contemporaneous transaction. The mortgage was endorsed on the bond, and it was the intention of the parties, previous to the purchase and loan, that the lien or charge of the Appellant upon the property should precede any interest of the Insolvent. Such is clearly the substantial effect of the acts and dealings of the parties, and unless this view be taken, the assignment was without meaning, as the debts of the Insolvent exceeded the value of the goods and chattels intended to be mortgaged. But, secondly, even if the goods had not vested in the Appellant, as we insist they did, the fact of the Insolvent having been allowed by the Official Assignee to carry on the business of the Hotel on his own account, and deal with the goods and chattels as his own property, is conclusive against any claim by him on behalf of the creditors, and estops him from disputing the assignment to the Appellant. As the Official Assignee did not, under the 86th section of the Statute 11th and 12th Vict. c. 21, enter up judgment against the Insolvent, he cannot claim any property acquired by the [353] Insolvent subsequent to his insolvency. If the Official Assignee could take the property it would be subject to the same equities which subsisted between the Insolvent and the Respondent.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessor.—The Right Hon. Sir Lawrence Peel.

Upon the question whether the proceeds of after-acquired goods belonged to the Assignees of an uncertificated Insolvent or to the mortgagee, the following cases were relied on:—*Platel v. Bevil* (2 Exch. Rep. 519), *Jackson v. Burnham* (5 Exch. Rep. 173), *Ashley v. Kell* (Stra. 1207), *Halsgrave v. Hodges* (3 Drew. 74), *Hosker v. Hallowell* (2 Sm. and Giff. 498), *Badley v. Culverwell* (8 Barn. and Cr. 448), *Foote v. Groves* (1 Ves. Jun. 280), *Row v. Dawson* (1 Ves. 331), *Langton v. Horton* (1 Haro. 549), *Curtis v. Auber* (1 Jac. and Wal. 526), *Tapprell v. Hildrean* (6 Man. and Gr. 245), *Carvalho v. Burn* (4 Barn. and Ad. 382; S.C. 1 Ad. and El. 883; 7 S.C. 1099), *Lempriere v. Pasley* (2 Term. Rep. 486), *Everett v. Buckhouse* (10 Ves. 94), *Becher v. Oldfield* (6 Bingham. N.C. 102), *In re Atkinson's Trusts* (2 De G. Mac. and Gor. 140), *In re Barr's Trusts* (4 Kay and John. 219), *Winch v. Kerley* (1 Term. Rep. 649), *Twiss v. White* (3 Bingham. 486), *Woodland v. Fidler* (3 Per. and D. 570), *Fraughton v. Gitley* (Amb. 630), *Tucker v. Hernaman* (1 Sm. and Giff. 394; S.C. on appeal, 1 De G. Mac. and Gor. 399).

Mr. Lewis, Q.C., and Mr. W. H. Melvill, for the Respondent.—The principle which concedes to the creditors of an Insolvent, debts contracted in public trade subsequent to his insolvency, a priority of payment out of the profits of such trade, has no application to a debt [354] contracted in the manner stated in this case. Immediately upon the purchase of the effects in question by the Insolvent, on the 7th of February, 1859, the same were vested in the Official Assignee. The subsequent assignment of such effects by the Insolvent to the Appellant could not prejudice or affect the title of the Assignee, as the statutory title of Assignees under insolvency is not subject to any equity arising from dealings of the Insolvent subsequent to the insolvency, except in certain cases in which the fact of the person asserting the equity is shown to have been ignorant of the insolvency. That is the distinguishing ingredient in cases of this kind which is lost sight of by the Appellant. *Exp. Boulton* (1 De G. and Jo. 163) is a strong case in our favour. There a holder of shares in a Railway Company was one of the secretaries of the Company and a Solicitor. He borrowed money of a client on a deposit of a certificate of the shares, but no further notice of the deposit was given to the Company. The Solicitor became Bankrupt; and it was held by the Lords Justices that the shares were in his order and disposition with the consent of the client. In the present case it cannot be denied that the Appellant was aware of the insolvency at the time of the transaction in question. Such knowledge is fatal to his claim to have a prior lien. Neither can it be urged that there has been any act or default on the part of the Assignee whereby he can be deemed to have waived or lost his right to such effects in priority to the claim of the Appellant.

Next, we submit, that the loan, bond, and mortgage did not form one transaction, or that the parol agreement for a lien at the time of the advance of the [355] money constituted an equitable lien. The authorities upon this point are conclusive. In *Exp. Coombe* (4 Madd. 251), Sir John Leech says, "A good equitable mortgage was made by the deposit of the original lease, but the parol agreement to deposit the further lease can give no title." Although it was held by Lord St. Leonard's, in *re Atkinson's Trusts* (2 De G. Mac. and Gor. 140), that the title of an equitable assignee for value of an equitable interest is not affected by the previous insolvency of the assignor; yet that case is distinguishable from the present. There the Assignee had no notice of the insolvency. *Exp. Hooper* (19 Ves. 477) is an authority, that where there was a mortgage to secure a sum of money, and the mortgagor afterwards entered into a parol engagement that further sums advanced subsequently to the mortgage should be tacked to the original mortgage, and the mortgagor afterwards became a Bankrupt, that a further mortgage was not created on the strength of the parol engagement. [Lord Chelmsford: It is impossible that you can split up the transaction or contend that the Assignee is not subject to the same equities as the Insolvent himself.] There may be an equity between the Insolvent and the Appellant, but not necessarily so as against the Assignee. It is necessary to establish that the party dealing with the Insolvent should not have had notice. [Lord Kingsdown: If that be so, as you broadly lay down, an Insolvent could deal with nobody.] You must look to the conduct of the party contracting with the Insolvent. If he, knowing the insolvency, supplies him with goods, he gives him a false ground for future credit. But, admitting that the loan, bond, [356] and

mortgage must be looked at as forming one transaction; yet in every case where property passes through the Insolvent and is dealt with as his, the statutory title of the Assignee at that moment attaches. There are only two classes of cases in which the statutory title of the Assignee is displaced: first, where the Insolvent is allowed by the Assignee to continue trading, then we admit that subsequent creditors have a preference on subsequently-acquired property. This is allowed on the ground of public policy and the conduct of the Assignee in leading the public to give the Insolvent credit. Here there was no public trading. It was a mere secret and private dealing. The second class is in *choses in action*. That rests on the peculiar nature of the property; but even there, want of notice of the fact of insolvency forms an essential ingredient.

The Right Hon. Lord Kingsdown.—The case rests upon a narrow point. Under the Statute, 11th and 12th Viet. c. 21, the Assignee has a right to the subsequently-acquired property of an Insolvent, unless the Insolvent has obtained a certificate and discharge; but the Assignee's right to the subsequently-acquired property is subject to two qualifications. In the first place, if the Insolvent has acquired property subject to liens and obligations, then any property taken by the Assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the Insolvent. The second qualification is this, that if the Insolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the [357] subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the Assignee under the first insolvency.

Now, in this case, when the facts are understood, their Lordships cannot entertain the slightest doubt. It is admitted that what has been done might have been done in such a way as to exempt the property from the claim of the Assignees. Then what is the transaction which takes place? The Insolvent carries on for a certain time the business of a Hotel, as agent or manager for other persons. On the 7th of February, 1859, he makes an arrangement with the Appellant, by which he becomes the purchaser of the property now in dispute, and carries on the trade subsequently on his own account, with the knowledge of the Assignee under the insolvency. Under what circumstances, then, does he acquire the property by which the subsequent trade is carried on? Does he acquire an absolute right to it, discharged from any lien, or does he acquire a right to it subject to a legal or equitable title on the part of other persons?

Now, it appears that a sum of money was advanced by the Appellant for the purpose of being laid out in the purchase of the property; and at the time it is advanced, it is advanced subject to an agreement, that it is to be laid out in that particular manner, and that the property is to be assigned to the person who advances the money in order to secure the repayment. A mortgage is executed accordingly. It is one transaction by which the Insolvent never acquired anything except subject to the lien of the creditor, and the Assignee can stand in no better situation.

Their Lordships, therefore, must advise Her Majesty that the judgment of the Court below ought to be reversed, and with costs.

[Mews' Dig. tit. BANKRUPTCY; B. PROPERTY AND ADMINISTRATION: 2. f. *After-acquired property*. E. THE BANKRUPT. iv. 2. *Rights of Trading*. S.C. 14 Moo. P.C. 452; 3 L.T. 712. As to special leave to appeal, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125.]

[358] ANUNDMOHUN PAL CHOWDHOORY, and Others,—*Appellants*; KISHEN CHUNDER BANNERJEA CHOWDHOORY, and Others,—*Respondents* :
[Dec. 4, 1860].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Heard *ex-parte*.

Money was advanced by A. to B. and others. The repayment, by instalments extending over a period of eleven years, of the principal and interest at 12 per cent., per annum, calculated up to a certain date, was secured by three instruments, consisting of a Dye Shooder Ijarah (usufructuary lease), a Dur Ijarah Kurbooleat (underlease agreement), and a security bond. A balance being found due on the expiration of the stipulated time for payment, the securities were put in suit, when it was pleaded in defence that the lease and underlease were a fraudulent contrivance to cover illegal interest, and, therefore, void by secs. 8 and 9 of Ben. Reg. XV. of 1793. Held in the circumstances, and from the accounts, that the transaction was not a device, or evasion of the law of usury, within that Regulation.

This suit was instituted in the Civil Court of Zillah Backergunge, to recover money due to the Appellants on a loan transaction secured by mortgage. The principal questions raised were, first, whether the Respondents had, as they alleged, paid off the loan, and secondly, whether the Respondents had proved that the loan, and the deeds by which its repayment with interest was secured, together constituted a de-[359]-vice, within the meaning of Ben. Reg. XV. of 1793 (*a*), to elude the rules regarding interest, prescribed by that Regulation.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Sir Edward Ryan. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

(*a*) The following are the sections of Ben. Reg. XV. of 1793, bearing upon this point, and referred to on the hearing of the appeal:—

Sect. II.—*First*: If the cause of action shall have arisen before the 28th day of March, 1780, the Courts of Civil Judicature are not to decree higher or lower rates of interest than the following:—

Second: On sums not exceeding one hundred sicca rupees, three rupees and two annas per cent. per mensem, or thirty-seven rupees and eight annas per cent. per annum.

Third: On sums exceeding one hundred sicca rupees two per cent. per mensem, or twenty-four per cent. per annum.

"Sect. IV.—If the cause of action shall have arisen on or after the 1st day of January, 1793, the Courts are not to decree any interest on any sum whatever, above the rate of 12 per cent. per annum.

"Sect. VII.—The Courts are not to decree any compound interest arising from intermediate adjustments of accounts. This rule, however, is not to extend to cases in which accounts between the parties shall have been adjusted, and the former bonds or agreements cancelled, and new bonds or agreements taken for the aggregate amount of the principal and the legal interest remaining due upon the adjustment consolidated into principal.

"Sect. VIII.—The Courts are not to decree any interest whatever, in any case, where the bond or instrument given for the security and evidence of the debt shall have been granted on or subsequent to the 28th day of March, 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date.

"Sect. IX.—Nor to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th day of March, 1780, where a greater interest than is authorized by this Regulation

[360] The Civil Court of the Zillah Backergunge decided on both questions in favour of the Appellants; declaring, as to the first, that the written receipts put in evidence by the Respondents to prove the payments were fabricated; and, as to the second, that the Respondents had failed to prove that the case was brought within 8th and 9th sections of that Regulation. The Sudder Dewanny Court upon appeal reversed the decree of that Court on the second question only, declaring that the case was shown to be within sec. 9 of that Regulation, and dismissed the suit with costs, thereby, in effect, decreeing an entire forfeiture of both the principal and interest due to the Appellants from the Respondents.

The circumstances out of which the suit arose were these:—

On the 15th of October, 1844, Woomakunt Bannerjea, since deceased, the father of the second and fourth Respondents, obtained a loan of Rs. 15,000, from the Chy-tunno Kishen Pal Chowdhoory, Banker, also since deceased, and the father of one of the Appellants, named Ram Kishen Pal Chowdhoory and Kally Kishen Pal Chowdhoory, and uncle of the other Appellants Anundmohun Pal Chowdhoory, Gobind Chunder Pal Chowdhoory, Mohesh Chunder Pal Chowdhoory, and who, together with his sons and nephews, constituted an undivided Hindoo family.

At the time when the money was agreed to be lent it was also agreed, between the borrower and lender, that three several instruments should be executed by Woomakunt Bannerjea, in order to secure the repayment, by instalments, extending over a period of eleven years and ten months, of Rs. 15,000, [361] together with interest thereon at the rate of 12 per cent. per annum.

These instruments were dated 1 Kartick 1251 (the 15th of October, 1844), and registered in the District.

The first of these instruments, executed by Woomakunt Bannerjea called an Ijarah Pottah (instrument of lease), and sometimes a Dye Shoodde Ijarah (usufructuary lease), was as follows:—

“To Chy-tunno Kishen Pal, son of Kishen Mungul Pal, deceased, inhabitant of Lohojung, Thannah Rajabaree, Zillah Dacca. This Ijarah Pottah is executed by Woomakunt Bannerjea Chowdhoory, inhabitant of Kaleepara, Thannah Sreenaggur, in the above District:—My ancestral Zemindary, Talook, and Howalas, comprise a one-third of the whole 12-anna share of Pergunnah Ramnuggur, bearing a proportionate Sudder jumma of Rs. 1,220 5a. 3p., out of the whole Rs. 3,660 15a. 9p.; a 4-anna share of the entire 16 annas of Tuppah Kaderabad, the proportionate Sudder jumma of which is Rs. 240 11a. 3p., out of the whole Rs. 962 13a., subordinate to the Collectorate of Zillah Backergunge, and in my Nij (own) name; Talook Abdool Momeen, the collections of which are included in Zillah Hyderabad, bearing a Sudder jumma of Rs. 3 4a., and 3p.; Kharija Chuckla Noorpoor, the collections of which are realized along with Zillah Rajnuggur, and which is named Howala Atush Khan, bearing a Sudder jumma of Rs. 21 5a. 4p.; Howala Anwar Khan, the jumma of which is Rs. 21 5a. 4p.; and Howala Sultan Mahomed, bearing a Sudder jumma of Rs. 1 1a. 1p., subordinate to the Collectorate of Zillah Dacca [362] Gelalpoore; so that in the above two districts my rights bear a total Sudder jumma of Company's Rs. 1,508 6p. The whole of this, I, of my own consent and free will, do farm out to you for a term of 11 years and 10 months from the month of Kartick, 1251, to the month of Sawun, 1263. The Mofussil proceeds of the whole, according to the fixed annual collections, are these:—in Pergunnah Ramnagore, Mouzah Balia, Mouzah Barjalia, and Jowar Shajeera, yield Rs. 3,391 10a. 3p.; Tuppah Kaderabad, Rs. 831 10a.; and Talook, Abdool Momeen, Howalas Atush Khan, Anwar Khan, and Sultan Mahomed, appertaining to Kismut Muchooa, Rs. 107 12a.; in all, Rs. 4,331 3p. Deducting from this sum the expense of collections to be incurred by you as heretofore, and the Chuckran allowances in money and lands (that is on account of Pergunnah Ramnuggur), Rs. 344 7a. 6p.; Tuppah Kaderabad, Rs. 133 10a. and Kismut Muchooa, Rs. 8, amounting in all to Rs. 486 1a. 6p., there remains Rs. 3844 14a. 9p.). At this calculation, the Mofussil proceeds during the above term, will amount to

shall have been received, or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever: nor to give any other judgment but for the dismissal of the suit, with costs to be paid by the Plaintiffs.”

Rs. 45,498 4a. 1p.; out of this sum you will make over to me annually the Government revenue for the above term, which, at the above rate (that is, Rs. 1508 6p. per annum), amounts to Co.'s Rs. 17,845 7p. I will pay this sum into the above collectorates. As for the remainder, Co.'s Rs. 27,653 3a. 6p. which, for the above term, will be due to me from you, I have received from you in cash, from hand to hand, on this day, at Lahojung, an advance of Co.'s Rs. 15,000. Instead of repaying this sum, Rs. 15,000, at once, it will be paid by instalments, noted below, within the [363] above term of the Ijarah, 11 years and 10 months; hence, interest on that sum, as per schedule, at the rate of 1 rupee per cent., will, for the above term, amount to Rs. 12,653 3a. 6p. in all, principal and interest, amounting to Rs. 27,653. 3a. 6p., which will be due to you. You will, therefore, retain the aforesaid Zemindary, Talook and Howalas in your own possession and control for the above term of the Ijarah, 11 years and 10 months, collect rents in the Mofussil, according to the gross assets, and, after deducting the expenses of collection and the Government revenue, you will take, in liquidation of the above principal and interest, the whole of the above sum of Rs. 27,653. 3a. 6p., which is due to me. I will not, during the term of the Ijarah, alienate the property mentioned in this Pottah, either by sale or gift. Should the aforesaid Mehals be sold for arrears of Government revenue, then, out of the above amount, whatever will remain due to you at that period, after deducting the sums repaid, will be paid, without any objection, by myself and my heirs. In failure of payment, the same will be realized from my other real and personal properties, and no objection, either on my part or on the part of my heirs, will be admitted. The Sudder and Mofussil expenses and losses, on account of suits relative to the aforesaid Mehals, which are now pending, or which will be instituted in future, in the Civil or Criminal Courts, the Collectorate, etc., will be payable by myself, and you have nothing to do with them. Under these terms, and on receipt of Rs. 15,000, do I execute this Dye Shooddee (usufructuary) Ijarah lease, and take a Kurbooleat. A schedule showing the instalments payable was annexed.

[364] The second instrument was executed by the Respondents, Krishto Chunder Bannerjea Chowdhoo, on behalf of Woomakunt Bannerjea, whose Gomastah he was, called a Dur Ijarah Kurbooleat (an under-lease agreement), and which became necessary as it had been agreed between the principal parties, as is usual, that the mortgagee, Chytunno Kishen Pal Chowdhoo should not enter into actual possession of the property, or into receipt of the rents, under the Ijarah Pottah, but that as lessor under it he would grant (which he did) an underlease to the Respondent, Kishen Chunder Bannerjea, as the appointee of Woomakunt Bannerjea.

To Chytunno Kishen Pal. You have taken an Ijarah lease of the ancestral Zemindaries, Talooks, and Howalas of Woomakunt Bannerjea Chowdhoo. Therefore, Bannerjea Chowdhoo being security, I do, hereby, of my own accord, take a Dur Ijarah from you of the above-mentioned Mehals for the said term of 11 years and 10 months, the annual Mofussil proceeds of which are, as stated in the Ijarah lease, Rs. 3391. 10a. 3p. in Mouzah Balia and Mouzah Burjalia, and Jowar Shajural, appertaining to Pergunnah Ramnuggur; Rs. 831. 10a. in Tuppa Kaderabad, and Rs. 107. 12a. in Talook Abdool Momeen; Howala Atush Khan, Anwar Khan, and Sultan Mahomed, appertaining to Kismut Muchooa, making a total of Rs. 4331 0a. 3p., from which is to be deducted Rs. 486. 1a. 6p., being the collection charges, etc., due to me, as stated in the Ijarah Pottah, as well as the Chuckran allowances in money and lands, viz., Rs. 344. 7a. 6p. for Pergunnah Ramnuggur, Rs. 133. 10a. for Tuppah Kaderabad, and Rs. 8 for [365] Kismut Muchooa, making a total of Rs. 486. 1a. 6p. That, from the remainder of Rs. 3844. 14a. 9p. per annum, or from the total sum of Rs. 45,498. 4a. 1p., accruing during the said term, I will pay to Bannerjea Chowdhoo, the proprietors, according to the terms of the Pottah, the sum of Rs. 17,845. 0a. 7p., being the total amount of Sudder jumma for the term at the rate of Rs. 1508. 0a. 6p. per annum, as stated above, by whom the same shall be paid into the Collectorates. The remainder, Rs. 27,653. 3a. 6p., which would be due to you for the period, shall be paid to you by me without any objection, according to the undermentioned instalments, and on the following months of each year. Failing to pay any instalment, I will pay interest at one rupee per cent. per month. All profits arising from increase, and losses incurred on account of

decrease in the fixed collections of the Mehals, caused by inundation, drought, damage, etc., as also all costs of suits pending, or that will hereafter be instituted in the Criminal and Collector's Courts, etc., will go to my account, and you have no concern with them. In case the rents be not paid according to the stated instalments, you will realize them in conformity with the Regulations that are now or will hereafter be in force as regards the collection of rents. I or my heirs are not at liberty to relinquish this Dur Ijarah within the aforesaid period." A schedule showing the instalments payable here followed.

The third and last instrument, called a security bond, was executed by Woomakunt Bannerjea in order to guarantee the due performance of the conditions contained in the above Kurbooleat.

[366] After the execution of these instruments Woomakunt Bannerjea, and the Respondent Kishen Chunder Bannerjea, as such under lessee, were jointly in possession of the land and premises mentioned in the securities.

Woomakunt Bannerjea died in 1845, leaving three sons, the Respondents, Brojo Chunder Bannerjea, Chunder Kunt Bannerjea, and Soorjoo Kunt Bannerjea, his joint heirs him surviving, who accordingly entered into and have since remained in joint possession of the land and premises with the other Respondent, Kishen Chunder Bannerjea.

It appeared that between the 16th Poos B.E. 1251 (corresponding with the 30th of December, 1844), and the 23rd Maugh B.E. 1256 (corresponding with the 4th of February, 1849), the aggregate sum of Company's Rs. 7398. 12a. was paid in divers amounts to account of instalments under the securities, partly by the late Woomakunt Bannerjea, during his life, and partly by the Respondents since his death, but no further payments were received in respect of the loan.

In consequence thereof, the Appellants, together with one Mussumaut Shukee Monee Chowdhoorane, since deceased, who had survived Chytunno Kishen Pal Chowdhoory, put the securities in suit, and, on the 28th of February, 1853, they filed a plaint in the Zillah Court of Backergunge, which, after setting forth that the loan of Rs. 15,000, and also the other principal facts before mentioned, sought to recover a balance, after crediting the amount so received as aforesaid, of Rs. 18,381. 10a., due from the Defendants at the date of plaint, under the three several instruments, [367] which were therein relied on, as having been duly executed, to secure the repayment of loan of Rs. 15,000, and interest at 12 per cent. per annum, and in such instalments as aforesaid; and the plaint prayed that the sum of Rs. 18,381 10a., the balance claimed to be due, might be awarded and decreed to be paid from the properties left by Woomakunt Bannerjea, in the deeds mentioned in the instruments, and also from the other real and personal properties of the Defendants.

The joint answer of the Respondents, Brojo Chunder Bannerjea and Chunder Kunt Bannerjea stated, that the loan of Rs. 15,000, was not paid down in cash on the 1st Kartick 1251, but was made up as alleged of a sum of Rs. 11,300, the balance of principal and interest, part of which they submitted was illegal, due from their father, Woomakunt Bannerjea, on five several bonds, and of the sum of Rs. 3700, paid him in cash on the last-mentioned date; that the execution of the lease and sublease was a mere fraudulent contrivance to cover the receipt of illegal interest, the addition of the sum of Rs. 12,653. 3a. 6p. being an illegal anticipation of interest, and the provision as to interest on instalments when over due, being a device to receive compound interest, and that, therefore, the suit ought to be dismissed, even as regarded the small portion of the principal due, with reference to sections 8 and 9 of Ben. Reg. XV. of 1793; that the Defendants had repaid, in respect of the loan, the sum of Rs. 17,972 8a. 8p. for which they held receipts, and a further sum of Rs. 700, for which, as they admitted, they had no written acknowledgment; that the right and interest in the lands mentioned in the instruments [368] of mortgage securities were not liable to be sold by auction, or the amount due to be recovered from the same, as the Mehals had been alienated.

The replication denied the statements in the answer, and in particular the payments therein alleged were denied. The replication explained that the sum of Rs. 12,653. 3a. 6p., stated to be the total amount of interest, was not interest on the whole principal sum of Rs. 15,000, for the whole term of 11 years and 10

months, but only on the balance from time to time to remain outstanding, supposing each instalment was paid at due date, and that, therefore, if the instalments were not duly paid, the provision in the mortgage securities for the payment of interest thereon was just and legal, and it was denied that any excess of legal interest or compound interest had been received.

The answer of the other Respondent, Kissen Chunder Bannerjea, stated that the amount of the liability of Woomakunt Bannerjea, together with illegal interest thereon, was determined at Rs. 15,000, and the securities were given to cover that sum with interest; that as he was then Gomastah of Woomakunt Bannerjea, he signed his name to the sublease as requested by him, but that, with this exception, he had no connection with the debt, or with those instruments, and was not in possession of the property.

An account was filed which showed that the balance of Rs. 18,381. 10a., principal money and interest sought to be recovered by the plaintiff, was owing. This account so given in evidence was calculated on this principle. The principal money, beginning with full amount of the original loan, viz. Rs. 15,000, was entered in that account in one column, and simple [369] interest thereon, accruing, under the agreement, at the rate of 12 per cent. per annum, was separately entered in another column; and the account showed that the sums actually paid from time to time were, as received, applied first to the discharge of the interest accrued due, and, when the amount of any payment was large enough to admit of it, which was only on two occasions, viz. the 15th Poos, 1251, and 18th Poos, 1252, the surplus was applied in reduction of the principal. The Defendants filed statements of account with the object of making it appear that illegal interest had been charged by the Plaintiffs.

The Plaintiffs filed, as their evidence, the three several instruments forming the mortgage securities hereinbefore mentioned. Ten witnesses also were examined by them to prove the loan and actual payments by Kishen Pal Chowdhoozy of the full sum of Rs. 15,000, at the time of the execution of the instruments as well as the due execution of the latter by Woomakunt Bannerjea and Kishen Chunder Bannerjea respectively, and also that promises of payment of the balance claimed by the Appellants to be due had been made by the Respondents since Woomakunt Bannerjea's death. The Defendants filed five documents purporting to be Bengalee Bonds, and alleged to have been executed by Woomakunt Bannerjea, at different dates between the 7th of February, 1837, corresponding with the 26th Maugh, 1243, B.E. and 24th of September, 1844, corresponding with the 9th Assin, 1251, B.E., in favour of Kishen Pal Chowdhoozy, as the lender of the moneys therein respectively mentioned, and which these alleged Bonds purported to cover, in the whole [370] the aggregate sum of Rs. 9700 for principal moneys admitted to have been lent, exclusive of interest, which was conditioned to be paid, on the principal moneys aforesaid, at the rate of 12 per cent. per annum. None of these Bonds had been registered. They also filed certain other documents, five of which purported to be the suleanas (yearly receipts), having different dates between 17th of March, 1845, corresponding with 5th Cheyt, 1851, B.E., and 19th of March, 1852, corresponding with the 7th Cheyt, 1258, B.E.; and the remaining fifteen documents, purporting to be the dakhillas (receipts) bearing different dates between the 31st of December, 1844, corresponding with the 17th Poos, 1251, B.E., and the 2nd of January, 1852, corresponding with the 19th Poos, 1258, B.E. The aggregate amount alleged to be covered by those fifteen documents was Rs. 17,972. 8a. 8p.

None of these alleged suleanas and dakhillas, it appeared, were written on stamped paper, but they had each been stamped two months subsequent to the date on which the plaint was filed.

Ten witnesses were examined on behalf of the Defendants to establish the suleanas and dakhillas filed, and these witnesses were also examined to prove that the sum of Rs. 15,000, was not paid in full, but that some part of it was made up of illegal interest charged under a verbal agreement made at the time of the alleged execution of the five several last-mentioned Bonds, and, as it appeared, directly at variance with the condition on the face of them, which provided for the payment of interest at 12 per cent. per annum only.

[371] The hearing of the suit took place before Mr. Kemp, the Acting Judge

of the Zillah Court of Backergunge, into which Court the suit had been transferred from the Court of the Principal Sudder Ameen.

The judgment and decree of the Court was pronounced on the 5th of April, 1855: the decree after holding that the sulemanas and dakhillas were fabricated, proceeded in those terms:—"The whole drift of the defence is to bring the transaction under the provisions of sec. 9, Reg. XV. of 1793. These provisions are very stringent, and, in my opinion, can only be enforced where the contract is so covert as to be manifestly a device implying trickery. A contract will not be bad under either sec. 8 or 9 of the Usury Regulation, unless there has been a clear attempt to obtain on the whole more than the principal, with legal interest. In the present case there has been no such attempt. The principal in this suit, or Co.'s Rs. 15,000, is stated by the Defendants to be made up of the aggregate of sums due to Plaintiffs on five bonds, interest thereon, and a cash payment. This is denied by the Plaintiffs: but, admitting the statement of the Defendants to be correct, there is nothing illegal in the transaction. To secure the liquidation of the above sum, a Dye Soodee Ijarah of certain Mehals was granted to Chytunno Kishen Pal by the father of the Defendants, Nos. 2 and 3, and the mehals were again sublet to Omakunt Bannerjea, the father of the Defendants, Nos. 2 and 3, in the name of the Defendant No. 1. The whole of these transactions have been formally registered, and are above suspicion. Moreover, they have been acted upon by the Defendants, who admit that [372] they have paid rent, according to the terms of the sub-lease, from 1251 B.S. to 1259 B.S., amounting to no less than Rs. 17,972. 8a. 8p., as per receipts, and Rs. 700 without a receipt. The argument of the Pleader for the Defendants, that anticipation interest has been added to the principal, and that upon the aggregate interest on the lapsed instalments has been charged, will not, if proved, bring the transaction under the operation of section 9: for, as already observed, the Plaintiffs have not attempted to obtain on the whole more than the principal, with legal interest. Let us test this:—the principal is admitted to be Co.'s Rs. 15,000, which was borrowed on the 1st Kartick 1251, payable by Srabun, 1263, B.S.; simple interest on the above sum for a period of 11 years and 10 months would be Rs. 21,300, add this to the principal, and the result is Co.'s Rs. 36,300. Now, the Kistbundy signed by the sub-lessee, Defendant, No. 1, and the security bond signed by Omakunt Bannerjea, father of the Defendants, provides for the payment within the term of lease, or from Kartick, 1251, and Srabun, 1263, B.S., of the sum of Rs. 27,653. 3a. 6p." The judgment then proceeded:—"I now come to the point whether the Plaintiffs are entitled to recover the amount of their claim from the property pledged by Omakunt Bannerjea, the father of the Defendants, 2 and 3, and from any other property, real or personal, possessed by the Defendants. I am of opinion that they are entitled to recover. In the security bond it is stipulated that, until the claim of the Plaintiffs be fully satisfied, the property pledged shall not be either sold or alienated. A further stipulation is made that if this property be not sufficient, all other property, [373] real or personal, belonging to the security and his heirs, shall be liable. There now remains to be determined to what extent Defendant, No. 1 is liable. This party admits that he took a sub-lease from the Plaintiffs on the security of Omakunt Bannerjea, the father of the other Defendants. This party may or may not be Benamee for Omakunt Bannerjea: he admits taking the lease, and he must be held to be liable. Holding, therefore, that the Plaintiffs' claim does not come under the provisions of sections 8 and 9 of Reg. XV. of 1793; that the Defendants have totally failed to prove that they have paid the sums alleged by them; and that both the property pledged and any or all other property possessed by any or all of the Defendants, is liable to the recovery of the Plaintiffs' claim, it is ordered that the entire claim of Plaintiffs, with interest from date of suit to date of final recovery, and all costs with interest from this date to date of recovery, be decreed against all the Defendants. Let the amount of this decree be recovered from the property pledged and from any other property of the Defendants."

The Defendants appeal from this decree to the Sudder Dewanny Adawlut at Calcutta.

The appeal was heard before Messrs. Raikes, Patton, and Sconce, Judges of that Court, and by a decree of the Court, they declared as follows:—"The first issue which we have to hear and decide is, that the transaction founded upon, is an

attempt to elude the rule laid down in Reg. XV. of 1793, whereby greater interest than 12 per cent. per annum is prohibited, and that, under section 9 of that law, the suit should be dismissed. Baboo [374] Ramapershad Roy, (the Pleader for Respondents), said, that in this case there was no device to take excessive and illegal interest, that is a mere matter of calculation. The Judge, whose decision is now before us, says also that there has been no attempt to obtain, on the whole, more than the principal due, with legal interest. To test this, he assumes that simple interest for 11 years and 10 months on Rs. 15,000, would be Rs. 21,300; and he contrasts with that Plaintiffs' claim for interest, Rs. 12,653. 3a. 6p. But the Plaintiffs demand much more than that. They demand not merely the simple interest of Rs. 12,653. 3a. 6p., but, consolidating this with the principal and making one item of Rs. 27,653. 3a. 6p., they claim interest on that from the date of each instalment to the date of liquidation. To show the extent of the Plaintiffs' claim, an account has been taken in this Court. Plaintiffs, in this suit, do not bring their claim for arrears later than the year 1259, in which the suit was instituted; but, for the sake of completeness, we have had an account taken to the final date of liquidation provided in the lease—viz. Sawan, 1263; and from this we find that, while simple interest on Rs. 15,000, from Kartick, 1251, to Sawan, 1263, amounts to Rs. 21,150, the compound interest which the Plaintiffs have stipulated should be paid to them amounts to Rs. 32,432—that is, first, we have the item of Rs. 12,653. 3a. 6p., and, next, the item of Rs. 19,778. 12a. 6p., which, upon all the instalments of Rs. 27,653. 3a. 6p., being unpaid, it is provided should be paid till liquidated. This is exactly the suit which the Plaintiffs now seek to give [375] effect to. Plaintiffs stop at Phagoon, 1259; but, if instead of that date, they had sued at the close of Sawan, 1263, upon a principal debt of Rs. 15,000, they would have claimed on their deed, interest amounting to Rs. 32,432. In the suit before us, Plaintiffs represent the principal debt due to the 13th Pous, 1259, to be Rs. 19,722, and upon that they claim also interest to the same date, amounting to Rs. 6057. 12a. 7p. Now this last item is calculated at 12 per cent., and the first item, called principal, comprises only a portion of the original debt for Rs. 15,000; while all the balance of that sum of Rs. 19,722 is also interest. Not only so, the Plaintiffs admit the receipt of Rs. 7358. 12a. 6p., of which they apportion Rs. 5376 2a. 3p. to principal (meaning thereby both the original debt of Rs. 15,000 and the interest of Rs. 12,653. 3a. 6p. consolidated therewith), and Rs. 2022. 9a. 9p. to subsequent interest. That this is the exact character of the suit, is no matter of opinion—it is a matter of fact and figures: the transaction which Plaintiffs entered into was clearly a transaction intended to evade the law, and we have no alternative under the law but to dismiss the suit. The Pleader, Baboo Ramapershad Roy, has desired to bring the case within the provisions of sec 7, Reg. XV. of 1793, as if it were a case of adjusted accounts, in which a new engagement had been taken for the aggregate amount of the principal and legal interest remaining due at the date of the adjustment. The present case is of a totally different character—that is, the whole interest set forth was prospective interest, and the engagement was, that it should be levied by a double cal-[376]-culation, which we find to largely exceed in amount the rate allowed by law. We reverse the judgment of the Lower Court, and dismiss the suit with costs. Let the Appellants, agreeably to the account prepared by the Khurchanuvees, receive from the Plaintiffs (Respondents) costs of this Court, together with interest from this date up to the date of realization; and, for the costs of the Zillah Court, let them present a petition there, when the necessary order will be passed in regard to the same, in accordance with the orders contained in the Circular Order, dated the 4th of March, 1836.

The appeal was from this decree. No appearances having been put in for the Respondents the appeal was heard *ex-parte*.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellants.—This is a security in the ordinary form in Bengal. There was no stipulation for usurious interest in the contract, or any condition that the borrower should pay compound interest on the loan. [Lord Kingsdown: It is like the purchase of an annuity payable by instalments.] The suit ought not to have been dismissed under the eighth and ninth sections of Ben. Reg. XV. of 1793, as the particulars of the transaction of loan were fully, openly, and truthfully set forth on the face of the three registered instruments securing the repayment of the loan. It is clear that the execution of these instru-

ments ought not to have been considered and treated as a device within the meaning of the 9th section to elude the rules as to interest prescribed by that Regulation. *Khedoo Lal* [377] *Khatri v. Rattan Khatri* (5 Ben. Sud. Dew. Adaw. Reps. 10), *Bahoo Shamsuddeen Lal v. Bahau Ubbelakh* (11 Ben. Sud. Dew. Adaw. Reps. 872), *Sheikh Uchur Ali v. Patuk Sher Lal* (10 Ben. Sud. Dew. Adaw. Reps. 459). The case of *Wise v. Kishankumar Bous* (4 Moore's Ind. App. Cases, 201), is distinguishable. That was a shift for usury. The documents were intended to cover a usurious contract. If it was a penalty to pay interest on the non-payment of the instalments the penalty was either good or bad in law; if the former, no question could arise, on the other hand, such penalty, if bad, was distinct from the contract, as shown by these instruments. [Lord Chelmsford: If the Respondents had appeared then the whole question of the alleged receipts could have been gone into.] But the decree of the Sudder Dewanny Adawlut only finds that compound interest was stipulated for by the parties; and, admitting for the sake of argument only, that such was necessarily the construction to be put upon these instruments, yet, we contend, that the Court ought merely to have disallowed by their decree such compound interest, as is especially provided for by sec. 7 of the Regulation in question. Lastly, we submit, that sections 4, 7, 8, and 9 of Ben. Reg. XV. of 1793, ought to be read and considered together; and we contend that there is nothing contained in these sections, or in any other part of that Regulation, to deprive the Appellants of their remedy, and, as the Zillah Court held, that they are entitled to a decree for payment to them of the sum sought in the plaint to be recovered, which sum was shown to be less than the amount of principal money then due in respect of [378] the original loan, together with simple legal interest thereon.

The Right Hon. Lord Chelmsford.—Their Lordships are of opinion, that the decree of the Sudder Dewanny Court ought to be reversed, and the decree of the Zillah Court affirmed, with costs of the Courts below and of the appeal.

[379] MOONSHÉE BUZUL-UL-RAHEEM.—*Appellant*: LUTEEFUT-OON-NISSA,—*Respondent** [June 17, 18, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Provision is made by the Mahomedan law for divorce in either of the two forms.

First, Talâk, and secondly, Khoola.

A divorce by Talâk is the mere arbitrary act of the husband, who may repudiate his wife with, or without cause, but in a divorce of that kind the husband is liable to repay dyn-mohr, or the wife's dower, and

Semble, also to give up her jewels and paraphernalia [8 Moo. Ind. App. 395].

A Khoola divorce is with the consent and at the instance of the wife, for which she gives a consideration to her husband for release of the marriage tie [8 Moo. Ind. App. 395].

Non-payment of the consideration-money by the wife does not invalidate such a divorce.

Divorce by Talâk is not complete and irrevocable by the single declaration of the husband, but a Khoola divorce is at once complete and irrevocable from the moment the husband repudiates the wife and a separation takes place [8 Moo. Ind. App. 395].

Suit by divorced wife against her husband to recover her dyn-mohr on the allegation that her husband had dissolved the marriage "by divorcing her," and had obtained from her by force and duress two instruments, first, an

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Lord Justice Turner. Assessor.—The Right Hon. Sir Lawrence Peel.

Ibranamah, or release of her dyn-mohr, and secondly, a Khoolanamah, or deed securing her husband the stipulated consideration to be paid by a wife in a case of Khoola divorce. In his answer, the husband denied that a Talâk divorce had taken place, and in order to bar her claim to dower upon that form of divorce set up the Ibranamah and Khoolanamah. Held,

First, that as it appeared from the evidence that the deeds were obtained by force and duress, they could not be supported; and [8 Moo. Ind. App. 398, 399],

Secondly, that upon the admission in the answer of a divorce it must be presumed as a fact, that a divorce of some kind had taken place, and that in the circumstances it was a Talâk and not a Khoola divorce, according to which the divorced wife was entitled to recover her dyn-mohr.

This suit was brought by the Respondent against the Appellant to recover dyn-mohr (marriage gift), [380] secured by Kabeenamah (deed of marriage settlement), by reason of the divorce of the Respondent from the Appellant.

It appeared from the evidence, in the year 1842, the Appellant, a Mahomedan, married the Respondent. On that occasion a marriage settlement was executed, by which the Appellant settled on the Respondent, by way of dower (mohr), Rs. 10,000 and 1000 gold mohurs. That in the early part of the year 1847, the Appellant also married one Shumsoonissa, a rich widow. From that time the Appellant did everything he could to get rid of the Respondent; treating her with great harshness, refusing to permit her to see her mother, denying her food and clothing adequate to her station, in the hope of inducing her to ask for a divorce, by which she would forfeit her right in respect of her dower, and to force her to return the marriage settlement, which was at this time deposited with her mother for safe custody. The Respondent complained to her mother of the treatment she met with from her husband, and begged her to return the marriage settlement to him. In consequence of these complaints her mother, in the years 1848, 1849, and 1850 filed petitions in the Foujdary Court, complaining of the treatment to [381] which her daughter was subjected at the hands of the Appellant, and praying the interference of the Court. Under one of these petitions, she obtained an order on the Appellant to allow her to see her daughter. At the interview which ensued, the Appellant, who was present, said to the mother, "I have divorced her (the Respondent); you give up the paper and take away your daughter." The mother refused at this time to give up the marriage settlement; but subsequently, no redress having been obtained by the petitions, on the 24th of August, 1850, hearing from her daughter that her condition was becoming more miserable, she sent that document to the Appellant. Having obtained the deed, the Appellant compelled the Respondent to execute an Ibranamah and a deed of divorce, after which he turned her out of his house at midnight in a state of insensibility.

In consequence of this treatment the Respondent, on the 7th of September, 1850, filed a petition in the Foujdary Court, for the production of the deed of divorce and other documents. This petition was dismissed, on the ground that the Foujdary Court had no power to make an Order as to their genuineness.

Whereupon the Respondent filed a plaint in *formâ pauperis*, in the Zillah Court of Twenty-four Pergunnahs, against the Appellant, in which she alleged that the Appellant had dissolved the marriage by divorcing her, and she further stated that two instruments by which she was alleged to have given up her dyn-mohr were obtained from her by fraud and duress, and by the plaint sought to recover her dower of Rs. 10,000, and 1000 gold mohurs, valued at Rs. 16,000, making in the aggregate Rs. 26,000.

[382] The Appellant by his answer, denied that he had divorced the Respondent by Talâk, that she left his house, having substance money of her iddit; and alleged that she had executed an Ibranamah, and had thereby released him from all claims in respect of her dower; and that, on the 24th of August, 1850, she had given him a Khoola and executed a Khoolanamah, by which the claim sought to be enforced by the plaint was barred.

The Respondent, in her replication asserted that the Ibranamah set up by the answer was a fabrication, and that the execution of the Khoolanamah had been

obtained by duress, and she contended, that the Appellant by pleading a Khoola divorce had admitted the existence of a divorce, which was Talāk.

By a proceeding of the Court, under sec. 10, Ben. Reg. xxvi. of 1814, the following issues were fixed:—On the perusal of the pleadings the chief points in dispute are these: First, had the Defendant divorced the female Plaintiff or not? Second, had the female Plaintiff, relinquishing her claim to the Kabeen, executed or not the Ibranamah of the 4th of Bysack, 1251, and the Khoolanamah of the 9th Bhadro, 1257? On the perusal of the replication, and the issues on the merits, the issues on law are these:—Although the divorce of the Defendant, and the execution of the Khoolanamah by the female Plaintiff be not proved, still the Defendant states that he obtained the Khoolanamah. Now, according to Mahomedan law, is it tenable or not as claimed by the female Plaintiff?

Evidence was entered into by both parties, and in support of the plea of the alleged Ibranamah, an instrument was put in by the Defendant, purporting to have been executed by the Plaintiff. This instrument, after [383] reciting that the Plaintiff had for a long time been passing her days in the greatest happiness and pleasure as a wife, and that her husband had in every way shown his love and affection towards her, went on to exonerate him from all liability in respect of her marriage portion, whatever the amount might be. It purported to be witnessed by nine persons, of whom only one, Ahmed Hosein, was called as a witness, and he admitted that he himself did not see the document signed by the Plaintiff, but stated that he recognized her by her voice from behind a purdah (screen). In support of the Khoolanamah, six witnesses were examined by the Defendant, of whom two only, Syud Mahommud and Syud Allee (Ameen of the Defendant's Mudrissa), deposed to having seen the Plaintiff execute it. Syud Mahommud, however, admitted that he did not know whether the Plaintiff signed it voluntarily or not, and both witnesses were contradicted as to the circumstances of the execution by the statement contained in the Khoolanamah.

The Court directed a Futwa by the Mahomedan Law Officer attached to the Court.

The case submitted to the Moulvie and his Futwa thereon, was as follows:—“Luteefut-oon-nissa Beebee claims her dyn-mohr money, stating that Moonshee Buzul-ul-Raheem married her on a dyn-mohr of the sum of Rs. 10,000, and 1000 gold mohurs, and consummated the marriage, and they lived as husband and wife. Afterwards he, without fault, and without her pleasure, divorced her from himself. Therefore, she prefers the claim to the dyn-mohr. Moonshee Buzul-ul-Raheem states that he did not divorce her, and did not declare that he had divorced her; but that she had given him a Khoola, and executed a Khoolanamah accordingly. The wife says that the allegation of the Moonshee aforesaid, to the effect that he got a Khoola, is, conformably to Mahomedan law, a proof of the divorce. Under these circumstances, if the Talāk and Khoolanamah aforesaid are not established, still is the Moonshee liable by Mahomedan law for the dyn-mohr on his own allegation that he had received a Khoolanamah?”—“Answer.—The husband's statement of the Khoola taking place, and of the wife's denial of it, are of two kinds; First, the man claims Khoola in this manner, viz. ‘I have entered into a Khoola with my wife in lieu of so much property, and she has voluntarily agreed to it; I am, therefore, entitled to that much of the property.’ The wife denies the Khoola, and the man is unable to adduce proof of his claim. Under these circumstances, there shall be a divorce inferred in consequence of the husband's admission, but the claim to the property, that is to say, in lieu of the Khoola, shall remain as it was, that is to say, it shall not be proved without the wife's admission, or testimony of witnesses; because the claim is based on two things; one, Talāk, which is to be proved by the admission of the husband, since he is competent to make the divorce, and it does not depend on the acknowledgment of the wife; and the other is the wife's liability to payment of the property in lieu of Khoola, which cannot be proved unless the wife has agreed to it. The wife's agreement, however, is proved either by her own admission, or by evidence of witnesses. The second kind is this: the wife claims from the beginning, saying, ‘My husband has divorced me after consummation of the marriage; I am, therefore, fully entitled to the whole mohr and iddit allowance.’ The husband in answer, in order to repel the [385] claim to mohr and iddit allow-

ance, alleges execution of the Khoola, stating that 'The wife has given me a Khoola : my liability to her claim of the mohr and iddit allowance is extinct.' This second kind conforms to the question. The divorce on which the wife claims her dyn-mohr is irreversible divorce, and carries with it no property. This divorce, however, if proved, obliges the husband to pay the entire mohr and iddit allowance. The divorce which is dependent on the Khoola, which the man alleges is quite a different one, and this divorce, if proved, extinguishes the mohr, as also the stipulation for the iddit allowance. Under these circumstances the allegation of Khoola which the man makes can never be admission of or submission to the divorce alleged by the wife. So, if the wife's allegation be proved, the husband shall be fully liable for payment of the mohr and iddit allowance; and if the husband's allegation be proved, in that case the entire mohr and nufka (maintenance) to which he was liable will become extinct. If the allegation of neither be proved, then the mohr shall remain in force as it was, that is to say, it will not be extinguished. The difference between the two kinds is, that in the first kind the husband claims the Khoola; and the object of his alleging the Khoola is to claim the property in lieu of which divorce is made, and the wife denies this. Since the Khoola is the same as that of an irreversible divorce, and, as the husband is competent to give a divorce, therefore, divorce, according to his admission, is established; but as the wife's liability to give property cannot be proved without her consent and acknowledgment, therefore, proof of the wife's liability depends entirely upon her own admission or evidence of witnesses. And, in the second kind, the [386] wife claims mohr and iddit allowance against her husband on the ground of divorce being effected without property, and the husband denies the claim, and in order to render void the wife's claim, alleges that she, of her own accord, has relinquished the marriage and extinguished it, and mentioned this relinquishment as being the Khoola. Under the circumstance, although the husband apparently claims the Khoola, yet she is the Defendant, and denies it, for the object of the Khoola is merely to rebut the claim of the mohr, and not to prove any property due by the wife, nor to prove the divorce which is included in the Khoola. The allegation of this Khoola can never prove the wife's claim, which rests on the Talâk without property, if the wife's claim, founded on divorce without property, is not proved, and if the husband's allegations of Khoola effected in lieu of property be not also proved. In that case, the wife's claim of dyn-mohr shall continue in force as before, and the husband's allegation of Khoola shall be extinct. As proof of divorce depends on Khoola being made, and as it is unnecessary for the husband to prove the divorce, and as he is not also required to prove the Khoola, his object being to rebut the claim to the mohr, therefore, when Khoola, which is the chief thing, is not proved, then Talâk, which is a branch of it, and is not the object sought for, shall not be established, because neither the husband nor wife claims this divorce. When divorce is not proved, in that case the liability of payment of the whole mohr and also the iddit allowance on the divorce, shall also not be established."

The cause was heard by the Principal Sudder Ameen (Baboo Lokenath Bose), who by his judgment found that [387] the Respondent had failed to prove a simple divorce (*Talâk*). With regard to the Khoolanamah and Ibranamah, that Judge observed that "after a consideration of all the facts of the case, the Court is convinced that the Defendant having received intelligence that Shumsoonissa aforesaid was desirous of entering into nika, and having observed the prospects of her wealth, made known his proposals, when Shumsoonissa pleaded that he had a wife, that Defendant having obtained her consent by promising to forsake his wife, afterwards entered upon some oath in her presence regarding a divorce, and was yet under fear lest he should be bound to pay the marriage portion. On this account, having prepared an Ibranamah at the time he became at ease and married; that being unable to treat the female Plaintiff as his wife, he consented to give her a divorce, but subsequently a discrepancy of names was known to exist in the Ibranamah; that the sight of the rival wife being painful, Shumsoonissa aforesaid urged the Defendant to turn her out, but the Defendant had purposed to do so without risk, that is to say, he desired to get back the Kabeenamah, and have a Khoolanamah written out; that as there were no means of doing so easily he began to torment her gradually, and make her pine under anxiety; that having obliged her mother to return the

Kabeenamah, he got up a fictitious assembly and invited all great men, and having acted apparently in conformity with Mahomedan law, induced the female Plaintiff to sign, and turned her out of the house at twelve o'clock at night." The Court further decided, that the Khoolanamah and Ibranamah had not been established; and, with regard to the issue in law, the Court held, that the Appellant having pleaded a [388] Khoola, the Respondent was exonerated from proving a Talak, and ordered the Appellant to pay the amount of the Respondent's claim, with interest from the date of the decree up to that of its liquidation.

From this decision the Appellant appealed to the Sudder Dewanny Adawlut at Calcutta.

In his reasons of appeal, the Appellant insisted that the finding of the Court against the Khoolanamah was erroneous, and urged that the Principal Sudder Ameen had illegally rejected the Futwa of the Moulvie, although the opinion agree with the Hedaya and other authorities in Mahomedan law. The Appellant also urged, that inasmuch as the Talak divorce by the Appellant, which was relied on by the Respondent, was not proved by the evidence, and as to the Khoola and Khoolanamah set up by him was also at the same time declared not to have been proved, the Court could not legally decree to the Respondent for the amount of the mohr, which was only recoverable on an actual dissolution of the marriage according to Mahomedan law being proved, or on proof of the death of either of the parties.

The Sudder Dewanny Adawlut ordered that a Futwa should be given by the Mahomedan Law Officer of that Court, on the following case submitted to him:—"The wife sues her husband on allegation of divorce for her dyn-mohr (the marriage portion due), and the husband denying the divorce, in order to bar the marriage portion, pleads a Khoola from his wife. By the Mahomedan law, an irreversible divorce is not established, nor is the Khoola of the wife. Under these circumstances, is the mere allegation of Khoola pleaded by the husband a real divorce sustainable or not; and is the wife entitled to claim the whole of the [389] marriage portion, the same as would have been the case on proof of the divorce given on the part of the husband?" The Futwa given was as follows:—"If the case be such as stated, then, by the mere allegation of Khoola on the part of the husband, which is tantamount to a relinquishment of property, the divorce of his wife will be fully established, and the wife will be entitled to demand the whole of the dyn-mohr as in the case of a divorce by the husband being proved." The following authorities were referred to by the Moulvie in support of the Futwa:—The Fosool Emandee, pp. 279, 481 (Calcutta Edit.); The Doorool mokhtar and Tahtanee, pp. 190-1 (Egypt Edit.).

The hearing of the appeal by the Sudder Court took place before Abercrombie Dick, Esq., Henry T. Raikes, Esq., and James Hardwicke Patton, Esq., the Judges of that Court.

The question as to the effect of pleading Khoola by the Appellant was first argued and disposed of by the Court. The material part of the judgment upon that point was in these terms:—"The question before the Court is, whether the mere pleading of a Khoola in defence, and inability to prove it, entitles the Plaintiff to claim immediate payment of dower, notwithstanding she has failed to prove such a divorce by her husband as would have entitled her. We are of opinion, that as Defendant has rested his defence on the Ibranamah and Khoolanamah it has that effect. The plea to exempt from payment of dower in virtue of a Khoolanamah is an admission of such a divorce (that is, an irreversible divorce) as entitles a wife to claim immediate payment of dower; and the release from such liability is dependent on proof of the truth of the Khoolanamah and the Ibranamah, the burden of which [390] lies on the Defendant, for it is a special plea. The Appellant's pleader will, therefore, proceed to show that both those deeds have been duly proved."

The evidence in support of the two instruments, the Ibranamah and Khoolanamah was then investigated, when the Court finally decreed as follows:—"We are of opinion, after a careful consideration of the evidence adduced, and the circumstantial facts on record in the case, that the evidence for the genuineness of the Ibranamah is utterly defective. Only one witness out of seven or eight has been produced to testify to it. It purports to have been executed by Plaintiff under the name of Wozerut-oon-nissa, a name she declares she never bore, and there is no proof that she, Plaintiff, was so called. It sets forth that it was given out of love and

affection for her husband, yet it bears the same date as his marriage with another lady, who had declared she would not enter his house until Plaintiff was turned out of doors. In short, the terms of the deed, with the reasons for giving it, are altogether irreconcilable with the notorious conduct of the husband to the donor, and the known facts opposed to it. The recital of it in the Khoolanamah by no means proves its due execution. The Khoolanamah is certainly proved to have been witnessed according to forms prevalent among Mahomedans of rank; but there is a remarkable want of care evident on the part of the respectable witnesses who have testified to it, to ascertain that the act of the lady was free and unrestrained. Finally, the recorded fact that no fewer than six complaints of ill treatment by her husband had been presented to the Magistrate by the Plaintiff, from the date of the alleged Ibranamah and the marriage with the second wife to the date of Plaintiff giving up her Ka-[391]-beenamah and executing the Khoolanamah, is sufficient, together with the other circumstances above alluded to, to satisfy the Court that the execution of the Khoolanamah was not a voluntary unrestrained act. It is, therefore, a nullity." The Sudder Court by their decree dismissed the appeal with costs.

The present appeal was from this decree.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant. —First. By the Mahomedan law a divorce may be obtained in two ways; in the first instance, by a form called Talak, and secondly, by what is called Khoola. Hedaya, Bk. IV. ch. ii. p. 213; *ib.* ch. viii. pp. 314-15. These forms are well known in India. The first is an absolute divorce, at the instance of the husband, without any misbehaviour on the part of the wife, or without assigning any cause. A Talak divorce entitles the divorced wife to have returned her marriage portion. Macnaghten "On Moohummadan Law," ch. vii. pl. 24, p. 58. It is not so in the second form, which is a conditional divorce. By the Khoola form the wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage. Macnaghten "On Moohummadan Law," ch. vii. pl. 28, p. 60. *Maulvi Abdul Wahab v. Mussumat Hingu* (5 Ben. Sud. Dew. Rep. 200). The Koran, ch. ii. p. 28 (Edit. 1858), lays it down in express terms that "the wife shall redeem herself," and by releasing parts with her dower. Now, we contend, that as the suit was brought by the Respondent to recover her marriage portion secured by deed, the *onus* of proving the validity of the alleged Talak divorce was clearly upon the Respondent. The decrees of the Courts in India have rightly held that she had failed to prove a [392] Talak divorce on the part of the husband, which was relied upon in her pleadings, as entitling her to sue for her marriage portion provided by the Mahomedan law, and yet, in effect, the Court decree her *dyn-mohr* as if she had proved her alleged Talak divorce.

Secondly. We submit that the Khoolanamah is sufficiently proved. Khoola is only an offer of divorce on certain terms. The Khoolanamah is the written contract between the parties for a conditional divorce, desired and to be purchased upon certain conditions by the wife. The inconsistency of the decree appealed from is this, that the Courts have found that this deed, although pleaded by the Appellant, but not proved, yet is to be taken as evidence of a Talak or absolute and unconditional divorce. Now, if the Khoolanamah is not proved, there is but one alternative, which is, that there was no divorce at all. In the pleadings the Respondent pleads that her husband divorced her; in the answer that is denied by the Appellant, who pleads that she gave him Khoola, which averment of a fact is reasonable, the second marriage being the inducement for the divorce by Khoola. There is no authority to be found in the Mahomedan law to show that a Khoolanamah, *per se*, is a divorce. Man and wife living separately does not without evidence of a divorce constitute a divorce. *Noorunnissa Begum v. Nawaub Syed Mohsin Allee Khan Bahadoor* (7 Ben. Sud. Dew. Adaw. Reps. 40). The Futwa of the Law Officer of the Zillah Court was right (*ante* [8 Moo. Ind. App.], 386), and the decrees of the Courts below ought to have been conformable to it.

Lastly. By the admission of the Respondent and the evidence, the execution by her of the Ibranamah and Khoolanamah were proved. She entirely failed to prove her plea of duress, or that she had been coerced by the Appellant to execute those deeds.

[393] At the conclusion of the Appellant's argument,

The Right Hon. Lord Kingsdown observed, that their Lordships were agreed

that the deeds relied upon by the Appellant could not be supported, and directed the Respondent's Counsel to confine themselves to the question, whether there was anything in the pleadings, or otherwise, not of the Khoolanamah, from which the Court could find that a divorce had taken place.

Mr. Lloyd, Q.C., and Mr. L. W. Cave, for the Respondent.—A Khoola divorce is irrevocable, according to the opinion of the Moulvie of the Court below, and not conditional, as contended by the Appellant's Counsel. The Hedaya, Bk. IV. ch. viii. p. 316. In this case the circumstances show that the divorce was Talak at the instance of the husband, and not of the wife. With respect to the pleadings we contend that all that the Respondent pleaded in her plaint was that her husband had divorced her. The general averment of such a fact is compatible with a Talak divorce. The Hedaya, Bk. IV. ch. ii. p. 213. The Appellant having by his answer pleaded a special divorce, or Khoola, at the request of his wife, he must be deemed to admit the fact and condition of a divorce, which relieves the Respondent from the necessity of proving a simple divorce; the consequence, therefore, is, that the Appellant having failed to prove the Khoola divorce, is liable to the demand for dower as upon a Talak divorce, for it cannot be denied that a divorce has taken place. The *fatwa* (see *ante* [8 Moo. Ind. App.], p. 389) of the Moulvie of the Sudder Courts supports this construction.

[394] Judgment was postponed and now delivered by

The Hon. Lord Kingsdown (July 12, 1861).—This suit was instituted in the Civil Court of the Twenty-four Pergunnahs by the Respondent, Luteefut-oon-Nissa, suing as a pauper against the Appellant, Moonshee Buzul-ul-Raheem, to whom she had been married, to recover her dyn-mohr, consisting of the sum of Rs. 10,000 and of 1000, gold mohurs valued at Rs. 16,000, amounting together to Rs. 26,000.

This sum was payable by the Appellant to the Respondent in the event of the dissolution of the marriage, and she alleged in her plaint that the Appellant had dissolved the marriage by divorcing her. She further stated, that two instruments by which she was alleged to have given up her dyn-mohr had been obtained from her by the force or fraud of the Appellant, and were of no avail to bar her rights.

The Appellant, in his answer, denied the divorce as stated by the Respondent, but alleged that two instruments, one a Khoolanamah, had been executed by her, by which she released her dyn-mohr, and which deeds he insisted were binding upon her.

The Zillah Judge was of opinion, that no divorce except by Khoola had been proved by the Respondent, but he held that the plea of the Appellant admitted a divorce by Khoola, and that the instruments set up by him as containing a release of the dyn-mohr were fraudulent and void, and that, therefore, the marriage being dissolved, the Respondent was entitled to recover her claim, and he decreed accordingly.

This decision by the Zillah Court was confirmed [395] by the Sudder, and from the order of the Sudder the present appeal is brought.

Upon the facts, we think, that there is little doubt. The question is mainly one of Mahomedan law, and we should not lightly in such a case disturb the concurrent decision of two Courts. But we are quite satisfied that the decision is conformable both to law and to justice.

It appears that by the Mahomedan law divorce may be made in either of two forms; Talak or Khoola.

A divorce by Talak is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dowry, or dyn-mohr, and, as it seems, to give up any jewels or paraphernalia belonging to her.

A divorce by Khoola is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband.

It seems, that according to existing usage, a divorce by Talak is not complete and irrevocable by a single declaration of the husband: but a divorce by Khoola is

at once complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. In these particulars the two modes of divorce differ.

But there is one condition which attends every [396] divorce, in whichever way it takes place, namely, that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her *iddit*, for her maintenance during this period.

At the hearing of this case, two points were made by the Appellant's Counsel. They insisted, first, that the instruments releasing the Respondent's claim under her settlement were valid; and, secondly, that if the *Khoolanamah* executed by the wife were laid out of the case, there was no evidence at all of divorce, and then the marriage was not shown to be dissolved; that the Respondent could not approbate and reprobate the same deed—insist that it was good for the purpose of establishing a divorce, and, bad for the purpose of securing to the husband the price which he was to receive for consenting to it.

This objection, however plausible, is founded on a misconception of the real nature of the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The *Khoolanamah* is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it, and is founded upon it. The divorce is created by the husband's repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts, as from the authorities cited at our Bar, that the law is otherwise.

The non-payment by the wife of the consideration [397] for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage portion invalidates the marriage.

In this case the husband, while denying a divorce by *Talak*, not only did not deny but set up a divorce by *Khoola*. He alleged distinctly, in his answer, that the Respondent took from him a *Furuckuttee* (which is a deed of divorcement), that she took from him also the subsistence money of her *iddit*, and gave him a receipt for it, and that she then quitted his house with the assent and under the care of her mother.

That a divorce, therefore, had taken place, was the common case of both parties, and the only question was, whether the husband could insist on receiving the consideration for which he says that he had stipulated.

This must depend on the validity of the deeds which he sets up in bar of the Respondent's demand. The dissolution of the marriage being admitted, it is for the Appellant to make out that the Respondent has given up the rights which *prima facie* result from the dissolution, and upon this part of the case their Lordships have never felt the least doubt.

Two instruments are relied on by the Appellant: one an *Ibranamah*, or instrument by which the wife is made, out of regard and affection for her husband, voluntarily to release to him all claim to her *dyn-mohr*. This instrument purports to have been made on the 16th of April, 1847. It states that the settlement by which the *dyn-mohr* is secured is in the possession, not of the wife, but of her mother; that the wife, therefore, cannot give up the in-[398]-strument, and is not aware of what the *dyn-mohr* consists.

There is nothing like satisfactory proof that the Respondent ever gave her assent to this deed with a knowledge of its contents, and the admitted facts of the case make it in the highest degree improbable, almost impossible, that she should have done so.

At the time at which this instrument purports to have been made, the husband had married, or was on the point of marrying, a second wife, as by law he was entitled to do. The evidence of one of the witnesses states, that the marriage took place either in April, 1847, or in the following October; and from the time of the marriage, and indeed from the time when it was decided upon, their Lordships are quite satisfied from the evidence that the Appellant and the Respondent were equally desirous of a divorce. Indeed, it appears that the second wife stipulated as

a condition of her consent to the marriage, that her husband should divorce his first wife. He had the power to do so by Talak, but this would not answer his purpose; he desired to get rid of his wife, but to retain her dowry, and he prepared this deed in order that, having procured a release of the dowry, he might exercise his power of divorce. The mother of the wife, however, had possession of the settlement, and refused to give it up, and it seems to have been thought by the husband that it would be impossible for him to establish the Ibranamah unless he could procure a confirmation of it, and a surrender of the settlement by the mother, and a divorce by Khoola. For this purpose he had recourse to measures of great cruelty: he refused to permit the mother to [399] see her daughter, and, by a long series of ill-usage, unless there be much exaggeration in the evidence, injured the health and even endangered the life of the Respondent. The mother, after repeated applications to the Foujdary Court for the protection of her daughter, at last yielded, and gave up the settlement; under such circumstances the Khoolanamah was obtained, which professed to confirm the Ibranamah.

The Courts below have most properly held that instruments so obtained can have no legal effect. They can be of no more avail, when used as a defence against the claims of the wife, than they would have had if the husband were suing upon them as Plaintiff to enforce rights secured to him.

Their Lordships are quite satisfied that the judgment complained of is correct, and they will humbly advise Her Majesty to affirm it, with costs.

[See *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, 1867, 11 Moo. Ind. App. 610.]

[400] MYNA BOYEE, and Others.—*Appellants*; OOTARAM, MYARAM, and TAUKOORAM,—*Respondents* * [June 19, 20, 1861].

On Appeal from the Sudder Dewanny Adawlut at Madras.

H., an Englishman, had five children by two native Hindoo women, one of whom was of the Brahmin caste, a married woman, though living apart from her husband. The five children were brought up as Hindoos, and lived together as a joint family. H. by his Will devised an estate to the five illegitimate children in equal shares: Held,

First, that the illegitimate children were to be considered as Hindoos, and their rights governed by that law [8 Moo. Ind. App. 420];

Second, that being children of a Christian father by different Hindoo mothers, although constituting themselves co-parceners in the enjoyment of the property after the manner of a joint Hindoo family, yet that the partnership so constituted differed from the co-partnership of a joint Hindoo family as defined by the Hindoo law; and that, at the death of each son, his lineal heirs representing their parent would be entitled to enter into that partnership [8 Moo. Ind. App. 420].

Quære. Whether such right of inheritance enures to collaterals?

A suit was instituted by one of the illegitimate children against his brothers for partition of the estate left them by H. A deed of Rahzeenama was afterwards entered into by the parties, by which the shares and the amounts to be paid to each were ascertained, and provision made against alienation by sale, mortgage, lease or security of any separate share. Held, that this deed did not affect the right which each co-sharer had to alienate by Will.

Where a reference is made by the Court to the Native Law Officers for an opinion

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessor.—The Right Hon. Sir Lawrence Peel.

upon a question which arises in a suit before the Court, the answer to which may bind a right, the question submitted should embrace all the important facts proved or admitted in the suit, which may affect the conclusion; and it is the duty of the Court itself so to frame the question, that the Court may elicit an opinion upon the very facts upon which the legal title depends. If the facts be not ascertained, but stated and disputed, then the question should embrace either view of the facts.

When the opinion given is apparently irreconcilable with the opinions of approved text writers on the Hindoo Law, those who give the opinion should be asked to explain that which appears, *prima facie*, irreconcilable; so that they may show on what ground an apparent exception from the general law is inferred; whether on general custom, modifying texts, on local usage, family customs, or other exceptional matter [8 Moo. Ind. App. 422].

If both parties are dissatisfied with a decree of the Court below, a cross appeal is necessary.

An Appeal was brought from part of a decree. At the hearing, held, that although the whole decree was not open to the Respondents, who had not appealed, yet, in the circumstances, leave to present a cross appeal ought to be permitted.

The Appellants having waived the formality of lodging a cross appeal, the appeal was heard from the whole decree [8 Moo. Ind. App. 412, 413].

In this appeal the question in issue related to the right of one Ramaprasad, the husband of the Appel-[401]-lant, Myna Boyee, an illegitimate son of George Arthur Hughes, an Englishman, by a native woman, of the Brahmin caste, a married woman, living apart from her husband, to one-fifth part of the rents and profits of an estate called Kadalkoody, to which Ramaprasad claimed to be entitled as heir of Taukooram, another illegitimate son of the same person.

The facts of the case were these:—

Some time before the year 1841, Hughes died, having made a Will, whereby he devised estate of Kadalkoody in equal shares to five persons, namely, the above Taukooram, and Ramaprasad, and also to Myaram, Chundoolaul, and Oottaram, who were three other illegitimate sons of Hughes by another native woman.

After the death of Hughes, the estate of Kadalkoody was held and enjoyed in common by his five children until some time in the year 1841, when Ramaprasad brought a suit in the Auxiliary Court of Tinnevely, claiming a separation or partition of the one-fifth share of the estate to which he was entitled as a devisee under the Will, and a decree was passed accordingly.

[402] About this time Oottaram, one of the five devisees, died, and after his death his daughters and co-heiresses contracted for the sale of his one-fifth share of the estate to Chundoolaul.

In the year 1843, Taukooram, Myaram, and Chundoolaul appealed to the Civil Court of Tinnevely against the decree of the Auxiliary Court, but before the appeal came to a hearing, a Razeenamah, or deed of compromise, in the form of a petition to the Court, was entered into between the parties.

This instrument was in these terms: “Razeenamah presented by both parties (seven in number) in appeal suit No. 92, of 1843, before the said Court, viz.:—Appellants (1) Taukooram, (2) Myaram, and (3) Chundoolaul. Respondent (4) Ramaprasad, and supplemental Defendants (5) Ganda Boyee *alias* Toolaja Boyee, (6) Ganga Boyee, daughters of Rama Boyee, widow of Oottaram, and Second Defendant in original suit, No. 39, of 1841, on the file of the late Auxiliary Court, and (7) Tarachund, guardian to Ganga Boyee. In the original suit, wherein the Plaintiff sought to recover from the Defendants as his share one-fifth of the Paliaput of Kadalkoody referred to in the plaint, a decree was passed as sued for. Dissatisfied with this decision, the Appellants preferred the Appeal above referred to, and, after Answer was filed in the said Appeal, the parties entered into a compromise.” The first portion of the compromise had relation solely to the purchase-money of Oottaram’s one-fifth share. The Razeenamah then proceeded as follows:—“Of the said Kadalkoody Paliaput, the share assigned to the third Appellant by Mr. Hughes’s Will is one-fifth, and this added to the one-fifth share purchased

[403] by him as stated above, makes his total share two-fifths of the whole estate. The share assigned to the second Appellant, Myaram, under the said Will, is one-fifth, and that left to the first Appellant, Taukooram, and the Respondent Ramaprasad, by the said instrument, is one-fifth each. Thus, it having been settled that we four should enjoy the said Zemindary in five shares, we have entered into the following agreement, viz. That from Fusly 1254, the management of the entire Zemindary shall for life be entrusted to one of us four, viz. Taukooram, the other three abiding by this arrangement. That the Paischush, amounting to Rs. 4469. 8a. 0p. per annum, shall be punctually paid by Taukooram, from and out of the income of the Paliaput, for each Fusly; the Irsal or remittance being made in the names of us all four. That all the repairs necessary to the Paliaput shall be executed by him every year at an annual outlay of Rs. 500, he taking care that the money is properly spent. That of the surplus left of each year's income, after defraying the Paischush, charges of repairs and costs of establishment of that year, Taukooram shall pay to Myaram and Chundoolaul, whatever may fall due to them for their said three shares, as per accounts. That on account of the one-fifth share of Ramaprasad, Taukooram shall, for his life, pay into the treasury of the Court the fixed sum of Rs. 1300 a-year, a moiety thereof being payable on the 11th April, and the other moiety on the 11th July, of each Fusly. That Ramaprasad or the heirs appointed by him shall receive the said sum from the Court. That should the income of Ramaprasad's said one-fifth share for any year exceed the fixed amount above referred to, such excess shall be appropriated by Taukooram. That [404] should the income of the said share fall short in any year of the fixed sum above referred to, Taukooram himself shall make good such deficit. That Taukooram shall be entrusted with the title-deeds of the said Paliaput, and any sharer shall be at liberty to refer to them whenever he wishes. That should the accounts furnished by the Ameen deputed to attach the Paliaput exhibit any old balance outstanding for Fuslies, 1251 to 1253, during which period the Paliaput remained under attachment, Taukooram shall recover the same, and pay to Ramaprasad his one-fifth share thereof, taking a receipt from him. That the other shares also shall receive their shares of the said balance in the same manner. That after Taukooram's death, Ramaprasad, or the heirs appointed by him, shall have the management only of his one-fifth share, subject to profits or loss. That the management of the other four shares shall be entrusted to Myaram or Chundoolaul, or their heirs or representatives appointed by them. That the Ryots, Kurnums, servants, etc., of the Paliaput, shall pay to the other sharers, when they go to visit the estate, the very same respect that they would show to Taukooram or persons entrusted with the management after his lifetime. That the Paliaput shall never be divided, but only the income thereof, of which each sharer shall receive and enjoy his share with reference to accounts of income and expenditure. That neither the sharers, nor their heirs nor representatives appointed by them, shall alienate their respective shares by sale, mortgage, lease or security; all such transactions, if effected, being null and void."

This instrument was filed in the Civil Court, and the estate of Kadalkoody remained under the manage-[405]-ment of Taukooram, in accordance with its provisions, until his death, which occurred on the 21st of January, 1852.

During the lifetime of Taukooram, he and Chundoolaul, and Myaram also, until his death, lived together, as undivided brothers. Ramaprasad, on the contrary, was a divided brother, and between him and Taukooram it appeared great enmity existed.

Upon the death of Taukooram, the management and the absolute beneficial interest in a one-fifth share of the Kadalkoody estate, to which alone Ramaprasad was entitled under the Razeenamali, passed to him, and Chundoolaul entered upon the management of the other four-fifths of such estate in accordance with that, and also assumed possession of the property of Taukooram, to which, together with any disposable interest of Taukooram in the estate, he claimed to be entitled under a Will executed by Taukooram on the 16th of January, 1852.

In February, 1852, Ramaprasad made an application under Act, No. 19, of 1841, to the Civil Court of Tinnevely, alleging that he was entitled to succeed, as sole heir of Taukooram, to all his property, including his one-fifth share of the

Kadalkoody estate, and that Chundoolaul had assumed wrongful possession of the property, and praying to be put into possession under a summary order of the Court. This application was rejected by the Civil Judge, and Ramaprasad was left to the institution of a regular suit to establish his alleged title.

Under these circumstances Ramaprasad, in September, 1852, instituted a suit against Chundoolaul in the Zillah Court of Tinnevely, alleging in his plaint that the suit was brought for the recovery of real and per [406] sonal property of the value of Rs. 14,568. 4a. 0p. belonging to his deceased brother, Taukooram, and that Taukooram died leaving no other heirs but Plaintiff, and that the Defendant in order to get possession of the property had forged a Will, and Mookternamah purporting to be executed by Taukooram in the Defendant's favour, and praying that the Court would be pleased to pass a decree adjudging to the Plaintiff, amongst other property valued at Rs. 8000, Taukooram's right and title to one-fifth of the income of the Kadalkoody Estate.

The Defendant by his answer stated, that the Razeenamah provided that after Taukooram's death the Plaintiff should be entitled to his own one-fifth share of the Kadalkoody estate separately and absolutely, and nothing more, and that the Plaintiff and Taukooram were enemies, while the Defendant and Taukooram were friends; and that on the 23rd of March, 1850, Taukooram executed a Mookternamah, vesting all his right and interest in the Kadalkoody estate after his death in the Defendant, and that on the 16th of January, 1852, he executed a Will confirming the Mookternamah, and devising and bequeathing other property to the Defendant, whom he appointed sole executor of his Will.

The Court stated that it was desirable, with reference to the terms of the Razeenamah, that the heirs of Myaram deceased should be made parties to the suit. Accordingly a supplemental plaint was filed, making Laudebhoy Ammaul, the widow and alleged sole heiress of Myaram, a Defendant.

The pleadings being completed, the Court proceeded to ascertain the issues of law and fact raised therein, and found that there were seven issues, of which the [407] second, third and fourth issues of fact, were alone material in this appeal. These issues were:—Second, whether the Plaintiff was, as the survivor of two illegitimate sons of a Hindoo woman, heir-at-law to his deceased brother. Third, whether Taukooram executed a Will in Defendant's favour under date the 16th of January, 1852. Fourth, whether under the Razeenamah in appeal suit, No. 92, of 1843, Myaram and Chundoolaul and their heirs take upon the death of Taukooram his one-fifth share of the Kadalkoody Zemindary to their own use, or in trust for Taukooram's heirs. Upon the above issues, the Court recorded the following points to be established by the parties respectively. Under the third issue, the Defendant was to prove—first point for the Defendant, that the deceased Taukooram left a Will on the 16th of January, 1852, constituting the Defendant his heir. “First point for the Plaintiff—Under the fourth issue the Plaintiff was to put in a copy of the Razeenamah in appeal suit No. 92, of 1843.”

Before any evidence was adduced, the Defendant Chundoolaul died, and on the motion of the Plaintiff the suit was revived, and Oottaram, Myaram, and Taukooram, the minor sons of Chundoolaul, by their guardian, Bhavany Prasad, were made Defendants thereto.

The following question was then submitted by the Zillah Court to the Pundit of the Sudder Dewanny Court for his opinion: “You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother,” to which the Pundit returned the following answer. “If the illegitimate sons referred [408] to in the question were undivided, the estate of one of them would, after his death, devolve upon the surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother.”

The Will alleged to have been executed by Taukooram in 1852, and the Mookternamah executed by Taukooram in 1850, the identity of these documents, and the execution thereof, were deposed to by three of the four attesting witnesses to the Will, and by four of the five attesting witnesses to the Mookternamah.

The Judge, Mr. Woodgate, pronounced the Zillah Court's decree, by which it decided that, in accordance with the opinion of the Pundit, the Plaintiff was the

heir of his divided brother, Taukooram; that the Mookternamah and Will were forgeries, and that the Razeenamah did not debar the Plaintiff from succeeding to the share of the Kadalkoody estate as next heir to his deceased brother, as that document passed only a right of management, and not a beneficial right or interest in the one-fifth share of Taukooram.

Against this decree an appeal was preferred by the guardian of the infant Defendants to the Sudder Adawlut at Madras.

On the 27th of November, 1856, the Sudder Court, consisting of Messrs. Anderson and Harris, pronounced the following judgment:—The Court observes that the Mookternamah was not registered in the Zillah Court, nor was the stamp paper on which it is engrossed purchased by one of the parties to the same, nor did the Defendant act upon that document previous to the death of Taukooram as he ought to have done, had it been genuine. [409] Both it and the Will have been discredited by the Lower Court, and nothing has been advanced in the appeal to lead this Court to consider that the evidence has not been correctly appreciated. As the property was not hereditary, but devised to Taukooram by his father, Hughes, the former had an undoubted right to devise it by Will; but the Court sees no reason to disturb the judgment of the Lower Court, which has declared the Will and Mookternamah not to be genuine documents. The judgment then proceeded, “As regards the right of the Plaintiff to inherit the property of his uterine brother Taukooram, the Court is decidedly of opinion that these persons must be looked on as Hindoos, and subject to Hindoo law. The question as to the Hindoo law of the case has been fairly put to the Pundits of the Court, and the Court is of opinion that the Plaintiff has a right to inherit the property of Taukooram. The Court, however, find it necessary to modify the award of the Civil Judge as regards the one-fifth share of the Paliapur of Kadalkoody, regarding which a Razeenamah was executed by the parties in settlement of appeal suit, No. 92 of 1843. In that suit, the present Plaintiff sued for a one-fifth share of the above Zemindary, and obtained a decree in his favour; this was appealed against, and the above Razeenamah was filed in the appeal suit. It must be borne in mind that as the present Plaintiff was Plaintiff also in that suit, it was his rights which were then specially to be settled. Now, in the Razeenamah, it is distinctly stated that the above Zemindary was never to be divided, nor were the sharers to convey or burden their shares;—a provision was made, not only for the disposal of the property during the life of Taukooram, [410] but also a distinct arrangement made for its disposal after his death:—the very contingency so provided for has led to the present suit. The provision made for this contingency was, that the Plaintiff, or heirs appointed by him, should be invested with the management of his (Plaintiff's) one-fifth share alone, and that the management of the other four shares should vest in Myaram and Chundoolaul or their heirs. It is subsequently provided that without ever dividing the Paliapur, the profits accruing therefrom for the share of each shall alone be divided and enjoyed according to the amount of profits. During the lifetime of Taukooram, the latter was to manage the whole Zemindary, and pay annually into Court the sum of Rs. 1300, as the value of the produce of Plaintiff's one-fifth share: after the death of Taukooram, the Plaintiff was himself to manage this one-fifth share, but it was clearly the intent of the Razeenamah that the right of the Plaintiff should be confined to the enjoyment of his one-fifth share with the management thereof. The right and title to the management and enjoyment of the profits of the other four shares was clearly vested in the other shareholders. The Court is, therefore, of opinion that the Plaintiff is not entitled to recover the one-fifth share of the Zemindary which belonged to Taukooram, and they resolve to reverse that part of the decree of the lower Court, which awards that share to the Plaintiff. In other respects the decree of the lower Court is confirmed.”

The Plaintiff applied for review of judgment, which the Sudder Court admitted. Ramaprasad, the Plaintiff, died, and the suit was revived by the Appellant, Myna Boyee, his widow and [411] heiress; and Era Saul, the executor and devisee, and Hary Ram, claiming to be the other devisee of the deceased Plaintiff.

The application for a review of judgment came on again before the Sudder Court, and an Order was made by the Court, on the 12th of November, 1857, to the effect that no grounds whatever had been established which would justify the Court in

interfering with the judgment already passed in the case. That the Court considered that the arguments used were such as could only be dealt with on a regular appeal from the judgment in question. The Court did not think that they could legally review, or be justified in reviewing, a judgment, because the decision was not that which, perhaps, the present Court would give; and the Court found that the matter in issue had been fully discussed, due consideration given, and that no grounds existed for considering that the merits of the case had not been fully understood, and rejected the application for review, with costs.

The Appellants applied to the Sudder Court, for leave to appeal to Her Majesty in Council from so much of the decree of the 27th of November, 1856, as declared, that Ramaprasad was not entitled to recover the one-fifth of the Zemindary which belonged to Taukooram, and which reversed that part of the decree of the Zillah Court, which awarded the one-fifth share to Ramaprasad, and also from the Order passed on the 12th of November, 1857. The Court admitted the appeal.

The appeal was argued by Mr. Rolt, Q.C., and Mr. Ayrton, for the Appellants, and [412] Mr. R. Palmer, Q.C., and Mr. W. H. Melvill, for the Respondents.

A preliminary objection was taken by the Respondents, who submitted that the Sudder Court were wrong in admitting the appeal, the value of the matter in dispute being under the sum of Rs. 10,000, and that no special certificate was made on admitting the appeal in accordance with Rule II. of the Order in Council of the 10th of April, 1838, so as to preclude the Respondents taking objection as to the value of the matter in dispute in the appeal and the admissibility thereof; and they further submitted that if the appeal was to be considered as properly admitted, then the whole matter originally in dispute including the question of heirship ought to be open to adjudication at the hearing of the appeal, although no cross appeal had been lodged by the Respondents from that part of the decree.

The Lord Justice Turner.—As leave has been granted by the Court below, the objection to value of the subject-matter in dispute cannot be sustained, but their Lordships are of opinion, that the question of heirship is not open to the Respondents upon this appeal from the decree of the 27th of November, 1856, which decree amounts to a declaration of the Court that the Plaintiff was entitled to inherit the property of Taukooram as heir. Their Lordships, however, are of opinion that, under the circumstances of the case the Respondents ought not to be deprived of the opportunity of bringing that question before the Court: and they think, therefore, that as to this particular portion of the decree leave ought to be given to the Respondents to bring that [413] point distinctly before the Court by petition for leave to appeal, if the Appellants require a petition of appeal to be lodged. If the Appellants be content to waive the question of form and have a decision of the question upon the merits, in that case their Lordships will consider and dispose of the case as it now stands; but if on the other hand the Appellants adhere to the objection that the question is not open to them before this Court, then the Order will be to give the Respondents liberty to present a petition of appeal confined to this particular point, their Lordships, under the circumstances, thinking it not right now to give the Respondents leave to open the whole of the decree (see as to the allowance of a cross appeal, though not applied for in the Court below, *Nana Naram Rao v. Hurree Punt Bhao*, 6 Moore's Ind. App. Cases, 464).

The Appellants' Counsel stated that they were willing to have the case argued without the necessity of lodging a petition for leave to appeal by the Respondents.

The appeal was then heard upon the whole decree of the Sudder Dewanny Court.

It was contended, that the Will and the Mookternamah, alleged to have been executed by Taukooram, were forgeries.

Upon the question, whether the Razeenamah operated as a partition, it was insisted, that Ramaprasad was precluded from claiming, upon the death of Taukooram, an interest in any portion of the Kadalkoody estate beyond his own one-fifth share. Strange's "Hindu Law," Vol. I., p. 201 (2nd Edit.), was referred to.

As to the inheritance of illegitimate children, W. H. Macnaghten's "Principles of Hindu Law," Vol. II., note, [414] p. 15, was cited; and, as to the right of a

uterine brother to succeed to his deceased brother's estate, W. H. Macnaghten's "Principles of Hindu Law," Vol. II., pp. 66-7.

And, as to the power of a Hindoo, to make a Will, *Nagalutchmee Ummal v. Gossao Naderaja Chetty* (6 Moore's Ind. App. Cases, 309), and the authorities there cited, were relied upon.

Their Lordships' judgment was delivered by

The Right Hon. Lord Kingsdown (Aug. 2, 1861).—The facts of this case, so far as they are material to the questions we have to consider, lie in a narrow compass. Mr. George Arthur Hughes, an Englishman, living in India, had two illegitimate children, named Ramaprasad and Taukooram, by a native woman, a Hindoo, who appears to have been a married woman, to have deserted her husband, and to have lived in adultery with Mr. Hughes. This woman appears to have been originally of one of the privileged classes, and not of the Soodra class. Mr. Hughes had also three other illegitimate children, Myaram, Chundoolaul, and Ootaram, by another native woman. By his Will he devised the estate of Kadalkoody to his five illegitimate children in equal shares; to each a fifth share. The children appear to have been brought up as Hindoos and to have lived at first as an united family, but some time after Hughes's death Ramaprasad, the original Plaintiff in the suit from which this appeal arises, instituted a suit for partition and obtained a decree accordingly. There was an appeal from this decree, and pending this appeal the parties compromised, and a Razeenamah, or deed of compromise, was entered into between them. This deed, to which four of the chil-[415]-dren, one of whom, Chundoolaul, had purchased the share of Ootaram, the fifth of the children, who had died, after reciting the Will of Mr. Hughes and the above-mentioned purchase, proceeded, as follows: [His Lordships here read the deed of Razeenamah, *ante* [8 Moo. Ind. App.], p. 402.]

In pursuance of the arrangement made by this deed Taukooram had the management of the estate during his life, and paid to Ramaprasad the annual sum stipulated for by the deed. On the 21st of January, 1852, Taukooram died intestate and without having had issue, and on his death Chundoolaul took possession of all his real and personal estate, including his one-fifth part of the Kadalkoody estate. The plaint in the suit which has given rise to the appeal before us, was filed on the 18th of September, 1852, by Ramaprasad claiming as the heir of Taukooram against Chundoolaul for the recovery of the real and personal estate of Taukooram. The Defendant, Chundoolaul, by his answer in the suit, amongst other grounds of defence which are not material to be mentioned, stated, that in the partition suit the Plaintiff had declared that he was not related to Taukooram; that if they were co-parceners they were so through their father and not through their mother; and that the Hindoo law was not applicable to them. That each of them having received a certain amount of property under Mr. Hughes's Will, their interest were distinct, and one of them had nothing to do with another's portion; that was the *status* in which Ramaprasad had, in the partition suit, prayed the Court to place him; and that the decree in that cause was that the parties were not amenable to the Hindoo law, and he insisted that in the teeth of these proceedings in the former suit it was not open to the [416] Plaintiff to claim Taukooram's share of the estate of Ramaprasad; he relied also upon the Razeenamah, insisting that Taukooram's intention that his share of the Kadalkoody estate should on his death pass to him, the Defendant, was evident from the fact of that instrument containing a detailed provision that Taukooram's share, and the management of the other four shares of the estate, should be held in succession by the Defendant and his heirs, or other persons appointed by him; he also set up a Mookternamah and a will alleged to have been made by Taukooram in his favour.

The Plaintiff, by his replication, explained the allegations made by him in the partition suit, and denied that they bore any such meaning as was imputed to them by the answer. The rejoinder was a mere recapitulation of the answer.

The only material evidence in the cause was, on the part of the Plaintiff, the Razeenamah, and on the part of the Defendant, the Mookternamah, and the Will, with the depositions of some witnesses in support of those instruments. There was no evidence as to the Plaintiff's title as heir; but upon this point the following

question appears to have been submitted to the Pundit of the Court of Sudder Adawlut:—"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother?" And to this question the following answer appears to have been returned:—"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

[417] Upon the hearing of the cause in the Zillah Court, the Judge was of opinion that the Mookternamah and the Will were forgeries, and that the provisions of the Razeenamah had reference to the management of the estate, and did not affect the right to it; and resting upon the opinion of the Law Officers, he treated the allegations in the partition suit as irrelevant, and considered the Plaintiff's title as heir to be established. The decree of the Zillah Court, therefore, was wholly in favour of the Plaintiff.

From this decree the heirs of Chundoolaul, who had died in the meantime, appealed to the Sudder Adawlut; but the Judges of that Court were also of opinion that the Mookternamah and the Will were not genuine documents; and as regards the right of the Plaintiff to inherit the property of his uterine brother Taukooram, they were of opinion that those persons must be looked upon as Hindoos, and subject to Hindoo law; and the question as to the Hindoo law of the case having, as they thought, been fairly put to the Pundits of the Court, they considered that the Plaintiff had a right to inherit the property of Taukooram. They accordingly, by a decree dated the 7th of November, 1856, affirmed the decree so far as respects the estate of Taukooram not included in the Razeenamah; but as to the one-fifth part of the Kadalkoody estate, which was included in the Razeenamah, they were of opinion that the intent of that instrument was, that the right of the Plaintiff should be confined to the enjoyment of his own one-fifth share, and the management thereof, and that the right and title to the management and enjoyment of the profits of the other four shares was vested in the [418] other shareholders, and they accordingly held that the Plaintiff was not entitled to recover the one-fifth share of the Kadalkoody estate, which belonged to Taukooram, and reversed that part of the decree which awarded that share to the Plaintiff.

The Plaintiff, however, afterwards obtained, as it would appear *ex parte*, an Order for the case to be reheard, but he died soon after the making of this Order, without having had issue.

By his Will, which appears on these proceedings to have been disputed, he devised the Kadalkoody estate to the now Appellants, and appointed two of them to be his executors. They accordingly revived the suit, and the Sudder Court having subsequently, by an Order dated the 12th of November, 1857, discharged the Order for re-hearing, upon the ground that the case was more proper to be the subject of appeal, they obtained leave to bring, and have accordingly brought, this appeal, which is from so much of the decree of the 7th of November, 1856, as reversed the decree of the lower Court, so far as it awarded to the Plaintiff Taukooram's share of the Kadalkoody estate, and also against the Order of the 12th of November, 1857.

With respect to the objection raised by the answer that the Plaintiff was precluded, by reason of the allegations made by him in the partition suit, their Lordships are of opinion that no weight is due to that objection. The allegations referred to could, at the highest, operate only, under the circumstances of this case, as an admission against title, on a particular view of the legal *status* of the party, in point of law, which, if it were erroneous, ought not to [419] have bound the party in another suit for a different object, the Court having before it all the facts relating to the true *status*.

The immediate question raised by this appeal, therefore, is, whether the Sudder Court was right in the construction which it put upon the Razeenamah. Their Lordships find themselves unable to agree with the Sudder Court upon the construction of this deed. The deed had its original in the partition suit. The result of that suit and of the decree which had been made in it, if carried out, would have been to sever, at all events, one-fifth of the estate, and to destroy, to that extent at least, not only all unity of interest but all power of joint management.

The deed appears to have been framed for the purpose of avoiding these results. It provides that there shall be no sale, mortgage, lease, or security of any separate share: that, during the life of Taukooram, he shall have the management of the whole estate, Ramaprasad receiving a fixed income; and that after his death, Ramaprasad shall have the management of his fifth, and the management of the other four-fifths shall be entrusted to Myaram or Chundoolaul; but these provisions point to management, and to management only. They effect the mode of enjoyment, not the right of property. That right does not appear to be affected by the deed otherwise than by the particular provisions against alienation—provisions which, it is to be observed, are carefully limited by the deed, and do not extend to prevent alienation by devise, for it is plain that the deed contemplates that each co-sharer might devise. It is scarcely possible to suppose that it could be intended that the right to devise should be preserved, but that the right of inheritance [420] should be taken away. Failing this argument upon the construction of the Razeenamah, the Respondents contended that the title of the Plaintiff was nevertheless defeated by that instrument. They argued that all the illegitimate sons were to be considered, as they were considered, and, as it appears to their Lordships, rightly considered, in the Courts in India, to be Hindoos; and that the sons, except Ramaprasad, having continued in common, Ramaprasad could not, by the Hindoo law, be entitled to any portion of the Taukooram's share.

This argument renders it necessary to consider what sort of a partnership was constituted by the actual agreed union of the other sons. They were not an united Hindoo family in the ordinary sense in which that term is used in the text-writers on the Hindoo law: a family of which the father was, in his life-time, the head, and the sons in a sense parceners in birth, by an inchoate though alterable title: but they were sons of a Christian father by different Hindoo mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindoo joint family. On the death of each, his lineal heirs, representing their parent, would, by the effect of the agreement, enter into that partnership; collaterals, however, could not so enter by succession, unless the Hindoo law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindoos, would come in only on failure of the heirs.

A further suggestion was made on this part of the [421] case, that from the peculiar *status* of the parties it was to be presumed that the intention of the instrument was to bar the State by the arrangement between the parties, *inter se*, as to the enjoyment of the property, but no such intention is to be collected from the instrument, or is disclosed by the evidence; and it may be added that the arrangement for the parties continuing in common would, as already observed, include survivorship, and that it could, therefore, only be on failure of heirs of the last survivor that the claim of the State could arise. The instrument too, in its dealings with the management, contemplates the existence of *haeredes facti*, and the parties, therefore, cannot but have been aware that they had in their power the means of protection against any claim of the State. So far, therefore, as the immediate question raised by this appeal is concerned, their Lordships are of opinion that the decree complained of cannot be maintained.

A further question was also raised on the part of the Respondents, whether the appeal, although from part of the decree only did not, open to them, the Respondents, the whole decree. Their Lordships were of opinion that it did not, but they thought that under the circumstances of this case leave should be given to present a cross appeal, and the Appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole decree should be considered as open.

The whole case as to the Mookternamah and the Will, and as to the Plaintiff's title as heir to Taukooram, was thus open to the Respondents. Nothing was said by them as to the Mookternamah or the Will, and it is unnecessary, therefore, to refer further to [422] those documents, which no doubt were forged. The contention was as to Ramaprasad's title as heir. This title appears to have been affirmed by

both the Courts in India upon the faith of the opinion given by the Law Officers. It does not appear to have been further investigated or inquired into.

The correctness of this opinion was questioned by the Respondents, who objected to the mode in which the question was submitted to them, but the Court declined to take another opinion, and adopted the opinion of these Officers, apparently without noticing its inconsistency with the ordinary text expositions of the Hindoo law. The question submitted to the Law Officers does not include some important facts which existed in this case. Every such reference to a suit, where it may bind a right, should embrace all important facts proved or admitted in the cause, which may affect the conclusion; and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained but stated, and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of proved text-writers, those who give the opinion should be asked further to explain that which appears *prima facie*, thus irreconcilable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

In this case it was very important to point out to the notice of the Law Officers that the mother of the Plaintiff and of his uterine brother was a wife living [423] in adultery; originally, as above mentioned, one of the privileged classes; that her sons were adulterous issue; that the property had never been the mother's, but had been bequeathed by the father, an Englishman, to his sons, as his sons, and was meant by him to be a parental provision for his children. It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as collaterals *inter se*.

On the terms of the answer, the Law Officers may have considered the case merely as one of succession amongst Soodras proper, and may have acted simply on a wider view of the law of succession amongst Soodras than the written text authorities afford. They may have viewed it as enlarged by some general custom there prevalent extending the law, according to the principles of the Hindoo law which would support such custom, if in fact such custom has obtained.

It is, however, impossible to treat these sons as the sons of a Soodra father; if the Plaintiff and Taukooram be viewed as the sons of a Soodra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not a proof.

If amongst Soodras proper a course of decisions, or other evidence of the prevalence of a general custom, support a heritable capacity of illegitimate Hindoos beyond that which the writers' text-books establish, these decisions have not been made known, nor has that custom been established. But a title such as the [424] present, so wholly irreconcilable with the expositions of any text-writer, and, unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the Appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship, *inter se*, to property which never was their mother's, would be at variance with legal principles.

Their Lordships have accordingly felt some difficulty in dealing with this part of the case. On the one hand, they are not prepared to act upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinions of the text-writers on the Hindoo Law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, more especially with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken is to remit this question to India for further investigation and consideration.

In the course of the argument on the part of the Respondents, an objection was

taken on their behalf to the title of the Appellants as the heirs of Ramaprasad, but this objection does not appear to have been entertained or considered by the Sudder Court, and their Lordships very much doubt whether it is competent to the Respondents to raise it upon this appeal, having regard to what must have been done in the cause.

Their Lordships, therefore, delivered the foregoing [425] judgment at the close of the sittings after Trinity Term, but they ordered their report to stand over until after the Long vacation, in order that the minutes might be fully considered by their Lordships and by Counsel; and the matter having been again brought before their Lordships on the 26th of November, 1861, the following minute was finally settled by their Lordships, with the assent of Counsel on both sides, on the 30th of November, 1861:

"The Appellants, having by their Counsel consented that the rights of the parties should be considered and dealt with in the same manner as if the Respondents had presented a cross appeal confined to the subject-matter of this appeal, viz., the share of Taukooram in the Kadalkoody estate, their Lordships humbly recommend to her Majesty that the decree of the Sudder Court of the 27th of November, 1856, be reversed, in so far as the same is complained of by the appeal, and that the appeal be dismissed in so far as it complains of the Order of the 12th of November, 1857, and that it be declared that the Razeenamah in the pleadings mentioned does not prejudice or affect the Appellants' claim to Taukooram's share of the Kadalkoody estate, and that the Mookternamah and the Will in the pleadings also mentioned were not genuine instruments; and that it be also declared that the aforesaid reversal of the said decree of the Sudder Court shall not in any way prejudice or affect the right of the Respondents to contest the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate upon any other grounds than those above mentioned, nor prejudice any objection which may be now open to the Respondents, and which they may be advised to take, to the title of the [426] Appellants as the heirs of Ramaprasad to the said share of Taukooram in the said Kadalkoody estate, and to any application they may be advised to make to the Sudder Court respecting the same; and that it be ordered that the Sudder Court do make all such further inquiry as may be proper and necessary as to the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate, and do proceed in the cause as respects that property according to the result of such inquiry; and that it be further ordered that, if it shall appear that Ramaprasad was entitled, as the heir of Taukooram, to the said share of the Kadalkoody estate, and that the Appellants are entitled thereto in right of Ramaprasad, the costs of this appeal be paid by the Respondents, and the whole costs in the Sudder Court be also borne by them, except the costs of the application for review, as to which, in that event, there should be no costs; but that, if it shall appear that Ramaprasad was not entitled as the heir of Taukooram, or that the Appellants are not entitled, in right of Ramaprasad, to the said share of the Kadalkoody estate, the whole costs of the case in the Sudder Court be dealt with as the said Court may direct, and that in that event there be no costs of this appeal."

[See *Collector of Masulipatam v. Cavalry Veneata Narrainapah*, 1861, 8 Moo. Ind. App. 529.]

[427] GEORGE LAMB and JOSIAH PATRICK WISE.—*Appellants*: BEJOY KISHEN DASS, DILLAWUR ALLEE GHOLAM ENSUFF and Others.
Respondents * [June 22, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Heard ex parte.

A suit was brought in 1852, to set aside an execution sale made in 1841, on the ground of irregularity in not complying with the provisions of Ben. Reg. XLV., sec. 12, of 1793, for the due publication of the sale. A summary suit, under Ben. Reg. VII., of 1825, sec. 5, had been brought shortly after the date of the sale by the judgment debtor, to set it aside on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852, that the notice of sale was affixed at the dwelling-house of the judgment debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852, that there was a town or village where the notification could be fixed as required by sec. 12, Ben. Reg. XLV. of 1793. The Sudder Dewanny Court held, that there had been an irregularity in the publication of the notice of sale, as it was not made within the ambit of the estate sold, and set the sale aside on that ground. Upon appeal, held by the Judicial Committee, reversing such decree,

First, that, as it did not appear that there was any town or village within the Pergunnah at which the notification required by the provisions of Ben. Reg. XLV., sec. 12, of 1793, could be affixed, there had been no irregularity in posting the notice at the house of the judgment debtor, so as to vitiate the sale, and,

Secondly, that, even if there had been an informality in that respect, it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards.

This was a suit, in the nature of an action of ejectment, brought in the Zillah Court of Dacca by the Respondent, Bejoy Kishen Dass, to oust the Appellants [428] from the possession of certain landed property, and with that object, to set aside a sale made by public auction to the Appellants, and for mesne profits.

The principal question raised in the suit below and by the appeal was, whether the sale by the Government Collector under an Order of a Civil Judge, in execution of his decree, ought to be set aside eleven years afterwards to the prejudice of the Appellants, the auction purchasers, for an alleged irregularity on the part of that Officer in the mode of publishing the notice of the intended sale, with respect to which alleged irregularity no material deviation from the mode prescribed by Ben. Reg. LXV. of 1793, sec. 12, was established by the Respondent, Bejoy Kishen Dass, nor was any pecuniary injury to himself shown to have resulted from the sale; and more particularly as the judgment debtor, who had availed himself of the remedy by summary suit given by Ben. Reg. VII. of 1825, sec. 5, cl. 2, shortly after the sale, to set aside the sale on the ground of irregularity, did not in that suit complain of the alleged irregularity as to the posting of the notice of sale, the objection urged in the present suit.

The principal facts of the case were as follows:—

The Respondent, Dillawar Allee Gholam Ensuff, and others, obtained a decree in the Zillah Court of Dacca against the principal Respondent, Bejoy Kishen Dass, [429] and others, and, after having made the usual application for execution of the decree, the Court issued an Order, directing the Government Collector of that Zillah

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessor.—The Right Hon. Sir Lawrence Peel.

to sell a certain share, namely, a 3 annas 18 gundas 3 c. 1 krant, out of a 10 annas 13 gundas 1 c. 1 krant share of Pergunnah, Ootur Shahpore, situate in the Zillah, belonging to the Respondent, Bejoy Kishen Dass, and two of the other Respondents, named Doyamoyee and Moheshurry, also judgment debtors and co-sharers with him, but excepting the rights of one, Ram Dass Dutt, who had previously purchased the interest of Doyamoyee in such share.

The Collector accordingly attached the share, lotted it for sale, and published the usual notice or notification of the intended sale, as required by Ben. Reg. XLV. of 1793. This notice, it appeared, was not affixed within the Mehal in which the property was situate, but at a place called Arrylazara, where the house in which the rents of the judgment debtor, Bejoy Kishen Dass, were collected, which house was within the estate sold, and, after some postponements, on the 30th of January, 1841, the share was put up to public auction in the Cutcherry of the Collector. Appellants purchased the same for the sum of Rs. 2105. The sale was afterwards confirmed by the Commissioners of Revenue.

In the month of April, 1841, Bejoy Kishen Dass commenced summary proceedings under Ben. Reg. VII. of 1825, sec. 5, cl. 2, to set aside the sale, by filing a petition in the Zillah Court of Dacca before the Principal Sudder Ameen, in which he stated, amongst other things, the postponement of the sale from the 23rd to the 30th of January, and the sale to the Appellants on the last-mentioned date, and alleged, that the price fetched at the sale was under the true value of the [430] share, with reference to the sums previously bid for it, and further alleged, that if the share had been sold on the 23rd of January, a larger sum would have been obtained for it; and prayed on that ground that the sale might be reversed and the share re-sold.

The Principal Sudder Ameen, before whom the summary suit was heard, on the 17th of April, 1841, ordered, that the sale should be set aside and annulled, and that a re-sale should take place, on the ground of irregularity, as the sale was not made on the day first appointed, and also as the share was, in his opinion, sold for an inadequate price.

The Appellants appealed from this Order to the Civil Court of the Zillah of Dacca, and the Judge of that Court, Mr. J. F. G. Cooke, by a proceeding of that Court, dated the 19th of May, 1841, reversed that Order, recording his reasons for so doing, as follows:—"Although the Principal Sudder Ameen, on the grounds stated by him, has reversed the sale, it does not appear to me that the sale was made in contravention of the law or established rules: for this reason, that though the sale was made several days subsequent to the date fixed, yet the *kyfeut* that has been recorded on the sale advertisement is not at variance with the established rules, nor are the biddings, made *ab initio*, and the sale which was concluded, incorrect according to the provisions of cl. 2, sec. 8, and cl. 2, sec. 14, Ben. Reg. XI. of 1822. It was not proper for the Collector to demand from Chunder Madhub the amount which he had bid at the first; for although the above Regulation has reference to arrears of revenue, there is nothing in addition thereto stated in Regulation XLV. of 1793. Under these circumstances, the Order of the Principal Sudder Ameen, [431] setting aside the sale at which the Appellants purchased the property, is not proper: for this reason, the Order of the Principal Sudder Ameen being reversed, it is ordered that a copy of this proceeding be forwarded to the principal Sudder Ameen, who is to consider the auction purchase of the Appellants as confirmed, and given intimation thereof to the Collector."

Bejoy Kishen Dass appealed to the Sudder Dewanny Adawlut at Calcutta, against this Order, and upon the hearing Sudder Court held, that nothing irregular had taken place in respect to the sale, and confirmed the Order appealed from.

The Appellants were put into possession of the share so purchased by them, on the confirmation of the sale by the Commissioners of Revenue, and continued in uninterrupted possession for about eleven years, until the 23rd of March, 1852, when the Respondent, Bejoy Kishen Dass, alone of the several co-sharers, commenced the suit *in forma pauperis*, out of which this appeal arose, by filing a plaint in the Zillah Court of Dacca against the Appellants, as auction purchasers, and the decree-holders and also against his own co-sharers, as Defendants, to set aside the sale to the Appellants, and to obtain possession of his own proportion of the share sold; with mesne profits. The plaint stated, that the sale was illegal, having been made in contraven-

tion of the existing laws and practice; and then set forth, in particular, two several alleged irregularities in the conduct of the sale, having reference to the notification and publication thereof:—First, that the notice of the sale was not published at the locality of the property sold, as prescribed by sec. 12, Ben. Reg. XIV. of 1793. Secondly, that the name of one Shah Newaz Khan, as a decree-holder, [432] was irregularly inserted in the sale notification, instead of the names of the decree-holders; and also that it was published in Kismut Arryhazara, which place was included in another Talook, Mahadeb Roy, instead of at the estate sold; and that for those causes the sale ought to be reversed, agreeably to the provisions of cl. i, sec. 5, Ben. Reg. VII. of 1825. The plaint also stated, that the Appellants had been in possession of the estate, and in enjoyment of the profits thereof, since the Order of the Judge of the Zillah Court in the summary proceedings, and that the Plaintiff's co-sharers had colluded with him, and, as they had not sued for the reversal of their respective proportions of the share, he had no other alternative but to institute the suit against the auction-purchasers, and the decree-holders.

The Appellants, the principal Defendants, by their answer, set forth the summary proceedings and the decrees of the Zillah Court and Sudder Dewanny Adawlut, insisting that by the latter decree it had been judicially decreed that there had been no irregularity in the conduct of the sale, according to the rules and practice of those Courts, and it was by the answer pleaded, with reference to the two grounds of irregularity set forth in the plaint, that they were of no avail, because the names of Dillawur Allee Gholam Ensuff and others, were written in the place of the decree-holders in the notification, which was duly published at the Plaintiff's house at Arryhazara, in which was the principal collection Cutcherry (office) of the estate sold, and which being the fact, the sale could not on that account be considered to have been illegally held, especially as the Plaintiff urged no objection as regarded the publication of the notification in the summary petition which he [433] presented for the reversal of the sale. The answer also asserted the regularity of the Collector's proceedings in postponing and adjourning the sale from day to day, and referred to a Circular Order of the Sudder Dewanny Adawlut of the 17th of July, 1846, to show that the Collector's proceedings were in accordance with what is stated in that Circular Order as the established practice; the answer moreover stated, that on the day of sale the property was publicly bid for and sold at the Cutcherry, in the presence of many people, and the Appellants purchased it in consequence of no other person having bid higher; and they submitted that, in such a case, the allegation that the property was sold at an inadequate price could not be a ground for the reversal of the sale.

The Plaintiff filed documentary proofs. Amongst these was a copy of the report of the Nazir of the Collectorate, dated the 15th of January, 1841, which stated that he had published two notifications of the sale through the Peon at Kismut Arryhazara, where the above property was situate, and that he had submitted to the Collector, the Peon's return and sooruthals (certificates) of certain persons resident in the neighbourhood of the publication of the notification. The return of the Peon who served these notifications was also put in evidence and which was as follows:—“Two notifications were delivered to me. No person on the part of the decree-holder having pointed out the locality of Talooka Kashee Ram Rae, but having pointed out Kismut Arryhazara as the locality of the aforesaid Talook and Zemindary, the notification was published in the house of debtors (Bejoy Kishen and others, judgment debtors aforesaid, having been previously mentioned in this return), in the presence of [434] Kawul Kishen Shaha, Kishen Chowkeedar, and others, inhabitants of Arryhazara, and I have brought up a sooruthal of the said persons.” The Appellants' witnesses proved that the principal Cutcherry for the collection of the rents of the share of the Respondent, Bejoy Kishen Dass, was in his own dwelling-house, at the time when the sale notification of the share was there published by the Peon of the Collectorate. No evidence was offered by the Respondent to contradict the facts proved by the Appellants, that the notification of the then intended sale was in due time published at his own dwelling-house, being the office also for the collection of the rents of his share, or to show that he had not notice of such intended sale; or that he had ever at any time objected to such publication, or had done otherwise

in respect thereof than acquiesce in the property of the publication up to the time of filing his plaint, eleven years after the sale.

The hearing of the suit took place before the Principal Sudder Ameen of the Zillah of Dacca, and on the 6th of February, 1854, he pronounced his decree, in which after disposing of the two first issues, by declaring that they do not operate as a bar to the suit, he decreed against the claim of the Respondent, as follows:— "In the trial of the third issue it is held, that although it has appeared that the Plaintiff has stated several objections as regards the incorrectness of the sale, yet not one is worthy of credence; because the first objection is, that in contravention of section 12, Regulation XLV. of 1793, the sale notification was not published at the estate to be sold. Now, it is no secret, that the object of publishing the notification at the property to be sold is, [435] that the proprietors of and persons connected with the property put up for sale may come to the knowledge of the sale; and this object is attained by the publication of the notification at a place where many persons of that locality collect, such, for instance, as the principal village Cutcherry, Bazar, etc. In section 8, Act IV. of 1846 (which has been enacted in elucidation of the aforesaid section 12), it is enacted, that the sale notification is to be published at a conspicuous place on the property, attached or contiguous to it; therefore, without doubt, by the term, 'principal village,' as stated in section 12 aforesaid, is meant such a locality of the land to be sold where many people reside; and from copy of the report of Bungo Chunder Bose, Nazir of the Collectorate, dated the 15th of January, 1841, it is clear, that the sale notification was published at the house of the Plaintiff, the proprietor of the property to be sold, and hung up at the Thannah of Roopgunge; and from the evidence of six of the witnesses of the Defendants, it is established, that the Plaintiff's house was close to the collection Cutcherry of the estate to be sold; therefore, in my judgment, according to the intent of that section, the publication of the notification at the collection Cutcherry of the Plaintiff's dwelling-house was sufficient. This view is supported by the Sudder Dewanny report, dated the 7th of July, 1853, in the case of *Eknatoes Panioty v. Shepherd*, in which it was held, that the publication of the notification at the debtor's house is to be considered sufficient. The other objection is, that in place of the names of the decree-holders, the name of Shah Newaz Khan was inserted in the sale notification; but looking at the copy of the notification, the name of Shah Newaz [436] Khan does not appear; rather it is evident from the report and proceeding of the Collector, dated the 30th of January, 1841, that the names of the decree-holders were written in the original notification, and that the sale in the case of the execution of the decree of the decree-holders was conducted with great regularity; therefore, this decree must be adjudged to be entirely false. The third objection is, that the Collector not having made the sale on the 23rd of January, 1841, the date fixed, sold the property on the 30th of January, or seven days afterwards, in contravention of law. Now, on looking at the copies of the notification and the proceeding of the Collector, it appears, that for want of time the sale was not made by him on the 23rd of January, but that he recorded a *kyfeut* of the cause of each day's postponement on the back of the sale notification, as prescribed by the sale laws, and held the sale on the 30th of January: therefore, this objection is considered groundless, as the Plaintiff has not submitted any reason to prove the illegality of the sale. The fourth objection is, that in contravention of section 13, Regulation XLV. of 1793, the estate was resold, without the publication of a fresh notification, on the 30th of January. On looking at the section aforesaid, it appears, that in the event of the auction purchaser not depositing the earnest-money, the sale is to be made *ab initio*; but the Plaintiff has submitted no precedent to prove that the words *ab initio*, as stated in the aforesaid section, means the publication of a fresh notification. It is ordained in section 5, Act IV. of 1846, which explains the aforesaid section 13, that in the event of the earnest-money not being paid, the property is to be forthwith resold: therefore, the words, *ab initio*, used [437] in sec. 13, and in lieu of which the word 'forthwith' is inserted in section 5 aforesaid, means that the first sale is to be held as never having taken place, and having had no existence; and a second sale is to be held according to the injunction in the said first notification, in the same way as if the property were sold for the first time; and, in the said second sale, all the compliances of a first sale are to be carried into effect. Besides, the orders for attachment and publication of the sale notification are passed prior

to the sale, and not subsequent to it. Objections fifth, sixth, and seventh, relating to the property having been sold at an adequate price, and to the Collector having rejected the petition or the decree-holders to stop the sale, are considered worthless, as they do not in any way show cause for the sale being invalid, because by no law can inadequacy of price be considered a cause for rendering a sale incorrect; and without an Order from the Civil Court the Collector had no power to stop the sale, so that his rejection of the decree-holders' petition could afford no ground for holding the sale irregular. In short, there do not appear to be any grounds for saying that there was any irregularity in the sale; and this action seems to be improper, and instituted for the purpose of giving trouble, because, from the commencement, *ie.* from the attachment and sale, the Plaintiff has instituted several summary suits, and afterwards instituted an action on a kubala through Radha Kishore, claiming on it the several of the sale, and which he maintained up to the Sudder Dewanny; and after that this worthless plaint is brought *in forma pauperis*, for the purpose of ruining the decree-holders, and harassing the auction-purchasers." And it was accordingly ordered, that the suit be dismissed.

The Respondent, Bejoy Kishen Das, appealed to [438] the Sudder Dewanny Adawlut at Calcutta from this decree.

The appeal was heard before Messrs. Raikes, Colvin, and Sconce. The Judges differed in opinion. Messrs. Raikes and Colvin were of opinion, that the decree of the Court below ought to be reversed and the sale annulled. Their recorded judgment was as follows:—"It is admitted by both parties that the sale notice was published by affixing it to the Plaintiff's house at Arryhazara: the points for determination are, whether Arryhazara, the village where Plaintiff has his dwelling-house, is within the property advertized for sale, and if not, whether the publication of the notice at that place fulfils the requirements of the law, as held to be the case by the Lower Court. We observe that it was clearly and distinctly averred by the Plaintiff, in his plaint, that the notice was not published on the spot, as required by section 12, Ben. Reg. XLV. of 1793, but at the village of Arryhazara, in Talook, Mahadeb Roy: it is also shown by the return of the Peon who affixed the notice of sale at the residence of the Plaintiff, that the notice was served in that manner, while the Defendants have not in their answer alleged, that Arryhazara is within the precincts of the Mehal, but have contended for the legality of the publication, as having been made at the dwelling-house of the Plaintiff, where the collecting Cutcherry was also situated. It has, however, been urged in this Court that the Mehal sold consisted of a fractional portion of Pergunnah Oottur Shahpore, within which Pergunnah, Arryhazara is situated, and that it is consequently a village of the Mehal sold, and service of notice at that place was, therefore, a sufficient service to protect the sale. It has been, however, explained, and the explanation [439] stands uncontradicted, that the Mehal advertized for sale is called Duftera Lukheenarian and Kishenram Roy, consisting of 10 annas 13 goondas 1 couree and 1 krant of Pergunnah, Oottur Shahpore, and that the remaining portion of the Pergunnah constitutes a distinct and separate Mehal under the name of Talook, Mahadeb Roy, within which, and not within Duftera Lakheenarian and Kishenram Roy, the village of Arryhazara lies. The return of the Peon who served the notice distinctly states that, as no one on the part of the decree-holder pointed out to him the locality of Talook, Kishenram Roy, he affixed it at the residence of the debtors in Arryhazara, Talook Mahadeb Roy. Now, it is clearly incumbent on the Defendants to deny or to controvert this part of the case, whereas they have not attempted to meet Plaintiff's averments, further than by tendering evidence to show that the collecting Cutcherry of the Plaintiff was held at the place where he resided, and by pleading that the publication of the notice at that place met all the requirements of the law. We must, therefore, hold the finding of the Lower Court to be that the notice was published at the dwelling-house of the Plaintiff, and that as the Cutcherry of the Plaintiff was at or contiguous to their house, the publicity thereby given to the sale advertisement was equally as effective as if the notice had been published on some spot within the Mehal, and the requirement of the law, therefore, fully accomplished. The law, however, see sec. 12, Reg. XLV. of 1793, under which process of sale was held, in this instance admits of no such lax interpretation. It provides, that publication of the notice shall be made at 'the principal town or village in the lands to be sold,' and although we are of

opinion, [440] that the length of time which has elapsed since the sale was made would fairly entitle the Defendants to be relieved from the burthen of proving that the place selected for publishing the notice was 'the principal town or village in the lands sold,' we do not think we can pass over the fact made evident in this case that the place of publication was not in the lands at all, or judicially determine that some other kind of notice was substituted for that specified and directed by the law. We must, therefore, in conformity with former precedents (see the case of *Ranee Moosidun v. Mussumat Roop Kowur*, 3rd October, 1844, Vol. VII., p. 184, Select Reports, and case of *Brijlul Oopaydhya*, Petitioner, 1st August, 1850, Summary Reports, and without reference to the lapse of time, Plaintiff being within the period allowed by law, hold that the informal publication of the notice vitiates the sale and renders it necessary that we should reverse the judgment of the Lower Court, and cancel the sale. It is, therefore, ordered, that the judgment of the Principal Sudder Ameen be reversed, and the sale annulled. Let possession be decreed to the Appellant on depositing the amount of purchase-money, without interest, within the period of one year from this date; but in consideration of the time, nearly twelve years, which elapsed before bringing the suit, the purchasers will not be called upon to account for (see case of *Musst Ram Mulla* and others, Appellants, v. *Mohummud Idrak* and others, Respondents, decided 4th September, 1850) wasilat during his possession previous to date of suit. Let the Appellant receive from the Defendants, who are the Respondents, the costs of this Court, according to the account prepared by the khurchanuvees, together with interest [441] thereon from this date to the date of realization; and for the costs incurred in the Zillah, and let a petition be preferred to the Zillah Court, from whence an Order will be passed for payment agreeably to the purport of the Circular Order, dated the 4th March, 1836."

The dissentient Judge, Mr. A. Sconce, stated the grounds of his difference of opinion with the majority of the Court, and of his reasons that the decree of the Zillah Court ought to have been affirmed, in these terms:—"It is with very great difficulty that I form a definite opinion upon the point now before us. We are required by the Plaintiff, whose suit was instituted in March, 1852, to set aside an execution sale made on the 30th of January, 1841, and the first ground set forth by the Plaintiff for quashing the sale is, that the publication of the intended sale had not been made, as provided by sec. 12, Reg. XLV. of 1793, in the principal town or village in the lands to be sold. So far as we can judge of the facts from the evidence submitted to us, it appears that notification of the sale was published in Mouzah, Arrybazara; that this village did not form part of the estate sold, but that as the residence of the judgment debtor and the Cutcherry at which, by his tenantry, his rents were paid to him, were situated within this village, the requisitions of the law were presumed to be complied with by notifying the intended sale there. Reg. XLV. of 1793, declares what forms should be followed previous to sale, but it does not contain any provision for setting aside sales on the ground of informality. The only assistance furnished in our law for the determination of such questions when they should arise is cl. i., sec. 5, Reg. VII. of 1825. A doubt had arisen, whether illegal sales [442] could be summarily annulled by the Civil Courts without a regular suit, and accordingly by this Regulation it was provided, that if within one month after the sale any material deviation from the mode of sale prescribed by the Regulation was brought before the Court ordering the sale, it was competent to that authority to declare the sale to be null and void. Here then the rule for the Courts to follow in discussing alleged irregularities in the sale proceedings, is to determine whether or not the deviation alleged to have occurred be a material deviation from the mode of sale laid down in the law. It is not only a deviation, but a material deviation, that by Regulation VII. of 1825 our Courts are required to look to, and I apprehend that the fair construction of these words is, that the irregularity in each case complained of should be shown to have materially, or, as I would understand, prejudicially affected the completed sale. It may be said, that such a construction of the law is too indeterminate, and furnishes no definite rule of action for the disposal of such cases as the present; but it seems to be the manifest purpose of the law not to declare absolutely that the omission of any one form constituted an illegal sale, but to leave it for the Courts to consider in each case whether or not the

non-compliance with any specific form was a material evasion of the law. In this case, as I have said, the suit was instituted more than eleven years after the sale objected to occurred. So far the Plaintiff may not unjustly be held not to have considered the asserted flaw to have been material to his interests, or he would have asserted it sooner. Besides, though the Plaintiff did by summary petition in the Zillah and in the Sudder Court contest the [443] validity of the sale immediately on its completion, he took no objection to the Mofussil notification. Here, again, I conclude, is evidence that the Plaintiff was not conscious that any material defect in the sale had arisen from an inexact service of the notification at his place of business. And, further, though I am far from arguing that it is competent to Officers effecting sales to substitute forms for those laid down in the law, we have in this case evidence that there was no intention to evade the law, as, both at the Plaintiff's residence and at the police Thannah, notifications of the intended sale were published. I observe, that on the 26th of May, 1853, on the appeal of Hurrooondree and others, a case was decided in this Court in which the non-compliance with the forms laid down in sec. 12, Reg. XLV. of 1793, was also pleaded. By this law, notification of the sales was required to be taken in the office of the Secretary of the Board of Revenue, and in that case the plea was taken that no such notification had been made. It was held, however, that as the Commissioners of Revenue, appointed under Reg. I. of 1829, had succeeded to the powers of the Board of Revenue (with certain restrictions), it was not to be presumed, with reference to the peculiar constitution of the Commissioner's Office, that notifications necessary to be made in the Board's Office should, instead thereof, be made in the Commissioners'. The appeal decided in 1853 differs from the present; but so much is inferable from that decision, that the Courts are competent to determine that the omission to comply with the whole forms prescribed by sec. 12, Reg. XLV. of 1793, does not necessarily import such an illegality as compels them to set aside sales, in concluding which the [444] omission may have occurred. Upon the whole, then, I am not satisfied that the Appellant has shown that he is entitled to the relief claimed upon the informality referred to."

By the final decree of the majority of the Court it was ordered, that the judgment of the Principal Sudder Ameen be reversed, and possession decreed, without mesne profits, to the Respondent, Bejoy Kishen Dass, on depositing the amount of purchase-money, without interest, and that the Appellants should pay the costs, with interest from the date of their decree.

The present appeal was from this decree.

As the Respondent did not appear the appeal was heard *ex-parte*.

Mr. R. Palmer, Q.C., (with whom was Mr. Leith) for the Appellants.—It is submitted that this decree cannot be upheld. First, the publication of the notification of the intended sale substantially complied with the requirements of Ben. Reg. XLV. of 1793, sec. 12. The rents were collected and paid into the judgment debtors' Cutcherry at Arrybazara, the village at which the notice was affixed. No town or village was proved in the evidence to be on the land sold. Now, the Act, No. IV. of 1846, sec. 8, supplies the defect in Ben. Reg. LXV. sec. 12, upon this point, by inserting the words, "town or village," which is "nearest the land to be sold." The cases relied upon by the Sudder Court of *Ranee Moradun v. Mussamat Roop Kowur* (7 Ben. Sud. Dew. Rep. 184), and *Mussamat Ram Mulla v. Mohammad Idrak* (13 Ben. Sud. Dew. Rep. 462), do not, there-[445]-fore, apply. There is no provision in the Regulations declaring a sale by public auction in execution of a decree, null and void, or liable to be set aside, in consequence of any irregularity on the part of the Government Collector or his subordinate Officer in the publication of the notification of the intended sale. Secondly, the Respondent elected to take his remedy under the summary suit given by Ben. Reg. VII. of 1825, sec. 5, cl. 1., to set aside such sale, and it ought to have been satisfactorily established by the Respondent, that the irregularity complained of in the present suit, involved a "material deviation" in the mode prescribed by the Regulations for publishing an intended sale, which was not done. There is no allegation in the plaint that there was any other town or place where the notification ought to have been made. The Plaintiff failed altogether to establish that fact; but the circumstances detailed, and the conduct of the Respondent with respect to his former summary suit, and his

other proceedings before the Collector, has the effect of waiving or curing the irregularity, if any existed, in the publication of the notice of the intended sale now complained of. Another objection is, that his conduct showed that he acquiesced in the mode of publishing the notice, adopted, under the circumstances, by the subordinate Officers of the Collector, as shown by their reports and returns made and filed at the time in the Collectorate. Lastly, the Appellants, *bona fide* purchasers for valuable consideration, at the sale by the Collector, have been in possession for eleven years under that sale; and even if the Respondent had proved any injury or damage to him, by reason of the alleged irregularity on the part [446] of that Officer, which, however, he did not attempt to do, his remedy in law would have been against that person, and not against the Appellants.

Their Lordships, without calling upon Mr. Leith, pronounced judgment, as follows, by

The Right Hon. Lord Kingsdown.—We consider the decree of the Court below erroneous.

It has not been made out to our satisfaction that there was any town or village within the Pergunnah at which notice could have been given. The notification posted at the principal Respondent's house does not, in our opinion, constitute a material irregularity with the provisions of the Regulation cited before us; at all events, if there was an irregularity, it ought to have been brought before the Court below at the time of the summary suit and taken advantage of then. The judgment appealed from must be reversed.

[447] GOLAUB KOONWURREE BEBEE,—*Appellant*: ESHAN CHUNDER CHOWDHOOREE, and Others,—*Respondents* * [June 22, 1861].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Heard *Ex parte*.

A Hindoo Testator, by his Will empowered his Executor and guardian of his infant children, who was also manager of his Zemindary, to charge the same for payment of debts and advances during his children's minority, and directed that when the children came of age they should repay the amount raised. The Executor borrowed of a Banking firm money for payment of Government revenue, and gave Bonds charging the Zemindary with the sums so borrowed. On the children coming of age they executed a Kistbundy for repayment by instalments, of the amount then due. This instrument they afterwards repudiated, and on a suit being brought against them by the lender upon the Kistbundy, in defence they not only denied the existence of the Bond, but charged the lender with fraudulently colluding with the Executor in obtaining the loan, and granting a lease to a nominee of the lender at an inadequate rent. Held,—

First, that the Executor had power under the Will to charge the Zemindary with advances made for the purposes of the Zemindary.

Secondly, that, as a question of fact, the Kistbundy was established.

Thirdly, that the remedy of the Defendants was to have instituted a suit against their guardian for an account, charging collusion between him and the lender, so as to investigate the transactions which had taken place and ascertain what was the amount due.

The Appellant in this case brought an action to recover the sum of

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessor,—The Right Hon. Sir Lawrence Peel

Rs. 25,119. 5a. 3p., the amount of principal and interest due on a Kistbundy, or instalment bond.

[448] The facts of the case were as follows:—

The late Anund Chunder Chowdhoree, a Hindoo inhabitant of Futtehpore, in the Province of Bengal, Zemindar of a 3-annas share of Chuckla Futtehpore, in Zillah, Rungpore, left six sons, minors, of whom the Respondents were the survivors (the others having died minors and unmarried), having first made a Will, whereby he appointed Hurrokant Bhuttacharjee, his spiritual guide, since deceased, the sole Executor and trustee, as well as appointing him manager of his Zemindary, until the Testator's sons should attain majority, when he directed all his real and personal estate to be equally divided among them. The Will also contained the following direction:—"If, in the event of a deficiency of money on any account, and incurring of loan, according to occasions be necessary, you will, according to custom, borrow from creditors, which will be repaid from the profits of the Zemindary. If this be not done, and the minors become of age, then those sons of mine shall repay the debts of the creditors; and on their failure to do so the same shall be realized from the said estates."

Hurrokant Bhuttacharjee accordingly took upon himself the execution of the trusts of the Will, as Executor, and entered upon and took the sole management of the Testator's Zemindary, and, in March, 1848, finding the collections of rent insufficient to supply the whole amount then payable to Government for revenue on account of the Zemindary, borrowed the sum of Rs. 2937 from a Kotee or banking-house carried on for the benefit of the Appellant, which sum he applied in payment of the Government revenue. He afterwards borrowed from the Appellant three other sums of money, under similar circumstances, and for [449] the same object, amounting in the whole to the sum of Rs. 16,444. 8a. For these respective sums eight Tumsooks (bonds) were severally duly executed by the Executor to secure the repayment of these principal moneys and interest.

The Respondents attained their majority in 1851, when they entered into possession of the Zemindary, when the Appellant demanded payment of the amount due; and, in the month of July, 1861, an adjustment of accounts took place, when the sum of Rs. 22,294. 10a. 11p. was found to be due from them to the Appellant for principal and interest for the moneys so advanced.

The Respondents being unable to pay the whole amount at once, it was agreed, that they should pay down Rs. 294. 10a. 11p., and grant the Appellant a Kistbundy (instalment bond) to secure the balance, with interest. Accordingly, on the last-mentioned date, a bond was executed by the Respondents respectively, in favour of the Appellant. This instrument recited the facts above mentioned, including the borrowing of the several sums, and the execution of the bonds, and the amount of the balance of principal and interest found due on the adjustment of the accounts as aforesaid. The Kistbundy then provided for the payment of the same by the Respondents, together with interest at 12 per cent per annum, by instalments, in various fixed amounts, and at various fixed dates in each year between the year 1258 B.E. (1851-1852 A.D.), and the year 1272 B.E. (1866-1867), both inclusive; and the Kistbundy then declared, that if four successive instalments should be in arrear, the Appellant was empowered to realize at once the whole sum then remaining due, [450] with interest. The Kistbundy concluded with a clause hypothecating the Zemindary and other immovable property of the Respondents, to secure the repayment of the moneys, with interest.

This instrument was registered in the public register office for deeds in the Zillah, Rungpore, by Juggurnath Sircar, the Mookter, under a Mookternamah, or power of attorney, signed by the Respondents, for that purpose. The Mookternamah recited the execution by them of the Kistbundy, to secure the amount due under the documents granted by the Executor on account of payments made in respect of the Government revenue payable on the Zemindary.

The Respondents paid to the Appellant, on account of principal and interest under the Kistbundy, in various amounts and at various dates, in conformity with the requirements of the deed in that behalf, the sum of Rs. 800, on account of principal, and Rs. 600, on account of interest. The Respondents, however, having made default, and more than four of the instalments of the Kistbundy having fallen

into arrear, the Appellant brought an action against the Respondents in the Civil Court of Zillah, Rungpore. The plaint, after stating in detail the facts above mentioned, stated and charged that, after crediting and deducting the part payments aforesaid, the Respondents were indebted, on the day previously to the date of the plaint, the sum of Rs. 21,200, on account of the whole balance of the principal, and Rs. 3915. 5a. and 3p. on account of interest, making together the aggregate sum of Rs. 25,119. 5a. 3p., the amount she sought to recover by her suit.

The answer of the two first of the Respondents stated, that the third Respondent, Hurro Chunder Chowdhoree, had gone on a pilgrimage before the [451] commencement of the suit, and had not then returned. The answer then charged, that the claim of the Appellant, as well as the grounds and statements thereof, were all invalid, for that neither was any money due by them, nor had they ever executed any Kistbundy for the same; and that the Appellant had fabricated that deed. The answer admitted the registration of the Kistbundy, but endeavoured to throw suspicion upon it by alleging, that the Mookter who presented it for registration was a stranger to the Respondents. The answer then stated, that the Executor had held the collection office for the rents of the Zemindary in the Appellant's Kotee, or banking house at Rungpore, from the year 1255 B.E. (1848-9 A.D.), when the Respondents reached their majority; that the Appellant's cash-keeper, Hurree Pershad Tewarree, made collections, and performed other affairs of their Zemindary, receiving a salary of Rs. 10 monthly in the name of his son; and that after the payment of the Government revenue and other expenses, the amount of profit used to be kept in deposit in this Appellant's Kotee; that no loans were contracted on account of the Government revenue, the Zemindary, as they alleged, having returned a large profit, and there being, therefore, no necessity to borrow money either before or after their father's death; and that either the Executor was acting in collusion with the Appellant, or the Appellant without his knowledge appropriated the surplus profit, and prepared the false Tumsooks or bonds, and the Kistbundy, and had, four months after the death of the Executor, brought the present action. The answer further stated, that the Appellant had, in collusion with the Executor, obtained a farming lease [452] of the Zemindary, in the name of the cash-keeper, Hurree Pershad Tewarree, at a very low rent, from the year 1258 to 1266 B.E.

The replication charged, that by large outgoings, some of which were especially referred to, the Executor and trustee was under the necessity of borrowing the moneys in question from the Appellant's Kotee, for the payment of the Government revenue; and submitted, that under the Will the Executor and trustee was empowered to borrow the moneys, and that the Respondents, after attaining majority, were bound to pay the same; and that, on their failing to do so, the same was to be realized from the Zemindary, on which the moneys borrowed were a charge; and it was averred, that the statement as to the lease of the Zemindary was false, and that the Appellant never took the Zemindary under lease, nor advised any other person to do so.

A great many witnesses were examined, the nature and effect of whose evidence is stated in the judgment of the Sudder Ameen.

The hearing of the suit took place before the Principal Sudder Ameen (Sreejoot Nuzeerooddeen Mahomed), who pronounced a decree in favour of the claim of the Appellant, as follows:—First: From the depositions of Juggunnath Sircar and the Defendants' relation, Hurro Gobind Sen, whom the Defendants have admitted in their answer to be another Mookter of theirs, as well from the depositions of the witnesses to the Kistbundy in question, viz. Bahadoor Singh, Boid Nath Tewarree, Ram Nath Doss, and Lalla Hurruck Chand, tenants of the Defendants, and also from the evidence of the other witnesses, Lokenath Sircar, Dwarka Nath Dass, and [453] others, it has been satisfactorily proved, that the Defendants executed the Kistbundy aforesaid under their respective signatures, in consideration of the aforesaid sum borrowed by their Executor, as well as the amount which the Plaintiff paid on account of Defendants' debts, and also the amount which they had borrowed themselves, together with interest thereon, after deduction of the amount repaid, and gave a special Mookternamah in the names of their Mookters, Juggunnath Sircar, Roy Gobind Dutt, and Hurro Gobind Sen, in order to get the Kistbundy registered; that they got the Mookternamah attested through another Mookter of

theirs, Kandoora, and by the evidence of the witnesses thereof, viz. Hurruck Chundro and Russool Mahomed, who are their tenants and dependants, that they got the Kistbundy registered through their tenant and Mookter, Juggunnath Sircar, one of the Mookters mentioned in the Mookternamah. The writer of the Kistbundy, Deb Nath Banerjea, who is a servant of the Defendants, has declared that it was he who wrote the Kistbundy. From the copy which the Plaintiff has produced of the Mookternamah, dated the 16th Bysack, 1259 Bengalee year, bearing the signatures of the Defendants, filed in the settlement case brought in the Collectorate, it appears that Juggunnath Sircar, who got the Kistbundy registered, was the Defendant's Mookter, in conjunction with the individual whom the Defendants have admitted in their answer to be their Mookter, and also in conjunction with their maternal uncle, Roy Gobind Dutt, and others. From copy of the Mookternamah, dated 10th Bliadon, 1258 Bengalee year, bearing the Defendant's signature, it appears that Kandoora, who had produced the Mook [454]-ternamah to get the Kistbundy registered, was the Defendant's appointed Mookter in conjunction with their beforementioned other Mookter. From the copy of the Mookternamah dated the 23rd Maugh, 1257 Bengalee year, bearing the Defendants' signatures, it appears that Lalla Hurruck Chund Doss was a witness of the Mookternamah, regarding the registration of the Defendants' names, and had given his evidence. Hence the Defendant's plea that the said individuals, though composed of their tenants, old servants, and relations, are strangers, appears to be false and untrue. That the sum of Rs. 16,444. 8a. mentioned in the eight bonds, bearing the signature of the Defendant's Executor, filed by the Plaintiff, was paid on account of the Government revenue of the Defendants' Zemindary from the year 1251 up to 1257 Bengalee year, is satisfactorily proved from the Collector's attested copies, filed by the Plaintiff, of the twenty-two chellans, etc., bearing the signature of their (Defendants') Executor, in which chellans that sum is stated to have been borrowed from and paid into the Collectorate through the Plaintiff's Kotee. That the Plaintiff's Mookter paid Rs. 2950, on account of the Government revenue of the Defendants' Zemindary for the Bengalee year 1257 is satisfactorily proved from the dakhilla bearing the seal and signature of the Collector, given in the name of the Plaintiff's servant, with a mention of payment being made through the Plaintiff's Kotee, and also from the copy of the Petition which the Mookter, Roy Gobind Dutt, had filed in the name of the Executor by his own pen, admitting that the sum (Rs. 2950) was paid by the Plaintiff's servant, and these facts have been corroborated by the Plaintiff's khattah [455] which have been produced and duly proved, and wherein it is mentioned that the aforesaid sums are due by the Defendants, but nothing is due to them. The Defendants cannot bring any objection to this. That the Defendants borrowed Rs. 350, by giving rookha (note), as mentioned in the Kistbundy, has not been proved like the above. From the copy which the Plaintiff has filed of the Wuseutnamah, which the Defendant's father executed in the name of their Executor, Hurrokant Bhuttacharjee, it appears that the Executor was authorized to contract loans, and that the liability of the loans contracted by him would attach to the Defendants as well as to their Zemindary. Such being the case, the Defendants' plea that the Executor was not authorized to contract loans appears to be utterly false. When the Kistbundy and its registration have been proved by the Defendants' relations, servants, and others, as well as by other witnesses, and when it has been proved that the amounts mentioned in the Kistbundy have been paid on account of the Government revenue of the Defendants' Zemindary, and that they (the Defendants) are liable to pay the debts contracted by their Executor, then there is no doubt that the Defendants are liable to pay the disputed money. The Defendants' servant, Deb Nath Bondopadhya, the writer of the Kistbundy, states, that he went to some other place after he had written the Kistbundy, and did not see the Defendants put their signatures on the same. The witness, Emamdee, states, that the Kistbundy was executed, but he did not see the Defendants put their signatures on the same. The Defendants' tenant, Narain Duftery, who is one of the subscribing witnesses to the Kistbundy, states that he did not witness [456] the Kistbundy. These statements appear to have been made by the influence of the Defendants. When it is considered how the Defendants have stated themselves to be unaware of the terms of the Wuseutnamah, and unacquainted with their own

servants and others so well known to them, then I cannot convince myself that any one of their statements is true. The Defendants' plea that the witnesses of the Kistbundy are low people and the Plaintiff's servants, can be of no consequence, when it has been satisfactorily proved, as stated above by the evidence of their (the Defendants') relations, etc., that the amount of the Kistbundy was paid into the Collectorate on account of the Government revenue due by the Defendants, and that the Defendants made over (to the Plaintiff) the Kistbundy, after getting it registered by the Register of Deeds through their Mookters, servants, tenants, and others. Secondly, The Defendants plead, that their Executor had held the collection-office of their Zemindary in Plaintiff's Kotee; that the amount of collections of their Zemindary used to be deposited at first in the Plaintiff's Kotee, and then out of the same the Government revenue of it used to be paid; that their Executor and the Plaintiff, being in collusion with each other, appropriated to their own use the profits of the Zemindary, and gave rise to these frauds; and that if an account be made up and a balance-sheet drawn up with reference to real khattas of the Plaintiff's Kotee, it will appear that nothing is due by them. They have also filed 146 chellans, signed by the Putwarrees of their Zemindary, and given evidence of the six witnesses, who are their Tehsildars, and others in support of their pleas. These proofs cannot vitiate this claim, brought [457] on the registered Kistbundy, which is based on the dakhillas, etc., of the Collectorate, and the bonds executed by the Executor, the validity of which has been proved, as stated in the first branch of this decision. The Defendants' witnesses state, that the Executor had appointed one Hurree Pershad Tewarree, a servant of the Plaintiff's Kotee, in the office of superintendent, and, therefore, the amounts of the collections of rents used to be sent to him agreeably to the direction of the Executor. This circumstance cannot prove that the Plaintiff made the collections of rents agreeably to her own request. If the Defendants' Executor have practised any fraud, still no investigation with regard to the same can take place in this suit, which is brought on a Kistbundy given in consideration of former debts, bonds, etc., nor can any adjustment of accounts of the collections of rents made at the Plaintiff's Kotee be made in this suit. If it be taken for granted that there was no need for the Executor to contract loans by giving bonds, owing to the amounts of the collections of rents of the Defendants' Zemindary having remained deposited, and that the Executor has practised frauds, yet another suit is necessary to investigate the loss incurred by the Defendants by their Executor's fraud. When there is no doubt that the aforesaid amount of loan was paid on account of the Government revenue due by the Defendants, and when it has been satisfactorily proved that the Defendants executed to the Plaintiff the Kistbundy in consideration of the same, then, agreeably to the decision of the Sudder Dewanny Adawlut, dated 3rd of February, 1853, in the case of Mohataboo, Appellant, as well as that dated 26th July of that year, in the case of [458] Prosunno Singh, it is not necessary to hold an investigation with regard to the former accounts. Lastly, there is no proof relative to the Rs. 350, but I am of opinion, that no more proof than the above is necessary in order to prove that sum, when it has been proved as required by law that the Defendants executed the Kistbundy, admitting the same to be their debt. The four instalments of the Kistbundy having fallen due, the Plaintiff is competent to sue for all the instalments agreeably to its terms, as is apparent. Out of the witnesses mentioned in the second isemnovesee filed by the Defendants, two were cited by both parties, and their depositions taken down. The Defendants prayed for the issue of a subpoena for the attendance of the remaining witnesses. It appears that the Defendants have made this prayer with no other view than to waste time uselessly. The Defendants have already given the evidence of many witnesses, which, however, has proved of no advantage to them with regard to the point respecting which they wish to give the evidence of the remaining witnesses. The copy filed by the Plaintiff of the Wusseutnamah executed by the Defendants' father appears to have been obtained on a stamp-paper worth eight annas. This is not a principal document in the case, but merely one in support of it. Therefore, it is not illegal to have taken it on a stamp-paper worth eight annas. It is, therefore, ordered, that this case be decreed, that the Plaintiff's principal amount, as well as interest thereon, agreeably to law, and all costs of Court, together with interest on

the aggregate amount of the money from this day till the day of realization, be awarded to the Plaintiff against the mortgaged property."

[459] The Respondents appealed from this decree to the Sudder Dewanny Adawlut at Calcutta.

The appeal was heard before Messrs. Colvin, Sconce, and Dick, when the two first-mentioned Judges, being the majority of the Court, by their judgment, decreed that the decree of the Lower Court should be reversed, with costs both of the Zillah and Sudder Court.

The judgment of Messrs. Colvin and Sconce was as follows:—"We are of opinion, that in a case of this kind, where a deed is said to have been formally executed in adjustment of previous accounts, some evidence should have been afforded of the fact of their settlement, and that a deed professing to be recognition of their settlement should be duly attested. But it does not appear from the evidence that such settlement took place when the Kistbundy was said to have been prepared, and the attestation of the deed by witnesses, two only of whom out of seven signed for themselves, is far from satisfactory proof of its execution. The writer of the deed also says that he wrote it by desire of the late guardian of the Appellants, without their sanction, and that he did not see them sign. Moreover, the execution of the power of attorney by the Appellants, to register the Kistbundy, is very insufficiently established. The chief witness, Juggunnath Sircar, says it was brought to him as coming from them, and he acted upon it, and only afterwards was informed by them that they agreed to it; and it was more necessary to have the power duly proved, as the Mookternamah for registry was not executed till two months, viz., on the 18th Bhadoon, 1258, after the date of Kistbundy, viz. 17th Assar preceding. The argument of the Respondent as to the existence of the old Bonds executed by the [460] guardian, and the payment of revenue through her, prove nothing in support of the Kistbundy, upon execution of which by Appellants, and not upon the acts of the guardian, the suit is founded."

The dissentient Judge, Mr. Dick, recorded his judgment in these terms:—"The Plaintiff in this case sues the Defendants on an instalment-bond for recovery of money lent on seven or eight bonds, and to an Executor of their father's Will, during their minority, for the purpose of paying up the revenue of their estates, and a small sum borrowed by themselves on note of hand after becoming of age. In proof of the claim they produce the subscribing and other witnesses to testify to the due execution of the instalment-bond, and file the deed; they file also the seven or eight bonds with the signature of the Executor and the note of hand of the Defendants, and documents from the Collectorate, showing the sums to have been paid up through the Plaintiff's banking concern for revenue of Defendants' estates. The Defendants deny the claim altogether, and rest their defence mainly on the improbability of their giving such a deed so soon after coming of age, when, too, they were disputing with a servant of the Plaintiff's banking concern about a farming lease purporting to have been given by the Executor for nine years, a short time before the expiration of their minority; on no accounts having been produced at the time the deed was executed; and on the want of respectability of the subscribing witnesses to it. The Plaintiff has by three witnesses at least proved the due execution of the instalment-bond and the signatures on it of Defendants. The Mookter who got the deed registered has distinctly testified that the Defendants [461] themselves told him to get it registered, and there is proof that he was in their employ as a Mookter. On the deed are indorsed three separate payments; one by an uncle of Defendants, who was summoned by Plaintiff, but would not appear, and the other two payments by principal servants of the Defendants. As corroborative evidence, the seven or eight bonds on which the money was borrowed have been filed, bearing the signature of the Executor, and documents from the Collectorate, which are not and cannot be impugned, showing that the money borrowed was expended in paying up revenue due on Defendants' estates. It is true that the subscribing witnesses to the instalment-deed are not of high respectability in point of station, but their testimony has been verified by persons of higher position, who were present at the execution of the deed. On the other hand, the signatures on the deed of each of the three Defendants have not been challenged, nor the signature of the Executor on the bonds. The Mookter who got the deed registered, and the subscribing witnesses to it, have

several of them been proved to be in the Defendants' employ, and to reside on their estate, though declared by the Defendants to be utter strangers. The Plaintiff has denied that there were any accounts to be produced, except the banking-books, which they have produced, and which have not been impugned, and Defendants have not filed any accounts of the Executor to gainsay what appears in those books and is substantiated by the Collectorate documents. The Defendants' uncle, summoned by the Plaintiff to testify to one of the indorsements, would not appear, and the Defendants would not summon their two servants to testify against the other two indorsements. [462] Here was an admirable opportunity, not accepted, for falsifying the deed. The payments indorsed seem to have been made in the lifetime of the Executor; and had the deed been forged, the names of three persons so much in the interest of the Defendants would not have appeared as the payers, nor would the names of the subscribing witnesses have been all, save one, written by one person, and the writer of the deed a servant of the Defendants. The instalment-deed was written while the dispute about the farm was pending in the Magistrate's Court, and the registry made after the Razeenamah, or deed of relinquishment, was filed by the farmer. So far, therefore, as that affair is connected with the execution of the deed, if the farmer were a servant of Plaintiff, probability in favour of the deed is more apparent than improbability, the registry being kept back till the Razeenamah was filed. Lastly, nothing to impugn the integrity of the Executor, or of the Plaintiff, on the fairness of their dealings with each other, has been adduced. I think, therefore, sufficient proof has been produced to establish the due execution and registry of the instalment-bond, and nothing of weight to throw doubt on that proof. On being asked by me in Court how the bonds of the Executor remained with the Plaintiff after execution of the instalment-deed, it was answered, that money-lenders in such cases retained the bonds as collateral proof, and, in lieu of giving them up, inserted their dates in the instalment-deed. I would uphold the decision of the Lower Court, and dismiss the appeal."

The present appeal was from the decree of the majority of the Sudder Court.

As the Respondents did not appear, the appeal was heard *ex-parte*.

[463] Mr. R. Palmer, Q.C., and Mr. Leith for the Appellant.—There was sufficient evidence of the loans, which formed the consideration of the Kistbundy, having been contracted by the Executor and trustee under the Will, and that those loans were applied for the benefit of the Zemindary, therefore, the Respondents were liable to the Appellant as the lender, under the express terms of the Will of their father, and bound to pay the same on their coming of age, as the payment of the loans by the Will created a charge upon the estate, *Hunoomanpersaud Panday v. Mussamat Babooe Munraj Koonwuree* (6 Moore's Ind. App. Cases, 393). As to the Kistbundy, that instrument was also proved; indeed, the Mookternamah for the registration fully recites that document, and the fact of its execution by the Respondents. The charge in the pleadings of the Respondents of fraud and collusion between the Executor and the Appellant was unfounded and not established; but such a charge could not avail the Respondents as a defence in the present suit, which is solely confined to the validity of the Kistbundy.

At the conclusion of the argument, their Lordships intimated their opinion that as at present advised they thought the decree appealed from could not be sustained.

The appeal stood over for consideration.

Judgment was now delivered by

The Right Hon. Lord Kingsdown (July 12, 1861).—We have looked carefully through the papers in this case, and remain of the opinion, which we inti-[464]-mated at the hearing, that the decree cannot be supported. Considering the large amount of the sum at stake, and the position in life of the Respondents, it is difficult to account for their omitting to appear at our Bar to maintain the decree which they have obtained. But as far as we can discover, the proceedings of the Appellant to have been regular, and she is entitled therefore, to call upon us to dispose of the appeal *ex-parte*.

The Appellant carries on business as a Banker; in that character she alleges that she made very large payments for the Respondents, during the time that they, or some of them, were minors, in respect of jumma or revenue due to the Govern-

ment from a Zemindary belonging to them. These advances are alleged to have been made at the instance of a person who was the guardian of the infants, and Executor and trustee under the Will of their father. For these sums the Respondents on taking possession of their Zemindary had given a Kistbundy, or engagement, to pay the amount by instalments, and for one of the instalments so secured the action in this case was brought.

There appears to be great reason to suspect fraud on the part of the guardian, and some reason to believe that the agents of the Appellant were privy to it. There can be little doubt that the lease of the Respondents' Zemindary, which was made by the guardian to a servant of the Appellant, and which was disputed by the Respondents and surrendered by the lessee, was really made to the servant as the nominee and for the benefit of the Appellant. It is very possible that if the Respondents had instituted a suit to take the accounts of this guardian, and, [465] charging collusion between him and the Appellant, had investigated the transactions which had taken place, it might have appeared that there was no such sum as was claimed by the Appellant justly due to her.

The Judges of the Sudder Court, who have pronounced a decree in favour of the Respondents, seem to have been influenced by reasons of this nature, and to have rested their judgment on the ground, that no adjustment of accounts had taken place to ascertain the balance really due to the Appellant before the Kistbundy was granted.

But we think this objection, under the circumstances, cannot be allowed to prevail; for the question, whether it would be fit to insist on this adjustment was distinctly brought under the notice of the Respondents before the Kistbundy was executed, and decided by them in the negative. It is proved by Hurro Gobind Sen that when a claim was made upon the Respondents in respect of the Bonds given by the Executor and guardian, they were desirous of avoiding the payment, and consulted him as to the mode of doing so; that they were advised by him that they could only do so by instituting a suit to which the Executor must be a party, and in which a settlement of his accounts would be required. Now, the Executor was their spiritual guide, and had been the spiritual guide of their father, and it was not considered proper to institute a suit against him. Under these circumstances it was thought better to come to terms with the Appellant, to obtain time for payment of the debt by instalments. The Kistbundy was accordingly executed, and the witness says that he considered the arrangement beneficial to the Respondents.

[466] There seems no reason whatever to doubt this statement. Hurro Gobind Sen, who makes it, was in the employment of the Respondents, was connected with them by marriage, and was referred to in their answer as one of their agents who ought to have been employed in any business of this description.

It appears impossible to permit the Respondents, after the death of the guardian, now to dispute their liability for payment of the debt which they had thus deliberately undertaken to pay.

The Kistbundy itself and its registration appear to be regularly proved, payments have been made of some of the instalments, and such payments are indorsed upon the instrument. The account books of the Appellant were produced at the hearing, and the fact of the payments made by her as the consideration for the bonds given by the Executor seems to have been thereby established.

Whatever suspicion may attach to the dealings between the Appellant and the Executor it cannot affect the decision of the present suit. We think that the decree of the Zillah Court must be restored, and the decree of the Sudder Court reversed, and that the Appellant must have the costs of the proceedings in the Sudder Court, but we are not inclined to give any costs of this appeal.

We will make a report to Her Majesty in conformity with the opinion which we have expressed.

[467] MUSSUMAT KRIPOMOYE DEBIA,—*Appellant*: GERISCHUNDER LAHORE, and Others,—*Respondents* * [July 2, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Suit to set aside a sale of Putnee Talooks, for arrears of rent, on the ground of an irregularity in the Proclamation of sale, as the lease was alleged to be held by the lessee in Benamee, and that the proper party's name did not appear, dismissed, the Ikrarnamah creating the alleged trust being declared a forgery.

The Appellant in this suit sought to recover possession of the Putnee Talooks, Dehee Chateaugour and Luckeebatta, situate in the Zillah, Rajshahye, of which Rajah Kisha Chunder Bahadoor was Zemindar, with wasilat, or mesne profits. In order to obtain such possession the Appellant sought by the suit to set aside, on the ground of irregularity, a sale by the lessor, made in the year 1836, under Ben. Reg. VIII. of 1819, for arrears of rent.

The facts of the case and the evidence sufficiently appear from their Lordships' judgment.

The appeal was argued by Mr. R. Palmer, Q.C., and Mr. Leith for the Appellant; and Mr. Forsyth, Q.C., and Mr. W. Field for the Respondents.

[468] As to the lease being a Benamee transaction, and the effect of such a trust by the Hindoo law, the case of *Goopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53) was referred to.

Their Lordships' judgment was reserved, and now delivered by

The Right Hon. Sir John Romilly (Aug. 2, 1861).—The question in this appeal is, whether the purchase of a Putnee Talook made by Juggurnath Roy, on the 6th of September, 1835, was a Benamee transaction—that is, whether it was bought with the money of and in trust for Hurro Kanth Roy, who is now deceased, but whose widow is the Appellant. Substantially, the question depends upon, whether an Ikrar Puttro, or declaration of trust, purporting to bear date the 29th Kartick, in the year, 1242, which corresponds to the 14th of November, 1835, and which also purports to have been executed by Juggurnath Roy, is a real or a supposititious document.

We entertain no doubt, if on the evidence it should appear that no reliance is to be placed on this document, that there is no other evidence before us sufficient to establish that the transaction in question was a Benamee transaction.

In consequence of the non-payment of the rent, the amount of which was disputed, the Putnee Talook was, after various proceedings to which it is unnecessary to advert, sold by the revenue authorities, on the 21st of May, 1836, by public auction, to Kalee Kanth Lahoree, who was the highest bidder; who has since died, but whose heir is the first Respondent on the record.

[469] The suit to recover the Putnee Talook was first instituted by Hurro Kanth Roy, on the 1st of March, 1845; that suit failed in April, 1850, by reason of misdating the Ikrar in the plaint, which error the Court refused to allow to be corrected.

On the 18th of July, 1850, the Appellant filed her plaint in this suit.

On the 26th of December, 1854, the Principal Sudder Ameen dismissed the Appellant's suit with costs.

This decision was appealed from to the Court of Sudder Dewanny Adawlut at Calcutta, and on the 28th of December, 1857, the decree of the Court below was affirmed with costs, which is the decree appealed from to us.

The original Kubalah granting the Putnee Talook was made on the 22nd of Bhedoon, 1242, which corresponds to the 6th of September, 1835; it was attested by fourteen witnesses, and at the same time a Kubooleut, or counterpart, was executed by Juggurnath Roy, containing the usual condition that, if the rents were not paid,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir Edward Ryan. Assessor,—The Right Hon. Sir Lawrence Peel.

the Zemindar should be at liberty to sell the Talook, under the provisions of Regulation VIII. of 1819. This counterpart was executed by nine witnesses, of whom the first and last were also attesting witnesses to the Kubalah, but the remaining seven witnesses were distinct and different persons.

That the same witnesses, fourteen in number, who attested the Kubalah should be obtained to attest the Ikrar, two months later, is a circumstance which, in our mind, gives rise to very grave suspicions. No valid reason is given for this peculiarity; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the [470] purpose of attesting another instrument, must have occasioned both difficulty and delay, and it is not pretended that the circumstance of the witnesses who attested both instruments being the same could confer additional validity on the Ikrar. So little did this seem to be a matter of importance to the parties engaged in the transaction on the 6th of September, 1835, that of the two instruments then simultaneously executed, only two witnesses attested both. The suspicion created by this circumstance is augmented by the consideration that in the original plaint, which was filed on the 1st of March, 1845, the Ikrar is alleged to bear the same date as that of the Kubalah. If, in truth, the Ikrar had been executed at the same time with the Kubalah, it might well be that the same witnesses who attested the lease would also attest the declaration of trust; and, indeed, such a supposition would be natural and probable. Upon the assumption that the original Plaintiff had intended to set up a fictitious Ikrar, with the view of establishing the transaction to be one of a Benamsee character, it would be natural to set up an Ikrar of even date with the original Kubalah, in which case it would be naturally attested by the same witnesses, and accordingly such was the Plaintiff's allegation contained in the original plaint; and we cannot but consider it a matter also open to suspicion that, in so important a matter as the statement in the plaint of the Ikrar, on which the whole of the Plaintiff's case depended, an erroneous date should have been assigned to that instrument. It is to be observed, also, that the Ikrar itself, on the face of it, seems to have been framed as if it had been intended to be contemporaneous with the Kubalah, for it speaks of the delivering up of the Umulnamah, or letter of [471] authority, of to-day—that is, of the day of the date of the Ikrar; but the only Umulnamah of the existence of which any evidence is given is the Umulnamah of the date of the original Kubalah.

On the assumption that it was intended to set up a fictitious deed, various circumstances might, after the institution of the original suit, render it impossible to act on that intention, and to establish by proof an Ikrar of even date with the original Kubalah.

The following are instances:—The witnesses speak of Hurro Kanth Roy as having been present at the time when the Ikrar was executed, and even of the conversation which passed between him and Juggurnath Roy on that occasion. Hurro Kanth Roy was, at the date of the execution of the Kubalah, distant four or five days' journey off, at Calcutta. This fact might possibly have been established by evidence brought on the part of the Defendants. There were present, at the time when the Kubalah was executed, in September, 1835, the witnesses to the Kubooleut, and these witnesses, or some of them, might have been called, and not only disproved the presence of Hurro Kanth Roy, but might also have disproved the execution of any Ikrar at all at that time, and might have given evidence which would have been irreconcilable with the evidence on the part of the Plaintiff.

Assuming, therefore, that a fictitious deed was intended to be set up, this circumstance might explain how it was originally intended to set up an Ikrar of even date with the original Kubalah, and how that intention was afterwards abandoned as far as regarded the date of the instrument.

Another circumstance which creates grave suspicion [472] in our minds is the age of Hurro Kanth Roy at the time of the transaction. This we consider to be proved by the deposition of Hurro Kanth Roy himself, made in a distinct matter on the 12th of May, 1843. By this deposition it appears that he was then at the Government School at Rampoor, and that he stated his age to be at that time seventeen or eighteen. This was eight years and nine months after the date of the Ikrar. This would reduce his age at the time of the transaction to nine or ten years old. The explanation attempted to be given, that he understated his age for the purpose

of entering the school, by the regulations of which no pupil could be admitted who had passed a given age—even if admitted, could only extend to a year or two; but no latitude which could be given to this suggestion would induce us to believe that a man of twenty-six or twenty-seven, could pass off for a youth of seventeen or eighteen; but we have no reason to doubt the accuracy of the statement of his age contained in the deposition which was made by himself in a matter in which his age was not a matter of importance, and by which it appears that he was then under the master of the school, and in which he speaks of the other lads of the school.

We are, therefore, of opinion that, on the evidence before us, the age of Hurro Kanth Roy in November 1835, must be considered as not exceeding ten or eleven years. In what way a boy of ten or eleven years of age could be possessed of money sufficient for the purchase of the Putnee Talook, the evidence fails to explain.

But this is not the only difficulty presented in the way of the Appellant by the youth of her husband [473] at the time of this transaction. The evidence given by the witnesses of the conduct of Hurro Kanth Roy on this occasion is irreconcilable with the supposition that he was not more than eleven years old, even allowing much to the precocity ascribed to Indian youths.

Ram Nedhee Deb says that this boy of ten or eleven years old gave directions for obtaining some of the Rajah's Mehal, if any were to be let out in Putnee. The witnesses all speak of his understanding the transaction, and taking a part in it.

Gooroo Dyal Roy says that Hurro Kanth Roy sent the money for the Kubalah, Rs. 4700 in specie, from Calcutta, by him and three other persons, accompanied by five or six others, by a boat; a very improbable mode of transmitting money in a country where Government notes were in circulation.

Kalee Pershad Dass says that Juggurnath Roy and Hurro Kanth Roy corresponded on this subject, and that Hurro Kanth Roy wrote letters to Juggurnath Roy on the subject, and they all state that he went from Calcutta to Sydabad, for the purpose of completing the transaction.

A careful examination of the witnesses also discloses various inconsistencies in their testimony. Two of them, namely, Haroo Dass and Gour Mohun Dass, in their depositions made in the first suit, speak of the Ikrar as originating from Juggurnath Roy; but the two witnesses examined in the suit, Ram Nedhee Deb and Sheetal Ram Raha, say that the Ikrar was made at the instance of Hurro Kanth Roy.

This latter observation would not have much weight were it standing alone, but combined as it is with the other circumstances enumerated above, it adds to the [474] suspicion necessarily created by the other facts in the case. It is not to be overlooked, also, that the Ikrar was not registered; to this omission, however, little weight would have to be attached, if the whole of the rest of the case were free from suspicion, by reason of the desire to keep the matter secret, which, on the assumption that it was a Benamee transaction, and intended to be concealed from Rajah Gobind Chunder was intelligible enough.

The circumstances above enumerated, if they stood alone, would bring our minds to the conviction that no reliance could be placed on this Ikrar in a Court of Justice as an authentic document.

But there is some evidence, on the other hand, in favour of the transaction having been originally a Benamee transaction. The strongest portion of this is to be found in a letter which, singularly enough, has been produced on behalf of the Defendant, Kalekanth Lahore; it is, therefore, free from all suspicion when used on behalf of the Plaintiff: this is a letter written in October, 1835, between the date of the Kubalah and the Ikrar, addressed to Juggurnath Roy, apparently by the Maharanee Kishenmonee Takooranee, who was the aunt of Hurro Kanth Roy. It seems to have been written in answer to a letter from Juggurnath Roy, requesting from her directions respecting this Putnee; and in it she directs that a Mookter-namali should be made out in the name of Nub Kanth Roy, and coupled with that of Oomapersaud Lahore, to whom the documents relating to the Putnee and the Kubalah were to be forwarded. This direction, to some extent, at least, seems to have been acted upon by Juggurnath Roy, and it is certainly very difficult to reconcile the writing by Juggurnath Roy of the [475] letter to which this was an answer,

with the supposition that he was the beneficial owner and purchaser of the Putnee Talook. This observation, however, although in favour of holding that the transaction was originally one of a Benam character, does not establish the case of Hurro Kanth Roy, or make out any title in him to the Putnee Talook. It may be that the Maharanee was the purchaser of the Putnee Talook, but that is not the case of the Plaintiff, or what we have to consider in this appeal. This document has however, although indirectly, a bearing on the part of this case, which is that which is indeed the principal foundation of the Plaintiff's case, namely, the presence of all the deeds and papers relating to this Putnee Talook, and the Wasilat papers during the time which elapsed after the Kubalah, and before the sale in May, 1836, which are all now in the hands of the Plaintiff. This letter of the Maharanee authorizes the delivery of all papers relating to the Kubalah to Nub Kanth Roy. Hurro Kanth Roy is stated in the judgment of the Court to have resided with Nub Kanth Roy, who predeceased him, and it is suggested that by this means the original documents may have come into the possession of Hurro Kanth Roy. Whether this be so or not, it will not, in our opinion, affect the ultimate decision of the case.

The mode by which the Plaintiff alleges that she acquired possession of these documents is not established to our satisfaction, and this being so, we cannot allow the simple possession of them to outweigh the other circumstances of the case, which, in our opinion, strongly preponderate in favour of the Respondent.

One circumstance, however, and that a very material one, remains to be noticed, and which makes [476] strongly against the claim of the Appellant; and this circumstance is, that the sale having taken place in May, 1836, no suit is instituted until March, 1845, a period of nine years. This circumstance is the more noticeable because it appears that the Rajah Gobind Chunder, on whose account alone the matter is alleged to have been kept secret, had died in November, 1836, thereby releasing Hurro Kanth Roy from the fear of his making any claim to the Putnee Talook, the apprehension of which is alleged to have been the cause of the Benam.

Another circumstance connected with this lapse of time is also most important, for the suit was not instituted until after the deaths of both Juggurnath Roy and of Nub Kanth Roy had taken place, and they were the persons who could have spoken positively to the truth of this case, and whose evidence was of the greatest value in the determination of it.

Taking all these matters into consideration, and also bearing in mind that this is an appeal from the unanimous decision of the Court below on a question of fact, in which they had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them, we are of opinion, that the decision of the Court below ought to be affirmed; and their Lordships will humbly recommend Her Majesty to dismiss the appeal, with costs.

[477] CHUNDERMONEE DEBIA CHOWDHOORAYN.—*Appellant*: MUNMOHEE-NEE DEBIA,—*Respondent* * [July 3, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

It is the practice of the Judicial Committee, in a case of disputed fact when the Courts in India appear to have diligently investigated the evidence, and no palpable mistake is apparent in the appreciation by the Court below of such evidence, to affirm the decree appealed from with costs.

An adoption said to have been made by a Hindoo widow in compliance with a power given her by an Unoomuttee Puttro, alleged to have been executed by her deceased husband, which adoption did not take place until seventeen years after his death, decreed by the Courts in India as unfounded in fact and

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Lord Chief Baron (The Right Hon. Sir Frederick Pollock), and the Right Hon. Sir Edward Ryan. Assessor,—The Right Hon. Sir Lawrence Peel.

the deed a forgery. Such finding sustained on appeal by the Privy Council.

This suit was brought by the Appellant on behalf of Sookda Gobind Chowdhooree, a minor, as the adopted son of Doorga Gobind Chowdhooree, deceased, claiming by his adopted mother and guardian. The principal objects of the suit were, first, to establish the minor's rights, as such adopted son, to the estate of his adoptive father; secondly, to set aside and cancel a clause in a Solehnamah (deed of compromise), alleged by the Appellant to have been fraudulently introduced by Burda Gobind Chowdhooree, the late husband of the Respondent, in which deed the Appellant admitted, that no permission or authority had been given her to adopt a son to her husband, and that, therefore, upon her death, the estate of her late husband devolved upon Burda Gobind Chowdhooree, his uterine brother; and, thirdly, to set aside, as fraudulent and void, two other Bengalee instruments, called respectively a Hibbanamah (deed of gift) and an Ikrarnamah (deed of agreement), purporting respectively to bear the seal of the Appellant, made in favour of Burda Gobind Chowdhooree by the Appellant; on the ground, that the same were prepared, and the seal of the Appellant surreptitiously and fraudulently impressed by Burda Gobind Chowdhooree himself.

The facts of the case were these:—

The Appellant was the widow of Doorga Gobind Chowdhooree. Doorga Gobind Chowdhooree had two brothers: the elder, Gooroo Gobind Chowdhooree, a half brother, and the younger, Burda Gobind Chowdhooree, whose widow, Munmohenee, was the Respondent. The three brothers lived as a joint undivided family, and held possession jointly of their ancestral and acquired property. Doorga died in 1830. After his death litigation arose in the family, and the property was, by a compromise (the terms of which were embodied in a Solehnamah, dated the 19th of January, 1838), divided in the proportion of half to the eldest brother, Gooroo, and half to the younger brother, Burda; and the Appellant, Chundermonee, who was by the death of her minor son entitled, as his heiress and representative in estate, to the share which had belonged to her husband. Gooroo gave up so much of the property in his possession as made up the share of Burda and Chundermonee to half; and Burda gave up, on the part of Chundermonee and himself, so much of the property in his own possession as made up the share of Gooroo to half. This deed in form addressed to Gooroo by Burda and Chundermonee, contained [479] the following clause:—"Further, I, Chundermonee Dibbea, have no male or female issue, nor have I any permission to adopt a son. After my death, my share will revert to Burda Gobind Chowdhooree and his heirs, and your heirs have no concern in the matter. At no period will yourself or your heirs put forward any claims to the above share; such claims, if ever made, will be inadmissible."

Not long after the compromise, Chundermonee, in consideration of Burda having given up his own rights, and of his being entitled to the property in reversion, executed a Hibbanamah, or deed of gift, dated 1st Bhadoon, 1246 (August, 1840) by which she gave him certain estates. This gift was qualified by a later deed, called an Ikrarnamah, dated 19th Thalgoon, 1246 (March, 1841), by which, after stating that the rents arising from the estates which she had not given him were insufficient for her expenditure, she gave him power to manage her remaining estates, but directed that the profits of all the property comprised in both deeds should be applied for her own purposes. In both the last-mentioned instruments, the statement that Chundermonee had no authority to adopt, and consequently that the property would devolve upon Burda after her death, were repeated.

In 1849, the Appellant filed a plaint in the Civil Court of Zillah Rajshahye against the Respondent, Munmohenee Debia, the widow of Burda; and Bejcy Gobind, the eldest son of Gooroo; Sheebsoondree, the mother of Gobind; and one of the widows of Gooroo; and Hursondree, another of the widows of Gooroo.

In this plaint the Appellant sought to set aside the above particular portion of the Solehnamah, made between her and Burda Gobind Chowdhooree on the one [480] hand, and Gooroo on the other hand, on a settlement of some family disputes and litigation in that year, and about ten years after the death of her husband. The particular passage in this deed which the Appellant objected to, was the one which alleged that she had not any permission from her husband to adopt a son. The

substance of the plaint was, that the Appellant had had one son by her husband Doorga, named Sarodha Gobind Chowdhooree, who had survived her husband, and had died before reaching his majority, in 1835; that that son being in bad health and misfortunes having been predicted to him by his horoscope, her husband having before his death given to her, in May, 1830, a deed of permission to adopt three sons consecutively in case of Sarodha's death; that after her husband and son's death she had lived jointly in mess with Burda, and, from the time of his coming of age, had entrusted him with the entire management of her affairs, and had placed her seal in his possession; that litigation having arisen between Gooroo on the one hand, and herself and Burda on the other, with reference to an ancestral Zemindary called Sonabajoo, this litigation had been compromised in the year 1838, by the deed of compromise, which deed had, as she alleged, been fraudulently filed in Court by Burda without her consent; that after Burda's death, in 1844, his widow (the Respondent), Munmoheenee, had forwarded to her (the Plaintiff) her seal, which had been left by her for a long time in the custody of Burda; that in August, 1845, she had proceeded to adopt a son (Sookda Gobind Chowdhooree) under the alleged deed of permission given by her husband, and that she had then discovered that Burda had unnecessarily and fraudulently caused to be inserted in the Solehnamah [481] a statement that she had no permission from her husband to adopt, and that after her death her share would revert to Burda and his heirs; that afterwards Burda had caused to be prepared a Hibbanamah and an Ikrarnamah relating to the same property as the Solehnamah without her knowledge, and she prayed that the rights of her adopted son might be established, by annulling the particular statement in the Solehnamah which she objected to, and by cancelling the deeds of Hibbanamah and Ikrarnamah.

The Respondent, Munmoheenee, by her answer, denied the allegation of the Plaintiff that, on the death of her husband, she had entrusted Burda with the management of her affairs; and alleged that it was untrue and incredible that the Solehnamah complained of should have been filed by Burda without the knowledge of the Plaintiff, since she had been fully informed of the nature of the compromise with Gooroo, in which the Solehnamah had been drawn up, the drafts of the deeds having been sent to her at Tantee Bund for her information, and the deeds themselves having been filed in the Court of Mr. Barlow, the then Judge of the Zillah Court, after distinct inquiry as to her consent to their contents; and the answer further alleged that the Judge had taken the precaution of sending back to the Plaintiff the Solehnamah, for the purpose of enabling her to affix her seal to it, and had caused it to be filed in Court, after taking the depositions of several respectable witnesses to the Plaintiff's execution, and making on the deed itself a memorandum on this point. It also alleged, that the Judge had ultimately decided the suit in which the Solehnamah was filed under its [482] provisions. The answer then averred, that it was necessary and material to mention in the Solehnamah that the Plaintiff had no permission to adopt, since the compromise had been made on the footing of Burda having a reversionary right to the property of the Plaintiff's deceased husband, and that Burda had, upon this understanding, given up his own property referred to in the compromise, in order to obtain for himself and Chundermonee certain other property which had been subsequently, and was then still enjoyed by the Plaintiff, and others, under the terms of the compromise; it also averred that, by numerous earlier petitions and proceedings in the Courts, the Plaintiff had herself disproved the allegations made in her plaint as to Burda having had possession of her seal, and had distinctly admitted her execution of the Ikrarnamah complained of. The answer also denied that Sarodha had been sickly before the death of his father Doorga, or that Doorga had given to the Plaintiff any permission to adopt; and it pointed out that it was very improbable that he should have done so, since he was, at the time when he was alleged to have made this deed, a young man, having one son, with the probability of having others, and that he had lived six months after the date of the supposed deed; and although he was the owner of considerable property, he had not, in that interval, caused the deed to be registered; nor had the Plaintiff, after her husband's death, in any way alluded to the deed in the declarations made by her before the public authorities, and in the petitions she had filed, after Sarodha's death, in which she had represented herself as the heir of Sarodha. The answer

further [483] alleged, that it was very improbable that the Plaintiff would, if she had really obtained from her husband a right to adopt, have entrusted Burda with the management of the estate, since he was a co-sharer in the property with her, having on her death a heritable right to her husband's estate; and it stated that, in fact, Burda had not been so entrusted, but that the Plaintiff had herself managed her estate for seven years, between the death of her husband and son, and the majority of Burda, during the whole of which period she had never mentioned to any of the authorities that she was in possession of a deed of permission to adopt. The answer then pointed out that nearly twelve years had elapsed between the death of Sarodha and the exercise by the Plaintiff of the alleged right of adoption; and that about seventeen years had elapsed from the date of the alleged deed of adoption, before the Plaintiff had brought it forward.

The Defendant, Bejoy Gobind Chowdhooree, by his answer, alleged that the Plaintiff had had full knowledge of the contents of the deed, a portion of which she was seeking to set aside, and that all the terms embodied in it had been inserted therein with her full consent; that not only had the signature and assent of the Plaintiff been distinctly proved under the precautions taken by Mr. Barlow for that purpose, but that she had, in January, 1838, sealed a Mookternamah properly attested, in order to give effect to the compromise; that although the Solehnamah had been so long filed in Court, and the Plaintiff had, after her husband's death, managed her own property and instituted various suits, she had not for a very long [484] period raised any objection to the Solehnamah, and had indeed, within two and a half years of the commencement of the suit, taken a copy of the Solehnamah and inspected it, without making any objection to its purport. He also denied that the Plaintiff's husband had given her any authority to adopt, pointing out in detail the great improbability of her statement in that respect.

The Plaintiff's witnesses were called principally with the object of establishing the deed of permission to adopt set up by the Plaintiff, and to show that Burda had in his lifetime possession of the seal of the Plaintiff, and had affixed it to the Solehnamah without her consent or knowledge, and that the other documents relating to and consequent on the compromise had been drawn up and sealed by Burda without her consent. The statement of the witnesses called to prove the deed of permission to adopt, as to the time during which Doorga had been ill before his death, did not agree with the recital in the deed itself in this respect, and several of the witnesses who denied their attestations to the documents, disputed by the Plaintiff, had, soon after the making of these documents, given opposite evidence before Mr. Barlow, the former Judge. The witnesses, on behalf of Munmoheenee and the other Defendants, substantially proved the allegations contained in the above-mentioned answers of the Defendants; the making of the compromise of January, 1838, and the Plaintiff's full knowledge of the terms of the Solehnamah; that the document was drawn up in the presence of numerous respectable witnesses, after a discussion as to the rights of the parties about to enter into the compro-[485]-mise, and a distinct mention in the Plaintiff's presence of her being a widow without any son, and after that portion of the Solehnamah which referred to the fact, and to her having no authority to adopt, had been distinctly read out in her presence. They also proved the precaution taken by Mr. Barlow, in sending back the Solehnamah for the purpose of having the seal of Chundermonee affixed, and the subsequent affixing of the seal by Chundermonee. They also deposed to facts which established clearly that Chundermonee had had all along the possession of her seal, and had not entrusted it to Burda, and that the alleged adoption by Chundermonee had been illegal in substance, as she had paid money for the purchase of the child which she pretended to adopt. Owing to the death of the witnesses who had attested the fixing by Chundermonee of her seal to the Solehnamah, the Defendants were unable to call them before the Court, but it appeared by the earlier judicial proceedings, that four of these witnesses had, within a short time of the execution of this deed, appeared before the then Judge, Mr. Barlow, and deposed to its execution by Chundermonee. Evidence was also given showing that at the time when, as Chundermonee subsequently alleged, her seal had been left in the custody of Burda, she had herself stated the contrary in legal proceedings, and had affixed her seal to legal documents; that in other instances in the earlier litigation, Chundermonee had admitted the Solehnamah.

and shown that she was well aware of its contents, and that she had dealt with the family property on the footing of the arrangement contained in the compromise, and had been a [486] party to proceedings taken before the Courts to enforce the carrying out of it; and that she had on many occasions described herself and sued as the heir of her deceased son, Sarodha, and had not mentioned the deed of permission to adopt, which she subsequently, and after the lapse of many years, had set up.

On the 26th of July, 1852, the Principal Sudder Ameen (Abdool All) gave judgment, dismissing the suit, with costs.

Chundermonee appealed from this judgment to the Sudder Dewanny Court at Calcutta.

On the 22nd November, 1852, the appeal came on for hearing before a full bench of the Sudder Dewanny Court (consisting of Sir Robert Barlow, Mr. H. T. Rakes, and Mr. J. H. Patton); when the Court, after referring to the evidence and issues, gave judgment in the following terms:— "There can be no doubt that the Plaintiff's object in bringing this suit has been to procure the recognition of her right to adopt a son, by putting to proof the validity of the Unoomuttee Puttro, and suing to get rid of certain admissions in existing documents which are opposed to the exercise of her alleged rights under the deed of adoption, on the averment that those admissions were introduced into the deeds in question with a fraudulent intent by her late husband's brother, without her knowledge or consent. The chief deed (to which it is only necessary to refer) is a Solehnamah filed in the suit before the Judge of Rajshahye, and, among other conditions relevant to the property then in litigation, it recites, that the ancestral property of Plaintiff's husband will be inherited after her death by her husband's brother, as she has received no power to adopt a son. This deed was filed in Court in the month of January, 1838, her husband having died in 1830, and the only son surviving him having died, before reaching his majority, in 1835. From the time of her husband's death till her assumption of the right to adopt in 1847, there is no proof whatever that she in any way intimated the possession of such a power, although there are admitted public acts on her part independent of the Solehnamah which might have naturally called forth some mention of her having been invested by her late husband with such a trust. Under these circumstances, it is impossible to withstand the strong and overpowering presumption against the Plaintiff arising from her own adverse admission in the Solehnamah, if it be established that that deed was filed in all its integrity with her knowledge and acquiescence. Of this we can entertain no doubt. The Solehnamah was filed in open Court with the greatest publicity by some of the parties themselves, and the agents of those not personally attending, on the 15th of the month of January, 1838, and on the deed itself is a memorandum written by the Judge of Rajshahye to the effect that as the deed exhibited no seal of the Plaintiff, Chundermonee, it should be forwarded to her residence on that day through parties named, that Plaintiff might affix her seal to the document in the presence of the parties so named by the Judge. There is another memorandum, written by the Judge on the 19th of the same month, certifying that his orders had been carried out, and that the parties indicated had authenticated the Solehnamah as the act of the Plaintiff, and to which she had affixed her seal in their presence. The decree of the Court then issued in the terms of the Solehnamah. Thus it is proved, and has now been admitted, that more than usual precaution was taken by the Judge of Rajshahye to ascertain and record that the Plaintiff herself duly certified by her own act her full acquiescence in the contents of the Solehnamah. She was a Purdah woman it is true, but parties apparently possessing her confidence, and in no other respect interested in the suit then pending, were specially deputed to witness her consent, and prevent the possibility of fraud being practised against her. It seems to us impossible, under these circumstances, to presume that she acted without a competent knowledge of the admissions contained in the deed, or at least to believe that she could have been long in ignorance of them when incorporated in the decision passed on that occasion. We coincide, therefore, in opinion with the lower Court, that the only reasonable conclusion is that she must have known the contents, and did of her own accord intimate thereby that she had received no power to adopt from her husband. Her assumption of that right now is under a deed which has never been

certified by registration, or otherwise publicly recognised by her husband during his life, and is supported by no preponderating proof of its previous existence, cannot be recognised by the Court, and the claim of the Plaintiff, founded thereon, has, in our opinion, been most properly dismissed." And it was ordered, that the decision of the lower Court be confirmed, with costs, against the Appellant.

[489] The present appeal was from this decree of affirmance. The case was argued by the Solicitor-General (Sir R. Palmer) and Mr. Leith for the Appellant, and Mr. W. Macpherson and Mr. Maude for the Respondent.

The Right Hon. Lord Kingsdown.—The question in this case is a mere dispute as to facts; and, in a case of disputed facts, when they appear to have been proved and diligently investigated in the Courts below, and their Lordships can find no palpable mistake in the appreciation by the Court below of the evidence, they never advise Her Majesty to reverse a decree which is brought before them under such circumstances.

Now, this case appears to their Lordships to have been fully and fairly investigated.

The object of the suit was to establish an adoption, under a deed, dated the 19th of May, 1830, called an Unoomuttee Puttro, giving authority to adopt. The husband died within six months after that date, and the adoption which is now represented to have been made is not completed until January, 1847, seventeen years after the death of the husband.

Now, the only excuse for the delay is, that there was a son then in existence, and that so long as that son lived there was no necessity for the adoption of another son; but that son died in 1835, and from that year to 1847, there is not any proof whatever, or even an allegation, of any such power as is represented in this case having existed.

The first objection to this Unoomuttee Puttro is, [490] that the instrument itself ought to have been, and in ordinary circumstances (considering the nature of the instrument, the importance to the family, and the amount of the property to which it relates) would have been registered, and would have been communicated to the different parties, the persons whose rights were likely to be affected by such an adoption. Nothing of the sort took place, although the party executing the instrument lived six months after the date of it.

It can hardly be pretended that, if no notice was given of this instrument until the year 1846, it would be possible to maintain such a deed; but it is said that in 1835, immediately after, or at least very soon after the death of the son, the deed was actually mentioned and set up by the present Appellant in a petition to the Zillah Court.

Now, upon referring to that petition their Lordships are satisfied, that the Court could come to no other conclusion than that which they arrived at. What is the proof? There is no proof whatever. A document is produced which purports to be a copy of an original existing on the file of the Court. The files of the Court contain no such original. It professes to have been compared by a person named Mohamed Assim, who swears that that which professes to be his original signature is a forgery. It also purports to have been written by one Surroop Chunder Baugeheo, who also states that he never heard of it.

It appears to their Lordships, therefore, that in the Court below, independent of the Solehnamah, which is conclusive, the evidence against the Unoomuttee Puttro is strongly prepondering of those witnesses [491] who swear to it. There are four witnesses produced, who, in terms, substantially and almost identically the same, state that the instrument was executed, and all fall into the same mistake as to the period at which the party executed it. On the other hand, the Solehnamah, which is a distinct recognition that there was no such instrument as this, appears to be free from all objection whatever.

On the death of that son, the Zemindary was claimed by his uncle, the eldest brother of the father, and he instituted a suit against the younger brother and the Appellant, claiming the Zemindary. In that suit the parties came to a compromise, and executed a deed of Solehnamah, and it was essential to that compromise, as it seems to us, that the fact of there not being anybody in existence who could dispute

the validity of that agreement should be stated. The deed accordingly, very naturally and very truly, states that the son who had been in existence was dead, and there could be no other son, because there was no power of adoption from the father.

Now, the deed not only has the seal of this lady attached to it, but is produced in Court. Sir Robert Barlow, the Judge before whom it is produced, seeing its importance, desired to have it fully ascertained, whether this deed was actually executed with the knowledge of this lady; he actually sends parties in whom confidence is placed, to have that verification of the instrument; they return an answer, that the deed was verified, and, she being a party to the suit, the Vakeel of the lady filed it in Court, and from that time to this it remains unimpeached.

Their Lordships are of opinion, that there was not the slightest pretence for this appeal, as the case had [492] been very fully and ably investigated by the Courts below; both Courts agreeing in holding that the one instrument is valid, the other a forgery. In those judgments their Lordships concur, and they will, therefore, advise Her Majesty to dismiss the appeal, with costs.

MOHUN LALL SOOKUL and Others,—*Appellants*; BEBEE DOSS and Others,—*Respondents* * [Nov. 26, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

The provisions of Ben. Reg. X. of 1829, imposing a stamp duty upon plaints in respect of the value of the subject-matter sued for, should be strictly attended to by the Courts in India.

Upon evidence taken in India showing the value of the property in dispute, an Order in Council, which rescinded a previous Order allowing special leave to appeal, on the allegation of the suppression of material facts as to the value, discharged, and the appeal restored.

The present application was to discharge an Order in Council, made upon a petition (see *ante* [8 Moo. Ind. App.], p. 193), which rescinded a previous Order in Council, granting special leave to appeal (7 Moore's Ind. App. Cases, 428), on the ground, that there were omissions in the petition for leave to appeal of proceedings in the Court below, which would have shown the true value of the subject-matter in dispute, and for leave to restore the appeal.

[493] The present petition, after setting forth the facts reported on the previous petitions, stated, that the Court in India, having transmitted the depositions of witnesses examined by the Registrar of the Sudder Court, in compliance with the Order of the 22nd of February, 1860, which required evidence to be supplied by the Appellants, that the real or market value of the lands in dispute exceeded the sum of Rs. 10,000, had returned an answer that the value of the estate was not less than Rs. 950, which, calculated at twelve times the profits according to the mode of estimating the value in India, would exceed the prescribed sum of Rs. 10,000. The Petitioners also alleged that, there had been no intentional misrepresentation as to the value, or in keeping back the fact of the supplemental petition; and it was submitted, that the requirements of the Order of the 22nd February, 1860, were fully satisfied by the evidence establishing that the value of the estate was above Rs. 10,000, and the Petitioner prayed that, under the circumstances, the Order of the 26th of June, 1861, should be discharged, with costs.

Mr. Leith, in support of the petition, contended, first, that there had been no fraud in respect to the amount of the stamp impressed on the plaint with respect to the value of the subject-matter in dispute; and that, if any error occurred, it arose from a misapprehension of the effect of Ben. Reg. X. of 1829; and, secondly, he sub-

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mitted that the evidence taken before the Registrar of the Sudder Court established the fact, that the real, or market, value was above Rs. 10,000, which brought the case within the limit prescribed by the Order in Council of the 10th of April, 1838.

[494] Mr. W. Field, for the Respondents, opposed the application. He insisted, in the first place, that as the plaint untruly stated the value of the property sued for, it was a fraud upon the revenue law of India, citing Ben. Reg. X. of 1829, and, therefore, that the Petitioners were not now entitled to any indulgence: and he further insisted, that if the Court entertained the application at all, it ought to be upon terms of allowing the Respondents to give evidence in India before the Registrar of the Sudder Court that the lands were not of the value stated.

The Right Hon. Lord Justice Turner (Nov. 27, 1861). In this case leave to appeal was granted by an Order of the 22nd of February, 1860, but it was provided by the Order that the leave to appeal should be null and of no effect, unless satisfactory evidence should be supplied by the Appellants to the Registrar of the Sudder Court, that the real or market value of the land in dispute exceeded the sum of Rs. 10,000. By an Order of the 26th of June, 1861, the Order of the 22nd of February, 1860, was discharged. The application now before us is to restore the appeal, and to discharge the Order of the 26th of June, 1861, with costs.

The petition on which the Order of the 22nd of February, 1860, was made, alleged that the real or market value of the land in dispute exceeded the sum of Rs. 10,000, the prescribed limit under which the Sudder Court has no power to grant leave to appeal: but that the amount laid in the plaint as the [495] value of the suit for the fiscal purposes being only Rs. 3572, 10a. 9p., three times the amount of the Sudder jumma, or rent, the Petitioners were prevented by the rules of practice of the Sudder Court from obtaining leave to appeal therein.

The petition on which the Order of the 26th of June, 1861, was made, alleged that the Respondent, Bebee Doss, in her answer, insisted that the suit ought to have been valued according to Regulation X. of 1829, that is, at the real or market value of the land, and that the Appellants after this answer filed a supplemental plaint, stating that the suit had been by mistake valued at three times the Sudder jumma, and that it should have been valued at Rs. 4300, the real or market value of the land, but that the stamp being sufficient to cover a claim of Rs. 5000, no objection could exist on that head; and this petition further stated that the petition on which the Order of the 22nd of February, 1860, was made, had omitted to state the Respondent's answer, and the supplementary plaint, and it also stated, that the real or market value of the lands did not exceed the sum of Rs. 10,000.

In this state of circumstances, it was of course to discharge the Order of the 22nd of February, 1860, that Order having been obtained *ex parte*, and appearing to have been obtained upon an inaccurate statement of the facts, and the Order was discharged accordingly; but it being considered that there had been no intentional misrepresentation on the part of the Appellants, the Order of the 26th of June, 1861, by which it was discharged, was made without prejudice to any further application by the Appellants on notice to the Respondents.

[496] The case, therefore, now comes before us unprejudiced by what passed on the previous applications, and, it now appears, that the supplementary plaint did not allege the Rs. 4300, to be the real or market value of the land, but stated it to be the auction price of the land, referring, of course, not to any then present auction, for there was none, but to some past auction at which the property had been bought, and meaning, no doubt, to refer to the auction mentioned in the plaint; and, it further appears, that the Appellants have laid before the Registrar of the Sudder Court satisfactory evidence that the real or market value of the land exceeds Rs. 10,000.

As the case now stands, therefore, there was no fraud practised upon this Court in obtaining the Order of the 22nd of February, 1860, and the condition on which that Order was granted has been fulfilled. There would seem, therefore, *prima facie*, to be no ground for now refusing to restore the appeal.

But it was said for the Respondents that the value of the land in dispute was untruly stated in the plaint, in fraud of the revenue laws of India, and that leave to appeal ought not, therefore, to be granted. Their Lordships are far from saying that, if they were satisfied that any such fraud was intended they would be disposed

to grant the least indulgence to any party in any way participating in it, but in this case they are satisfied that, whatever misapprehension there may have been, there was no such fraud intended. It was a mistake on the part of the Court, no less than of the Appellants, to allow the cause to proceed upon such a representation of the value as was contained in the supplementary plaint, and their Lordships take this opportunity of suggesting that the terms of the [497] Regulation upon the subject of value should be carefully attended to. They think that, as this case now stands, the Order applied for cannot be refused upon the ground suggested.

It was asked by the Respondents that they might be at liberty to go into evidence on the question of value, but their Lordships are not disposed to deviate in this respect from their original Order, which was carefully and designedly confined to evidence to be adduced by the Appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation, of a contested issue on the question of value, a result which, in their Lordships' Judgment, ought in all cases, as far as justice will permit, to be avoided.

The petition before us asks that the Order of the 26th of June, 1861, may be discharged with costs, but their Lordships think that there should be no costs on either side.

The Order, therefore, which their Lordships will humbly recommend to Her Majesty to be made on this application, will be simply to discharge the Order of the 26th of June, 1861, and to restore the appeal.

[See note to S.C. 8 Moo. Ind. App. 198.]

[498] OMANATH CHOWDRY and Others,—*Appellants*: SHEIKH NUJEEB CHOWDRY and Others,—*Respondents* * [Nov. 26, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A cross appeal from a decree of the Sudder Dewanny Court in India, although not interposed within the proper time, admitted, upon conditions, (1), of the principal appeal being prosecuted; and (2), that the principal and cross appeals be consolidated and heard on one printed case.

This was a petition by the Respondents for leave to prosecute a cross appeal from part of the decree of the Sudder Dewanny Court at Calcutta, dated the 31st of December, 1860, which affected their interests.

It appeared from the petition that Omanath Chowdry and the other Appellants being dissatisfied with the above decree, in due course appealed to the Queen in Council, and it was alleged that the effect of that decree was to deprive the Petitioners of a portion of the land sued for by them, which consisted of 2339 Beegahs. That Omanath Chowdry and others, having by their petition appealed against the whole decree, the Petitioners, acting upon the practice of the Courts in India, regulated by the Act, No. XV. of 1853, thought [499] that it would be open at the hearing of the appeal in England to offer objections to that portion which deprived the Petitioners of part of the land without incurring the expense of a cross appeal in respect thereof. That the Petitioners were afterwards advised that it was necessary to institute a cross appeal for that object, and that as the time for applying to the Sudder Dewanny Adawlut for leave to appeal had expired, under the circumstances, it was submitted, that a cross appeal ought to be allowed, and the Petitioners prayed for special leave to lodge a cross appeal, and that the same should be consolidated with the original, or principal appeal of Omanath Chowdry and others, and that the same should come

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on for hearing upon one printed case, provided that if such original or principal appeal should be dismissed for non-prosecution, then that the Petitioners should be at liberty to prosecute their cross appeal as a separate appeal.

Mr. Leith, for the Petitioners, applied *ex-parte* for leave to prosecute a cross appeal.—Their Lordships granted the application upon the terms embodied in the following Order in Council, made thereon:—"It is hereby ordered, that the Petitioners be, and the same are hereby allowed to enter and prosecute their cross appeal from so much of the decree of the Sudder Dewanny Adawlut at Calcutta of the 31st of December, 1860, as deprives the Petitioners of a portion of the 2339 Beegahs of land sued for by their plaint, provided the principal appeal be prosecuted by the original Defendants to the suit, and in [500] case the appeal and cross appeal are prosecuted, the same are to be consolidated and to be heard on one printed case on each side" (a).

THE COLLECTOR OF MASULIPATAM,—*Appellant*: CAVALY VENCATA NAR-
RAINAPAH,—*Respondent** [June 15, 18, 19, 1860].

On appeal from the Sudder Dewanny Adawlut at Madras.

The estate of a Hindoo of the Brahmin caste, dying without heirs, escheats to the Crown, as the Sovereign power in British India.

An estate taken by escheat is subject to the trusts and charges, if any, previously affecting the estate.

Exposition of the law of escheat laid down in the *Mitaschara*, ch. ii., sec. vii., art. 5, and the passages there cited, where it is said "Never shall a King take the wealth of a priest; for the text of *Menu* (ix. 189) forbids it. The property of a Brahmana, shall never be taken by the King; this is fixed law." And also referring to *Narada*, where it is declared that "If there be no heir of a Brahmana's wealth, on his demise it must be given to a Brahmana, otherwise the King is tainted with sin." Held by the Judicial Committee, reversing the decision of the Sudder Court at Madras, that the title of the Crown by escheat to property of a Brahmin dying without heirs, subject to the duty, or trust impressed, prevailed against any claimant who could not show a paramount title.

Semble. There is no distinction in this respect between Sacerdotal Brahmins and the ordinary members of that caste.

In this case, the question raised was the right of the Government to seize as an escheat a Zemindary, in the Collectorate of Musulipatam, the property of a [501] Hindoo of the Brahmin caste, who died without heirs, and without an adopted son.

The estate in question, called the Zemindary of *Vissulnapettah*, was held by a Hindoo of the Brahmin caste, named *Varegonda Ramanapah*, under a permanent Cowl, or grant, subject to the payment of the revenue to Government. On his decease in the year 1810, without issue, and without any adopted son, his widow, *Lutchmedavamah*, entered into possession, and continued so until her decease, which happened on the 1st of September, 1849.

It appeared that as early as the year 1795, the Respondent's family had been in the habit of advancing money to the owners of this estate, to enable them to pay the Government revenue, and other liabilities incurred on its account. The Respondent's father, *Cavalv Vencata Lutchmia*, continued to make advances to the

(a) As to the necessity of a cross appeal, see *Nana Narain Rao v. Hurree Punt Bhao*, 6 Moore's Ind. App. Cases, 464; and *Myne Boyce v. Ootaram*, *ante*, p. 400.

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widow Lutchmedavamah until the year 1838, when a balance of Rs. 48,614. 13. 6p. was found to be due to Cavalv Vencata Lutchmia from her; and on the 20th of April, 1838, she executed a bond in his favour, by which she mortgaged to him the Zemindary, with the exception of two villages, as security for the payment of that sum, by instalments, and the permanent Cowl of the Zemindary was at the same time delivered up by her to Cavalv Vencata Lutchmia.

Default having been made in payment of the first instalment, Cavalv Vencata Lutchmia instituted a suit in the Provincial Court of Masulipatam against Lutchmedavamah to recover the amount of the Bond, which became due on the first default, by a sale of the mortgaged estate. That Court on the 10th of March, 1839, decreed that the amount [502] due to Cavalv Vencata Lutchmia, with interest and costs, then amounting to Rs. 65,613. 2a. 4p., should be paid to him by the sale, in the first instance, of the property mortgaged by the Bond, and in the event of the proceeds of the sale not proving sufficient for the purpose, that the deficiency should be recovered from any other property belonging to the Defendant Lutchmedavamah.

Cavalv Vencata Lutchmia died shortly afterwards, leaving three sons, one of whom, the Respondent, on behalf of himself and his brothers, in the year 1840, presented a petition to the Provincial Court, praying for execution of the decree against Lutchmedavamah. On the 14th of January, 1841, the Provincial Court ordered that a precept be issued to the Assistant Judge at Masulipatam, directing him to enforce the decree by collecting the amount thereof from Lutchmedavamah, and from the mortgaged property, and to pay the same to the Respondent.

The Assistant Judge transmitted a precept, with a copy of the proceedings, to Mr. P. Grant, the then Collector of the District, upon which the Collector sent a letter to Lutchmedavamah, advising her to make arrangement with the judgment creditor for the satisfaction of his claim; and he added, that, if she did not enter into a compromise with the creditor, and report the arrangement to the Court within five days, she might be sure that the Zemindary would be attached, and the precept of the Court carried out.

In compliance with this requisition, Lutchmedavamah entered into a settlement with the Respondent, and on the 5th of April, 1841, following, executed a Razeenamah, which set forth that, the Collector had taken measures to affect a sale of [503] the property, and that she had, for the purpose of preventing such sale for the present, entered into a compromise with the Respondent, whereby she had undertaken to pay him Rs. 67,444 12a. by eight annual instalments and that twelve of the fourteen villages of the Zemindary, and the hamlets attached thereto, and that the permanent Cowl granted by the Government to her late husband should remain under mortgage, according to the terms of the Bond sued on, till the principal and interest were discharged, the remaining two villages being reserved for her maintenance. This compromise was recorded, and the execution of the decree suspended. This arrangement was reported by Lutchmedavamah to the Collector on the 26th of April, 1846.

In consequence of litigation between Lutchmedavamah and other parties respecting the Zemindary, the Sudder Court, on the 5th of December, 1841, suspended the execution of the compromise; but on the termination of those disputes, the Respondent again moved the Sudder Court to execute the decree of 1839, when that Court made the following order: "The delay to give effect to the Razeenamah in question particularized by the Petitioner (the Respondent), having in effect occurred, and he having thereby been subjected to loss of produce, from the estate transferable to him under the Razeenamah having been thus kept from him, the Court is of opinion, that it is just and equitable that Petitioner should be indemnified for the losses. The Court, therefore, direct the Civil Judge to adjust the Petitioner's claim, in regard to its amount, from the 15th November, 1841, on which date, according to the terms of the Razeenamah, the Zemindary should have been made over to the Petitioner, and to realize the same from the estate of Lutchmedavamah for the period terminating with her death, up to which the estate was in her hand, and for the remaining period from the party or parties who then held possession."

Upon the death of Lutchmedavamah, in 1848, the Zemindary was attached by the Magistrate of Masulipatam; and possession taken by the Collector, under Act. No. XIX. of 1841. On the 16th of July, 1850, the Governor in Council of Madras

declared the estate to have escheated to the Government on failure of heirs, and directed the same to be assumed and incorporated with the Circar lands.

The Respondent presented two petitions to the Civil Judge of Masulipatam, praying to be put in possession of the Zemindary, in accordance with the stipulations of the Razeenamah. These petitions were rejected by an order of the Civil Judge, dated the 24th of June, 1853; but such order was reversed, on appeal, by the Sudder Adawlut, on the 13th of February, 1854, and that Court ordered the Civil Judge to execute the decree in suit of 1839, by making over the Zemindary to the holder of the decree, pursuant to the terms of the Razeenamah. An application was made on behalf of the Collector of Masulipatam to the Sudder Adawlut, for a view of the order of the 13th of February, 1854, on the ground that the Zemindary had escheated to Government on failure of heirs; but the Court decline to depart from such order, and confirmed the same on the 21st of October, 1854.

From these decisions there was no appeal, and the Respondent was put in possession of the Zemindary. Under these circumstances, the Appellant, as the [505] Collector of Masulipatam, on the 25th of September, 1855, instituted a suit against the Respondent to recover the Zemindary, alleging, amongst other things, that the title of Government to the estate was paramount to that of the Respondent, if, in fact, he had any valid title at all, and that Lutchmedavamah had no power or authority under the Hindoo law to alienate the estate, or any part thereof, in perpetuity, or to pledge the same, if at all, for any period beyond that of her own life, as against those entitled to the estate as next in succession to herself. That upon her death the estate passed by way of escheat to the Government, and vested therein, and that no act of Lutchmedavamah, could in any way defeat, postpone, or curtail the vested right of the Government, who upon her death became entitled by the Hindoo law to enter upon and enjoy the estate fully discharged from any incumbrances or liabilities created by her during her incumbency and possession thereof.

The Respondent by his answer denied that the title of Government to the Zemindary was paramount to that of the Respondent, which he insisted was absolute and established by law, and also denied that Lutchmedavamah was without power or authority under the Hindoo law, to alienate the Zemindary, or any part of it in perpetuity, or to pledge the same for any period beyond that of her own life, as against those entitled to the Zemindary as next in succession to herself; and the Respondent contended that, the Zemindary was an ancient Zemindary held under a permanent Cowl, guaranteed by a Sunnud Istemrar Milkeut, or deed of permanent property, with full power to dispose of or alienate [506] it, and that no such Zemindary could escheat to Government after it had once been legally disposed of under a decree of a competent Court and the Razeenamah, and that such Zemindary could in no way be seized or attached by Government except for nonpayment of the annual settlement, or kist, which had not happened in this case; and the answer insisted, that Lutchmedavamah succeeded by the Hindoo law with full power of alienation, and that by that law a widow in possession as heir had full right to sell, mortgage, or alienate in perpetuity the property, or any portion of it, which she had inherited, for certain necessary purposes, such as the payment of debts contracted by herself or the former proprietors; for lawful purposes, such as, in this case, the payment of Government Peishcush, or the discharge of liabilities, and also for her maintenance, binding the estate, and on such, as a matter of law, the Respondent craved the judgment of the Court; and the answer further insisted, that on the death of Lutchmedavamah there was no part of the Zemindary, being her estate, remaining to lapse to Government, or to be claimed as an escheat, for that the whole of the estate had been already vested in the Respondent years before, by a decree of a competent Court, and by the Razeenamah, having the force of a decree; that the delay in executing the decree and Razeenamah, which was not occasioned by the Respondent or his acts, could in no way alter his vested interest, or cut down his absolute right to possession and enjoyment of the lands and profits; and that of all this the Government, through their agent, the Collector, were fully cognizant, having had due notice thereof before and at the time of the execution of the Razeenamah, and through [507] their agent, the Collector, having been consenting parties thereto; and on those points, as matters of law, the Respondent craved the Judgment of the Court.

After the reply and rejoinder had been filed, the Court recorded the following points to be established by the Appellant and Respondent respectively:—The Appellant's points were; first, to prove the title of Government to escheats, of the nature alluded to in the plaint. Second, that the widow, Lutchemdavamah, had no authority by Hindoo law to transfer her ancestral property to the Respondent; and that she was only a life tenant, and had only a life interest in the same; and third, that the property was seized by Government as an escheat, and to show authority for such act.

The Respondent's points were—first, to prove the present Respondent's title to the property. Second, that in the decree of 1839 he had authority under Hindoo law to alienate all property, personal and real, by demise or otherwise to any one. Third, that the Collector, or agent of the Government, was made acquainted with the stipulations of the Razeenamah, now disputed, and that he acceded to them. Fourth, that execution was never sued out for the decree of 1839, and what occurred officially thereupon. Fifth, that the property was not seized as an escheat, but zifted (sequestered), pending the decision of judicial authorities as to the respective rights thereto of different claimants. Sixth, that the property in question could, under no circumstances, escheat to Government; and to show the order of succession to such property as laid down in Hindoo law.

Evidence was adduced on behalf of the Appellant [508] and of the Respondent, to establish the facts above stated. It appeared from the Appellant's evidence that the Collector of Masulipatam, in the year 1830, had refused to register a transfer of the estate in question from the widow Lutchemdavamah to one of her relations, on the ground that it would prejudice the next heirs of her deceased husband.

At this stage of the proceedings, the Court of Masulipatam, at the instance of the Respondent, propounded the following questions to the Hindoo law officers of the Sudder Court:—"Whether a Hindoo widow (Brahmin) has authority to transfer by mortgage, or conditional bill of sale, all right and title to her real property (landed estate) on account of debts incurred by her for the payment of the Government Peishcush, her own personal expenses, as well as those of the establishment?—If such deed of transfer is valid and binding on her, her executors and assigns, having no direct heir at law?—Whether the estate of such party thus transferred during her lifetime can be escheated at her death, as Bewariss, or without heirs?"

To these questions the Pundits of the Sudder Court returned the following answers:—"The Hindoo law declares, that a widow inheriting the estate of her husband is bound to perform his exequial rights, maintain his relatives, and make daily religious gifts, in proportion to the extent of the estate. She cannot, likewise, fail in her punctuality of payment of the Circar Peishcush. These charges are so important, that the law holds the widow possessed of only real estate competent, when she has no other alternative, to alienate her right and title thereto by mortgage, or conditional bill of sale, in the [509] event of the estate not yielding, under any circumstances whatever, produce sufficient to meet the above charges, as well as her own personal expenses; and in the event of her having no cousins, or of her cousins having neglected to afford her the necessary pecuniary assistance. Under these circumstances, the Brahmin widow referred to in the question has, under the Hindoo law, authority to transfer by mortgage, or conditional sale, the real estate mentioned in the question, on account of the debt incurred, for the purposes therein stated. Such deed of transfer, emanating as it does from an authorized person, as stated above, is valid, and is, therefore, binding upon her and her relations. The only estate which would escheat to Government as Bewariss, or without heirs, is that of persons other than Brahmins, which might have been left undisposed of by the proprietors thereof; but the Circar cannot take as heirless property that which had been legally transferred by the proprietor thereof during his lifetime, and which has, in consequence, become the property of the transferee. In the present instance, therefore, the estate transferred, as stated above, cannot be escheated as Bewariss."

The Civil Court of Musalipatam, on the 8th of May, 1857, pronounced its decree in the cause, by which it decided, that the object of the agreement of compromise was to make that permanent and absolute which the mortgage bond had made simply conditional or dependent on the amount that should be realized by the enforcement of the terms, namely, by the sale of the property alluded to; and although such deed might have been executed by the free will of the parties in question, the Civil

Judge was of opinion, [510] that such transfer, without good and sufficient cause shown, was illegal, and contrary to the provisions of Hindoo law. That from a full consideration of the whole of the circumstances of the case, the Court was of opinion, that the Kararnamah, or postponed petition alluded to, must be quashed, and that the provisions of the decree in the original suit of 1838, should be enforced in its integrity by the sale of the property therein alluded to, or so much thereof as might be sufficient to meet the balance of the award then made, and to no later period, the whole to be exposed at an upset price equal to that demand; and on failure to realize the sum decreed, the property itself should be made over to the Defendant. That, on the other hand, should the value of the property be more than sufficient to satisfy the award to the Defendant in the former decree, in consequence of there being no direct heirs to the deceased widow, Lutchemdavamah, the title of the Government to claim such property as an escheat was confirmed on payment of the lien thereon, namely, the balance due to the Defendant.

The Respondent appealed from this decree to the Sudder Court at Madras.

The appeal was heard before Messrs. Hooper, Strange, and Baynes, the Sudder Court Judges, and on the 8th of May, 1858, the Court delivered judgment as follows:—“The Defendant objects that the estate in question, as belonging to a Brahmin, can never escheat to the Government; and to this point, as being one of a conclusive nature, the hearing of the appeal has been confined. On the trial of the suit before the Civil Judge, a question, among others, was put by him to the Pundits of the Sudder Adawlut, in such a form as to elicit from them an answer to the effect [511] that the estates of Brahmins could not escheat to the Government; but the point appears to have escaped the Civil Judge's attention, as it is not noticed by him in his decree. The objection is met on the part of the Plaintiff by the plea, that the law which would ultimately assign the estate of an heirless Brahmin to other Brahmins, and these virtuous ones, is of too vague and uncertain a nature to be dispensed: that this law must be considered obsolete, as are other parts of the Institutes of Menu, from which it is derived; and that, if it be put in force, it can have respect to none but sacerdotal Brahmins. The Judges have considered these various pleas, and do not find them sustainable. It is true that, there may be difficulty in dealing with the ultimate provisions of the law of succession to Brahminical estates devoid of natural heirs, but there can be none in upholding the primary declaration that ‘the property of a Brahmin shall never be taken by the King,’ which, it is added emphatically, is a ‘fixed law’ (Menu, ch. IX. art. 189); and it is with this primary declaration that the Court have now to deal. That this law is an obsolete one, there is nothing to show. It is re-enforced in the current law-books, and prominently in the Mitaschara, (ch. II. sec. vii. art. 5), which is the authoritative and prevailing declaration of law in this part of India; and it is obvious that, while Brahmins exist in the integrity of their caste, a law regulating inheritance among them, and unchanged, must in like manner be in continued existence. The plea that the law now in question relates merely to sacerdotal Brahmins is founded in misapprehension. Whatever the occupation of a Brahmin, he is as much a Brahmin as one who devotes himself to the office of the priesthood; and the law is general as to all Brahmins, without any [512] such limitation as is contended for. The term ‘Priest,’ it has to be observed, as the text may show, has been used in the translation of the fifth clause of the section of the Mitaschara, above referred to, as convertible with the Brahmin, the words used in the original being ‘Brahmana Dravyam,’ or ‘the wealth of a Brahmin.’ The Court finding thus a positive prohibition in the Hindoo law to the assumption in escheat by the ruling power, of the estate of a Brahmin, and it being allowed that the property now in question is a Brahminical estate, the Court resolve to set aside the decree of the Civil Judge, and dismiss the suit, with costs.”

The Collector of Masulipatam appealed from this decree to Her Majesty in Council.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill for the Appellant.—Although there is no averment in the pleadings that Veragonda Ramanapha, the last Zemindar seized, was a Brahmin, or that on account of his caste the Zemindary could not escheat to the Government; points which by Mad. Reg. XV. of 1816, sec. 10, ought to have been recorded for proof in the suit, *Srimut Moottoo Vijaya Raghanaidha Goveery Vallabha Perria Woodia Taver v. Rany Anya Moottoo Natchiar* (3 Moore's

Ind. App. Cases, 278), *Namboory Setapaty v. Kanoo-Cholannu Pulla* (ib. 359), yet, for the purpose of the argument, we will admit that he was a Brahmin, although there is no proof of that fact.

We insist, however, that the judgment cannot be sustained upon these grounds, first, that the Government was constructively in possession of the Zemindary, and had a good possessory title as against the [513] Respondent: secondly, that the Respondent had no title, inasmuch as the widow had no power by the Hindoo Law to alienate any part of the Zemindary: and thirdly, that the Government is in possession by escheat.

First, The Government were put in possession by the Court under the provisions of the Act, No. XIX. of 1841, and we insist that that is a valid title, as against the Respondent, whose only right was as a mortgagee, and under the Razeenamah. Now, as the widow had no power to alienate the estate, the whole transaction, as affects the Government right, must fall to the ground. The Collector had no authority from the Government to recommend the widow to agree to the Razeenamah to save the estate from sale, and as such act was beyond the functions which devolved upon him as an executive Officer, the Government are not bound by this act, which was *ultra vires*.

Secondly: the important question really involved is, whether a childless Hindoo widow has power by the Hindoo law prevailing in Madras to alienate her deceased husband's estate. Our contention is, that she has no such power. According to the Books of authority and text-writers received in India, they all, without exception, negative such a power: no passage can be found in the Books which authorizes a widow to alienate her husband's estate, even if the husband had died without heirs. It must be borne in mind that there are two schools of law in India. The Mitashara prevails throughout the peninsula of India. The Dāya-Bhāga is confined to Bengal, and is, therefore, the exceptional law. Now, the Dāya-Bhāga, though it is not the law which governs the rights of Hindoos in Madras, gives larger powers to widows than the Mitashara, which latter authority, we sub-[514]-mit, governs this case upon this point. It makes no difference that she was the widow of a Brahmin. The general Hindoo law on this subject is thus stated by Sir Thomas Strange, "Hindu Law," Vol. I. p. 246 (2nd edit.): "With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than tenant for life, and trustee for the next heirs, of property so possessed; being (as already intimated) restricted from alienating it, by her sole independent act, unless for necessary subsistence, or purposes beneficial to the deceased." This interpretation of the law is confirmed by the Pundits, in the case of *Ramasamy v. Mandavilly Pariah*, referred to in Strange's "Hindu Law," Vol. II. p. 408. So, in the Dāya-Bhāga of Jimūta Vāhana, ch. XI. sec. i. art. 56, it is laid down that "the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus, Catyayana says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." And in the Mitashara, ch. II. sec. i. art. 35, which is an authority more favourable to the widow's rights than the law received in other parts of India, it is said, that if the husband dies without male issue, his brothers take, and the widow has only an allowance for maintenance for life, as "the wife takes as much as is adequate for her subsistence, and the brethren take the rest." In Morley's Dig. tit. "Inheritance" 4. "of widows," Vol. I. p. 311, it is broadly laid down that "a widow succeeding to the landed estate of her husband, takes only a life interest," and he quotes numerous authorities in sup-[515]-port of that proposition. The restriction upon the widow's power of alienation of the real estate of her husband arises from the fact that she has only a life estate. Sir F. W. Macnaghten, "Hindu Law," p. 9, says "widows who take an estate shall take it for life only." And so it has been determined by the Supreme Court at Calcutta, *Gopeymohun Thakoor v. Seban Cover* (Sir E. H. East, notes of decided case, 2 Morley's Dig. p. 110), *Doe dem. Ramanund Mookopadhin v. Ramkishen Dutt* (ib. 219), *Doe dem. Sibnauth Roy v. Bunsook Buzzary* (ib. 131); by the Sudder Court there, *Mohun Lal Khan v. Ranees Siroomunee* (2 Ben. Sud. Dew. Rep. 32), *Nundkomar Rai v. Rajindurnaraen* (1 Ben. Sud. Dew. Rep. 262), *Pokhnarain v. Mussumaut Seesphool* (3 Ben. Sud. Dew. Rep. 116): and

by this Tribunal, in the case of *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331).

Thirdly: the estates of a Hindoo, whether of the Brahmin or any other caste, dying without heirs, devolve on the Sovereign power, by the law, as now administered in India. [The Lord Justice Knight Bruce:—It would avoid further litigation if some arrangement could be made for the surrender of the Zemindary to Government upon payment of what is due to the Respondent.] The Indian Government, as the Sovereign power, took the Zemindary, in the absence of heirs of the late Zemindar, by escheat. Nothing can be more positive than the right of the State to take either as *ultimus haeres*, or for forfeiture, as in the case of felony (a) or treason, the estate of a Hindoo. Mad. Reg. VII. of [516] 1817, sec. 6, expressly provides for the general superintendence of all escheats, which that section directs to be vested in the Board of Revenue. That regulation was founded upon the Ben. Reg. XIX. of 1810, sec. 7, which is almost identical with the former Regulation, and also provides for the superintendence of escheats. *Joanna Fernandez v. Domingo de Silva* (2 Ben. Sud. Dew. Rep. pp. 227, 230), was a case of a British subject dying in India without heirs, and the Sudder Court held that the Government was entitled to take the lands under the provisions of the latter Regulation. If there can be any exemption in such law from the general law of escheat in favour of any class, it must be confined to the estates of Brahmins who are devoted to priestly offices, and does not apply to the Zemindary in question. It is true that it is laid down in the Institutes of Menu, ch. IX. sec. 189, that "The property of a Brahmin shall never be taken as an escheat by the King; this is fixed law: but the wealth of the other classes, on failure of all heirs, the King may take." And that principle is adopted in the Mitaschara, ch. II. sec. vii. art. 5. But it is impossible to receive this as an exposition of Hindoo law now received or acted upon in India. It must be treated as obsolete. Sir Thomas Strange says in his preface to his treatise on "Hindu Law," Vol. I. p. xiii., that the Institutes of Menu, though the undoubted foundation of all Hindoo law, are looked upon by Jurists "as a work to be respected, rather than, in modern times, to be implicitly followed." So W. H. Macnaghten "Hindu Law," Vol. I., pref. p. viii., treats of ancient Hindoo laws as obsolete at the time he wrote. But, if the question is to be tried solely by the ancient Hindoo law, if not affected by Mad. Reg. VII. of 1817, which we contend overrides it, then we [517] submit, that the exemption in such law from the Government's right to take by escheat, in favour of any class, is confined to the estates of sacerdotal Brahmins, a distinction well known and defined by the Hindoo law. W. H. Macnaghten's "Hindu Law," Vol. I. ch. V. pp. 248-263; Strange's "Hindu Law," Vol. II. pp. 220, 247, where the point was distinctly raised and decided. Mill's British India, Vol. I. p. 185 (4 edit. by Wilson), gives a valuable summary of the law relating to Brahmins, showing the utter impossibility of the application of the doctrine laid down by Menu to the present state of society. Wilson says, in a note, Vol. I. p. 192, that the Brahmins, collectively, have lost all claim to the character of a priesthood, and that they form a nation following all kinds of secular avocations. How is a Brahmin property to be generally exempt from escheat! Take this test. Suppose a Brahmin committed felony, or treason, if the passage in Menu is to be adopted, the Crown would have no power of declaring his estate forfeited to the State. Such an anomaly could not be permitted upon the authority of a single passage in that work. If the Crown cannot take as *ultimus haeres*, who then is the heir of a Brahmin? Menu does not say any one Brahmin in particular, but "Brahmins who read the three Vedas," ch. IX. sec. 188. Such succession is utterly impracticable. Strange's "Hindu Law," Vol. I. pp. 149, 310 [2nd edit.]. In any circumstances the ruling power must take, even if it be held to be subject to a trust for a Brahmin; though such a trust would be void by English law for uncertainty.

Lastly, we are not concluded by the orders or the decrees of the Sudder Court and the Civil Court of Masulipatam, in 1854, and we submit that, although the former order was not appealed from, yet that the whole [518] subject at issue can

(a) Upon this point see the case of *The Advocate-General v. Richmond*; Oriental Cases by Sir E. Perry, p. 566, in which the question was raised to whom the goods of a convicted felon belonged, whether to the Crown or the East India Company.

be taken into consideration by the Court upon a final decree, *Sumbloodall Girdhurlall v. The Collector of Surat* (8 Moore's Ind. App. Cases, 1). No appeal lies from an Interlocutory order (1 Summary Cases, 113).

Sir Hugh Cairns, Q.C., Mr. Ayrton, and Mr. Norton for the Respondent. First: Our answer to the Appellant's argument is, that there is no possessory title by the Government: on the contrary, that the Collector in advising the compromise admitted the Respondent's possessory title, and that the Government are bound by the Collector's acts. Indeed the Respondent's title is unquestionable. He was put into possession, and holds the Zemindary under a judgment of a Court of competent jurisdiction, made in a regular suit in which the Collector, as representing the Government, was a party, and such judgment is still in force, unimpeached and not the subject of the present appeal. Mad. Reg. VIII. of 1818, sec. 3, requires, that if the party is dissatisfied, an appeal should be interposed within six months, otherwise the decree stands. No appeal having been brought it is too late now to question the decree. The proceedings of the 13th of February, 1854, therefore, operate as an estoppel, and are a bar to the present suit. What was done under Mad. Reg. VII. of 1817, sec. 6, was merely an administrative act on the part of the Government as between itself and one of the Government Board of revenue. It does not in the slightest degree alter the rights of any of the parties in respect of this property. The Appellant's contention, that the Government were in possession by escheat, and that the possession decreed to the Respondent by the decree [519] of the Court was *ultra vires*, cannot prevail. For if the Government taking by escheat is the next heir, then from the acts of the Collector we must assume that we have had their full assent to the alienation by the widow.

Secondly. It is contended by the Appellant, that a childless widow is by the Hindoo law tenant for life only, and has no power of alienating immoveable estate. We submit, that such a proposition is untenable and cannot be maintained. The principle of the Hindoo Law is, that a childless widow has the whole inheritance of the estate vested in her. It is true that her rights over that inheritance are so far restricted and qualified that she cannot dispose of real estate without the consent not only of the lineal heirs of her deceased husband, but also of the collateral relations, or for a sufficient cause, such as necessary subsistence, or for purposes beneficial to her late husband, Strange's "Hindu Law," Vol. I. p. 246, which operates as an alienation for the benefit of the next heir. Such alienation must, however, be with the consent of the members of the family, who are entitled to maintenance, but if there be no heirs, then the limitation, *ex necessitate*, ceases to exist. No doubt can be raised that in this case upon the death of the Zemindar last seized, the Zemindary devolved upon his widow. There is nothing known in Hindoo law analogous to the English law with respect to dower, or that by which a claimant would be simply tenant for life. The inheritance is in the widow as perfectly as what in England would be called the fee. The authorities fully support this. In the case of *Cossinaut Bysack v. Hurroosondry Dossee* (2 Morley's Dig. 215) Sir Edward Hyde East says, the [520] widow has "the entire right of property vested in her, both in the moveable and immoveable state; for there is no distinction between them taken in the Books in respect of the husband's estate devolving upon her as heir." So in the *Dāya-Bhāga*, ch. XI. sec. i. art. 43, it is laid down, that "on failure of heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because she performs acts spiritually beneficial to her husband from the date of her widowhood (and not like them from the moment of their birth), succeeds to the estate on their default." This exposition of the widow's right of inheritance is recognized in the case of *Pokhnarain v. Mussimaut Soosphool* (3 Ben. Sud. Dew. Rep. 114), *Sihoo Singh v. Pirthee Singh* (10 S. D. R. N. W. P. 415).

Thirdly, we insist that the estate in question was, at the death of the widow, Lutchemdavamah, charged with the debt due to the Respondent, being mortgaged to him to secure repayment thereof, and that the right or interest of the Respondent in the Zemindary did not escheat to Government on the widow's decease. The question of escheat involves two considerations:—first, that although we admit that the ruling power may generally take by escheat on failure of heirs, yet an exception exists in the case of a Brahmin, and that in this case, as the Zemindar last seized was a Brahmin, the Government could not take, as upon his death his real

and personal property must be given to a Brahmin. That is the opinion of the Sudder Court, founded upon the great authority of Menu, and unless you repudiate that authority, the law as expounded by the Pundits and adopted by the Court must prevail. Menu, ch. IX. art. 189, says, "The property of a Brahmin shall never be taken as an escheat by the [521] King; this is fixed law: but the wealth of the other classes, on failure of all heirs, the King may take." And this doctrine is fully recognized in the Mitaschara, in ch. II. sec. vii., "on the succession of strangers upon failure of the kindred." In art. 3 it is laid down that a learned priest is heir; according to Gautama, 28, 29; and art. 4 of that section states, generally, any Brahmin, who has read the three Vedas, as Menu has declared; and so in art. 5, where it is unequivocally declared that "Never shall a King take the wealth of a priest; for the text of Menu forbids it: The property of a Brahmin shall never be taken by a King: this is fixed law. It is also declared by Nareda, If there be no heir to a Brahmin's wealth, on his demise, it must be given to a Brahmin, otherwise the King is tainted with sin;" and so it is laid down by Strange, "Hindu Law," Vol. I. p. 149. Secondly, if the Government took by escheat as the *ultimus haeres*, then the act of the Government officer is binding, as it shows the full consent of the Government to the alienation by the widow. Nothing is to be found in the pleadings to show that the Government impeached it on that ground, which they were bound to have done if they depend upon their right by escheat.

But, lastly, the Government in no circumstances can have a right to the estate sought to be recovered until the Respondent's claims have been discharged. It is a simple case of a mortgagee endeavouring to recover back money, which it is admitted he had advanced for the benefit of the Zemindary.

Judgment was reserved, and now delivered by

The Lord Justice Knight Bruce (July 30, 1860).—Of the various questions that have arisen in this case, the only one which appears to have been argued [522] in the Sudder Dewanny Adawlut at Madras, and certainly the only one decided by that Court is, whether, on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by escheat. The decision of the Sudder Court upon this question strikes at the root of the Appellant's title; and its correctness is, therefore, the first thing to be now considered.

The learned Judges of the Sudder Dewanny Adawlut have treated the question as one to be determined merely by Hindoo law; and recognizing the general right of the Crown or other ruling power by escheat when there is a failure of heirs, have adopted and enforced an exception as to the property of Brahmins, which is supposed to result from certain texts in Menu and other ancient authorities. The arguments addressed to us have also assumed the applicability of the Hindoo law; and their Lordships, therefore, propose to deal primarily with the question, whether that law, as it now obtains in British India, has, if applicable to the case, been properly held to be fatal to the Appellant's title.

For the exposition of the Hindoo law on the point, it is unnecessary to go back further than the Mitaschara. That treatise, the highest authority on the law of inheritance in the part of India where the Zemindary, the subject of this suit, is situate, comprises, amongst other authorities, the passage of Menu which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of the law.

The important passages are in articles 3, 4, and 5, of chapter II., section vii.

[523] From these it would appear that the beneficial enjoyment of a Brahmin's property ought not on his death without heirs to pass to the King; that it ought, in some way or another, to pass to other Brahmins. But the texts also shew that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins having certain spiritual qualifications; they are to be pure in body and mind, and are to have read the three Vedas. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin who could lay hands upon the property of a member of his caste dying without heirs was to hold it, subject, perhaps, to the con-

dition of showing that he possessed the personal qualifications which the law requires.

It appears to their Lordships, that the passage quoted by the Mitaschara from Nareda, in the very section which cites the prohibition of Menu, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a Brahmana's wealth, on his demise it must be given to a Brahmana. Otherwise the King is tainted with sin." In other words, the King is to take the property, but to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts.

If this be so, it appears to their Lordships that, according to Hindoo law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against [524] any claimant who cannot show a better title; and that the only question that arises upon the authorities is, whether Brahminical property so taken is, in the hands of the King, subject to a trust in favour of Brahmins. In this suit, where the issue is between the Government claiming the property (whether subject to a trust or not), by escheat, and a party claiming by an adverse title, it is unnecessary to decide whether the duty imposed upon the King is one of imperfect obligation, or a positive trust affecting the property in his hands, or whether, if a trust, it is or is not one incapable of enforcement by reason of the uncertainty of its objects. It is also unnecessary to decide on the arguments addressed to us concerning a distinction, or supposed distinction, between the Brahmins who have been called "Sacerdotal Brahmins" and the ordinary members of the caste. For, assuming that the Appellant's title is to be governed by Hindoo law, and assuming that there is no valid distinction in this matter between sacerdotal and other Brahmins, their Lordships, for the reasons above stated, would be unable to concur in the judgment under review.

Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the Appellant's claim as wholly and merely determinable by Hindoo law. They conceive that the title which he sets up may rest on grounds of general or universal law.

The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If, upon her death, there had been any heirs of her husband, those heirs [525] must have been ascertained by the principles of the Hindoo law; but by reason of the prevalence of a state of law in the Mofussil which renders the ascertainment of the heirs to take on the death of an owner of property, a question substantially dependent on the *status* of that owner. Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindoo, to Mahometan, to Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive regulation; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle.

In the case of *The East India Company v. The Mayor of Lyons* (1 Moore's Ind. App. Cases, 175), the [526] question arose whether an alien could hold lands in British India. Some of those lands were without the bounds of a Presidency town. It was decided, on appeal here, that that part of the law of England which disabled an alien from holding land against the claim of the Crown had not been introduced

into India; but the reasons and principles of the decision do not appear to their Lordships to be inconsistent with the view that they take of the present controversy.

In the present case, if the Hindoo law had expressly provided that, upon the death of a Brahmin without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a Soodra, there would be ground for excluding the title of the Crown, because there would, by Hindoo law, be some person in the nature of an heir capable of succeeding; but here the Sudder Dewanny Adawlut rests its decision on what it terms "the primary declaration of Menu that the property of a Brahmin shall never be taken by the King." That declaration is contained in an article (see Menu, ch. IX, art. 189) which, assuming a complete failure of heirs, negatives the King's right to Brahminical property, whilst it affirms his title to the wealth of all other classes in such circumstances. In so dealing with the question, the Sudder Court was, we think, applying the actual or supposed Hindoo law, in derogation of the general rights of the British Sovereignty.

Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a [527] Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the Zemindary in question (subject, or not subject, to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow, Lutchmedavamah, in her lifetime. In the latter case, the Government will, of course, be entitled to the property subject to the charge.

It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised on this appeal touching the effect of the acts of Lutchmedavamah in her lifetime. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collector's acts in 1841, it is particularly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may be also material to know what was the nature and what the effect of the proceedings by which the execution of the Razeenamah was suspended. In these circumstances, their Lordships, though they would have been glad to determine, if they could, this long litigation by a final decree, do not feel that they can safely do more than remit the case to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject, or not subject, to a trust) has been established. It is right, however, to state further their [528] Lordships' opinion, that the proceedings of the Sudder Adawlut, under the dates of the 27th of October, 1853, and the 21st of October, 1854, do not constitute any bar to the title of the Appellant in this suit; but that they do amount to an award of possession, with which, in the present state of the cause, and until its final adjudication, their Lordships will not interfere.

Their Lordships desire again to suggest, for the consideration of the parties, that some arrangement for the surrender of the Zemindary to Government, upon payment of what is due to the Respondent for the advances actually made, would probably meet the real justice of the case, and save both parties from protracted litigation.

There will be no costs of this appeal. The costs in India will be dealt with by the Court to whom the cause is remitted.

It is remitted with the declaration as to the right of the Crown to escheat, without touching the question of trust, or no trust (see the further report of this case, next page).

[See *Rante Sonet Kowar v. Mirza Himmut Bahadoor*, 1876, L.R. 3 Ind. App. 92. For other proceedings, see next case and *Cavalry Venkata Narrainapak v. The Collector of Masulipatam*, 1867, 11 Moo. Ind. App. 619.]

[529] THE COLLECTOR OF MASULIPATAM. *Appellant*: CAVALY VENCATA NARRAINAPAH. *Respondent* * [Nov. 29, 30, 1861].

On appeal from the Sudder Adawlut at Madras

By the Hindoo Law of inheritance, a childless widow takes as heir, but it is only a special and qualified estate.

If there be collateral heirs of the husband, the widow cannot alien the property except for special purposes, such as for religious or charitable objects, or those acts which are supposed to conduce to the spiritual welfare of her husband, in which circumstances she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the latter purpose, she must show actual necessity.

The restrictions imposed by the Hindoo Law on a widow's power of alienation of her husband's estate are inseparable from her estate, and do not depend on the existence of heirs capable of taking on her death.

When the Crown takes by escheat for want of heirs, it has the same right to impeach an unauthorized alienation by the widow, which the heirs of the husband (had there been any) would have had.

The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact, or in law, directly, or by implication, ratifies the excess.

Circumstances in which it was held that, a Government Officer had no authority to waive the rights to which the Government might be entitled by escheat, and that a decree founded thereon by a Court in India did not operate as an estoppel against the Crown.

The rule laid down in the case of *Myna Boyer v. Ootoram* (*ante*, p. 400), that an opinion of the Pundits, apparently discordant from works of current and established authority upon Hindoo Law, given in the absence of authorities, or of local usage, is not to be received as conclusive upon the question at issue without further investigation, approved of.

In the first appeal in this case, the question then raised, the right of the Appellant to seize an estate [530] in his collectorate as an escheat to the Government for want of an heir to the person last possessed, their Lordships decided in favour of the general right of the Crown to take by escheat the estate in question, subject, or not subject, to a trust, and remitted the case to the Sudder Dewanny Adawlut for further hearing, with the expression of their opinion, that there was not sufficient evidence in the case to admit of a satisfactory decision on the subject of the trust and the claims under it.

The suit accordingly was again brought before the Sudder Dewanny Adawlut on the 20th of October, 1860, and, on the 22nd of the same month, that Court delivered judgment, whereby, after stating that the Court had ascertained from the parties that they were not in a position to come to an arrangement in accordance with their Lordships' suggestions, but wished the suit to proceed, and that the Court "had not found it necessary towards their pronouncing upon the merits of the suit to call for the additional evidence which their Lordships had indicated as apparently requisite," the judgment of the Court proceeded in these terms: "The arguments brought before the Court have led them to consider, primarily, what may be the rights of the Crown by the law of escheat, especially as connected with the powers of a female, under Hindoo law, to alienate property. In view of the circumstances under which the right of the Crown to an escheat, in reference to the particular estate in litigation, has been declared by their Lordships of the Privy Council, any clause of the Hindoo law, 'actual or supposed,' notwithstanding, the

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Court have felt it incumbent on them to judge of the law of escheat in the most general aspect: and, towards forming an [531] opinion on the subject, they have admitted the arguments of Counsel, based upon the bearings of the law as recognized in the Courts in England, besides taking into consideration the state of the law as existing in this part of India, which it is their more peculiar province to deal with. It has been pressed upon the Court, that by English law, title by escheat does not confer the powers belonging to title by heirship. The Lord paramount, it is declared, always takes to his own disadvantage, *Burgess v. Wheate* (1 Sir W. Black, 123). There a trustee held property, and those for whose benefit it had been intrusted to him had lapsed, the Crown was declared not entitled to deprive the trustee of the possession as having escheated to it, 2 Spence, 'Equi. Juris.' p. 266; *Taylor v. Haygarth* (14 Sim. 16-7). It has been also ruled, in the case of property held under mortgage, the heirs of the mortgagor being extinct, that the Crown cannot exercise the equity of redemption, *Burgess v. Wheate*; Jeremy, 'Equi. Juris.' p. 182; 2 Spence, 'Equi. Juris.' 237; *Taylor v. Haygarth*; *Prescott v. Tyler* (1 Jurist, 470). Also, that the Crown cannot enforce forfeiture upon breach of condition, *Burgess v. Wheate*. The Hindoo law is here analogous. Had the last undisputed owner of the Zemindary in issue been a male, without male progeny, he could have alienated the estate at any moment before his death, whether with or without consideration, and no collateral could have questioned the act. By consequence, the Crown could not do so. The last owner having been a female, the power to alienate in her was placed by the law under certain special restrictions—that is, though destitute of direct lineage, she could not alienate to the prejudice of her remotest heirs, [532] save under their consent, or under strict necessity. In the present suit, the Crown claim to possess the restrictive power belonging to an heir of the female, and have laid this suit to defeat her act. The Court have consulted their Pundits on the occasion, and their declaration is to the effect that the limitations under which a female is placed are exclusively for protection of the interests of her heirs—meaning thereby her kindred—or those of her husband; that failing all such heirs, the provision does not extend to the protection of the interests of the ruling power as coming in by escheat; and that in regard to the ruling power, the female is absolutely free, being at liberty to alienate without seeking its consent, and irrespective of its ulterior rights. Among the authorities quoted by the Pundits in support of their view of the law, they have referred to Mitaschara, ch. I., sec. i. art. 2, where the following definition appears:—‘The term heritage (Daya) signifies that wealth, which becomes the property of another, solely by reason of relation to the owner.’ This being the treatise under which rights in property are governed among Hindoos in this part of India, the *dictum* must be received as of high authority; and it obviously governs all those parts of the treatise which relate to the limitation under which females are placed in respect of those who are to take the ‘heritage’ after them—that is, ‘the heirs,’ or, as the original is, the ‘Dayadies.’ The limitations are thus for protection of those to whom the property is to come in right of kindred; and here the Crown, as the ultimate possible successor, is not in question. Accordingly, it is the consent of the ‘Dayadies’ that must be secured by the female before she can alienate, save under strict [533] necessity, and the consent of the Crown is unessential. Community of right in property among the Hindoos is ever dependent upon community in blood, and the possible ultimate appropriation by the Crown rests upon quite another basis. It is where there is no ‘heir’ only, that the Crown comes in, and obviously as universal landlord, where no individual rights exist, and for the avoidance of the disputations and disturbance which would arise were unclaimed property left, without provision of law, to be seized upon by the strongest or the most active. This the Court consider to be the principle of the law of escheat. Under it, the Crown could probably defeat the possession of any heirless property obtained by fraud upon the previous owner, and certainly any that had been secured by mere seizure without pretence of right; but where there is an assignment by the former owner, the Crown cannot take the place of an heir to challenge the power of the individual to effect the assignment, and undo the act. It is upon the presumption that the Crown has thus the power to challenge and defeat the act of the last incumbent that this suit has been brought, and on the ground that the Crown, by the law of escheat, has no such power, the suit

should be dismissed. Another bar to the suit, it appears to the Court, is created by the Collector's act in 1841, to which their Lordships of the Privy Council advert. The Defendant was in process of putting in execution the decree held by him, and was about to have his claim satisfied by sale of the Zemindary, as provided for in the decree. The execution was intrusted by the Court to the Collector to enforce, when he gave that counsel to the debtor, Lutchmedavamah, which [534] led to the execution of the Razeenamah on which the Defendant founds his title. The terms of the Razeenamah were immediately communicated to the Collector, and the execution dropped. The Collector held office in more capacities than one. As respected the enforcement of the decree, he was acting as the Nazir, or executive officer, of the Court; otherwise, in his ordinary position, he was the agent or representative of the Government in his District. It appears clear to the Court that, in advising Lutchmedavamah to come to some terms settling upon any conditions with the creditor, so as to save the estate from sale, the Collector was dealing with the matter in a manner beyond the functions devolving on him as executive officer of the Court, and was acting in the capacity proper to him as agent of the Government. It is the policy of the Government to save from peremptory sale the possessions of landlords, and especially those important estates known as Zemindaries; and there can be little doubt that it was owing to the interest thus felt in Lutchmedavamah as a Zemindar that the advice in any way to save her property from being brought to auction was given, together with the respite necessary for the purpose. The terms into which Lutchmedavamah entered with her creditor, in pursuance of the above advice, were such as to allow of the estate eventually vesting in him. The Collector, after being made aware of these terms, offered no objection thereto. On the contrary, he gave effect to the arrangement, and so indorsed it, by dropping the execution. It would be altogether inadmissible that the Collector, individually, after the condition of lapse to the creditor had become effectual, should appear and protest against the arrangement, and seek to de [535] feat it on the plea that it was made without his consent and against his interests; and it is equally inadmissible that his principal, the Government, should do so. The Court are of opinion, therefore, that, supposing the consent of the ruling power to the alienation by Lutchmedavamah were necessary, the suit should be dismissed on the ground that such consent was in effect obtained. But even if it might be admitted that the Government could now challenge the alienation in question, it appears to the Court that the plaint takes up no ground on which the act can be called in question. The Defendant held a decree, in which it was found, upon evidence taken, that the debt was one actually incurred by Lutchmedavamah, and of a nature to be fairly and legally chargeable upon the estate. To defeat that decree the Plaintiff had to subvert the facts found, by showing that the judgment was one obtained fraudulently and collusively; that the debt was not a *bona fide* one, or that the obligation was of a character such as to render it not chargeable on the estate. In the plaint no such grounds are taken. The plaint, in fact, is founded upon a wrong view of the law, being to this purport:—‘Let the obligation be of what character it will, it is not chargeable upon the estate, as a female can, under no circumstances, alienate her property in which she holds but a life interest.’ Now, it is well known, and certainly not disputed at the hearing of this appeal, that a female may alienate her property absolutely, if for relief of necessities. There can be no more admissible necessity than the obligation to meet the Peishcush or Government demand, failing discharge of which the estate would be peremptorily sold, and lost both to the occupant and her heirs. [536] Advances for Peishcush are represented to have formed an essential part of the debt incurred by Lutchmedavamah. The fact was so found in the decree held by the Defendant, and the plaint discloses that the Plaintiff was aware, as in truth he was bound to be, that such was the alleged character of the debt. Yet there is no denial that the debt was thus incurred. On the contrary, the Civil Judge who had the conduct of the actual examination of the case, states, in his judgment, that ‘the justice or otherwise of the claim in original suit, No. 18 of 1838, is in no way called in question in the present case.’ True it is, the Civil Judge adds, that ‘the suit is alluded to as having been a collusive one,’ but where he has met with such collusion the Court fails to discover. The claim itself being taken as a just one, how the suit can have been a collusive one is not apparent. Possibly the fact of the suit having been undefended is all that is pointed to. From all these grounds, the Court

come to the conclusion that the plaintiff has alleged nothing in consideration of which the assignment by Lutchmedavamah to the Defendant can be called in question. It has been maintained, on the part of the Plaintiff, at the hearing of this appeal, that the burden of sustaining the legality of the assignment rested upon the Defendant. The Court think otherwise. First, as before observed, he held a decree sustaining the basis of the assignment, and it was for the objector to show something by which that decree could be overthrown. Nothing of the sort having been shown, the Defendant may rest upon his decree. Secondly, even supposing there had been no decree, or that the decree obtained cannot be pleaded, the obligation in question was not incurred [537] with the Defendant, but with his father. It sprang from transactions originating, as the decree held by him shows, in 1813, and continued to 1838, and remaining unchallenged, so far as this Plaintiff is concerned, until the filing of this suit in 1855, even if this suit can be said to have called them in question. The father, in 1831, obtained assurance for the debt by the bond in favour of which the said decree was given, and the Defendant, in 1841, entered upon the fresh transaction, on the basis of the previous obligation, which it is the design of this suit to set aside. The Defendant would be placed at a great disadvantage, were the maintenance of his position to be dependent upon his producing antiquated testimony of transactions long ago concluded, and not personally so by himself—evidence which may by this time have been extinguished, or otherwise placed beyond his reach. The Court think, therefore, that where such a transaction as that now in question is challenged, the burden of showing causes against it rests with the challenger. In this opinion, the Court find themselves supported by a judgment of the Privy Council. In deciding upon a case, where the heir sought to free his estate of liability for a charge incurred by the previous incumbent as his guardian, their Lordships observed,—‘It is obvious, however, that it might be unreasonable to require such proof from one not an original party (*i.e.* the creditor) after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously ques-[358]-tioned, a presumption of the kind contended for by the Appellant (the creditor, namely, that the obligation formed a valid charge) would be reasonable.’ *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore’s Ind. App. Cases, 420). The burden of proving, therefore, whatever might be necessary to free the estate in issue of its liability to the Defendant, has rested upon the plaintiff. It is apparent that no sort of proof of the nature in question has been adduced by him. He has contented himself with filing four exhibits, which are irrelevant to the transaction in issue, and produced no witnesses. The judgment of the Privy Council, above referred to, enables the Court to meet another plea that has been taken in behalf of the Plaintiff; namely, that admitting the obligation incurred by Lutchmedavamah to have been of a character whereby the estate could be charged, the resources of the estate were so ample that it could only have been by dissipating them that she could have fallen under any necessity to incur debt, and that, consequently, the estate cannot be charged with such debt. The Court have already observed that the liability for Peishush, to meet which the obligation in question was in part, and presumed in chief part, incurred, was one of a nature so urgent, that when it arose, had it not been met, the estate would have been sold and lost to all interested in it. To pronounce the estate when thus redeemed from risk not liable for the money advanced for its redemption would, under any circumstances, in the opinion of the Court, be unjust, and the prevalence of such a principle would, it may be remarked, jeopardize every estate incurring similar risk; but, in the judgment of the Privy Council adverted to, it is laid down that a [539] creditor is ordinarily not to be prejudiced by the previous waste, which may have led to the necessity which he relieves—‘Where,’ their Lordships observe, ‘the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.’ *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore’s Ind. App. Cases, 423). Upon every ground above taken, the Court resolve, in reversal of the decree below, to dismiss the suit with costs:—first, because the law of escheat does not give the Plaintiff

the power to question the assignment objected to; secondly, because the Plaintiff acquiesced in this assignment when made; thirdly, because the burden of showing cause against the assignment rested upon the Plaintiff, had he been in a position to challenge the same, and no such cause has been shown by him, or even alleged.

From this judgment the Collector of Masulipatam again appealed.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill for the Appellant.—By the former judgment of this Tribunal the right of the Government to the Zemindary in question to take by escheat was established, unless it had been absolutely, or to the extent of a valid and subsisting charge, been defeated by the acts of the widow, Lutchemdavamah, in her lifetime. No such valid acts have been established in evidence. The case must be considered under two heads. First, the power of the [540] widow by the Hindoo law, to alienate as she has done, and, secondly, whether the acts of the Collector affect the rights of the Government.

Upon the first point we insist, that she had no power to dispose of or mortgage the Zemindary, or do any act charging the Zemindary, except to raise money for certain necessary purposes as defined by the Hindoo law. A widow has not an absolute proprietary right in her husband's property, nor can she in strictness even be called tenant for life. W. H. Macnaghten, "Hindu Law," Vol. I. pp. 19, 20. No such purposes as allow her to charge the Zemindary were proved to exist in the present case. It has not been established that the advances were to pay the husband's debts or the Government revenue. The Respondent has been challenged to sustain such a case, but he failed to do so. The restrictions upon her alienation are defined in the Mitashara, ch. i. sec. i. art. 20. Colebrooke's Dig., Vol. III. pp. 457-8, 467. [Sir Lawrence Peel referred to the case of *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393).] That was the case of a manager acting for an infant heir. The authorities are collected in Morley's Dig. Vol. I. tit. "Inheritance," p. 311; *ib.* Vol. II. pp. 110, 111, 131. Steele's "Law and Custom of Hindoo Castes," pp. 42, 69. Strange's "Manual of Hindu Law," pp. 29, 30 [edit. 1856]. Madras Appeal Suits, p. 453. Bengal Decisions of 1859, p. 567, *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 334).

Secondly. It was established that the Government, through the then Collector, and through the Board of Revenue, expressly refused to allow Lutchemdavamah to dispose of the Zemindary, and such refusal [541] was never actually or constructively withdrawn. Even admitting that there was a valid charge on the estate, as the Government never consented to the creation of the charge, they are not bound by the act of the Collector. His advice to her related to her life interest. How can the Respondent's interest be damaged, as her life interest only could have been sold under the decree? But as the Government were not parties to the suit in 1838, the acts of the then Collector, in 1841, as respects the enforcement of the decree made in such suit, were not such as to affect or waive the rights of the Government. [Sir Lawrence Peel: It does not appear that the Collector knew that there was a failure of heirs.] There has been a miscarriage. The Sudder Court ought, in conformity with the direction of this Court when the first appeal was before them, to have called for evidence to show the nature of the advances alleged to have been made to the widow, and the necessity for the same.

Sir Hugh Cairns, Q.C., Mr. Ayrton, and Mr. Norton for the Respondent.—It must be taken as a fact that in the years 1830 and 1831 the Government were aware of their rights as escheators, and the Government should then have repudiated the proposed compromise by the widow and her creditor; but, on the contrary, Government by the Collector proposed and acquiesced in the Razeenamah, and they are, therefore, bound by his acts, *Sumbhoolall Girdhurlall v. The Collector of Surat* (8 Moore's Ind. App. Cases, 1). In such circumstances the rights of the Respondent, under the decree of 1838, and the sub-[542]-sequent Razeenamah and Order made in that suit, could not be questioned by the Government claiming title by escheat. Again, the suit now under appeal was not instituted, nor was any evidence adduced by the Appellant, to impeach the *bona fides* of the decree of 1838, and the Razeenamah. Assuming, therefore, that the consent of Government to the alienation by the widow, in the absence of heir, was necessary, that consent has in point of fact been given in a form which cannot afterwards be retracted, and that is one of the grounds which the Court has decided in the Respondent's favour.

The question whether the widow could by her own absolute authority alienate without the consent of the Crown, taking by escheat, was left open by the judgment of your Lordships. Now, the first principle of Hindoo law is, that the property is supposed to belong to the family and held by one of the family for the benefit of the other members of that family, and that law, as to descent of immoveable property, is, that it descends from father to son. The widow takes no estate if there is a son. There is nothing like a life estate known by that law, and, therefore, it is reasoning by false analogy to compare an estate for life by the English law with a Hindoo widow's rights, which error arose from the earlier English Judges using that phrase with respect to the widow's estate. The system of restriction of alienation does not apply to widows only, it applies to all holders of property. If a father has no son, he can alienate by deed; but if he has male heirs, he cannot without their consent. Neither can he, if he has daughters, deprive them of their right to maintenance, which, like the widow, is chargeable [543] on the property. By the Hindoo law the whole estate descends upon the widow as heir, in the absence of sons, although her power of alienation is restricted where there are heirs. If there are no heirs she can absolutely dispose of the estate. The *Mitaschara*, ch. ii. sec. i. art. 39. In *Sibhoo Singh v. Pirthee Singh* (10 S.D.R., N.W.P. 420), the validity of such an alienation was upheld. All that the authorities cited by the Appellant, upon this branch of the case, affirm, is this, that where there are heirs, alienation by the widow cannot be made without their consent. In the present case there are no heirs, and she has, therefore, an absolute power of alienation.

Lastly, we insist that there is sufficient proof of the advances made to the widow mentioned in the *Razeenamah*, and it would operate inequitably if the Respondent is after this distance of time to prove the advances made for the purposes of the Zemindary. It cannot be questioned after the decision of this Tribunal that a manager has power to charge this Zemindary, to preserve the estate, *Hunoomanpersaud Panday v. Mussumate Bahooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 293), and so by a widow, *Chetty Culum Comara Vencatachella Reddyer v. Rajah Rungasawmy Jyengar Bahadoor* (8 Moore's Ind. App. Cases, 319). If the Crown is heir, it could not be as a member of the family; and the title accrued when the husband died, not the widow; and, as the Collector advised the widow to execute the *Razeenamah*, it cannot now avoid the transaction. In *Burgess v. Wheale* (1 Sir W. Black. 123), it was held that the Crown coming in by escheat cannot avoid a transaction which the heir claiming by right of inheritance has done.

[544] Mr. Forsyth, Q.C., replied.

Their Lordships' judgment was pronounced by

The Lord Justice Turner (Dec. 21, 1861).—This cause has come before their Lordships on appeal for the second time. They regret to find that they are still without the means of satisfactorily determining the long litigation between the parties.

The Zemindary which is the subject of the suit was claimed by the Appellant on behalf of the Government of Madras, as an escheat to which the Crown became entitled on the death of the widow of the last male Zemindar, of whom there were no heirs in remainder to the widow; and he claimed to have it free and discharged from all incumbrances with which it had been charged by the widow during her enjoyment of it.

The Respondent disputed the right of the Crown to take the particular property by escheat in any circumstances; and insisted that, even if that right existed, he had a title to the Zemindary, paramount to that of the Crown by virtue of a *Razeenamah* executed in his favour by the widow in her lifetime. His case as to this was, that his father had made advances to the widow for some of the purposes which, under the Hindoo law, justify the alienation by a widow of immoveable property inherited from her husband, and had obtained a decree for the amount of the debt; that after his father's death he had taken out execution on that decree, and that to stay his execution the *Razeenamah* had been executed. He further contended that this had been done with the sanction and under the advice of the then Collector of the District, and that the Government was [545] estopped from disputing the transaction, if it could otherwise have done so, by the conduct of its officer.

The Razeenamah was in the nature of an agreement for the payment of the judgment debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment creditor should be put into possession of twelve out of the fourteen villages comprising the Zemindary (which were to be implegged to him), and should, on her death, take possession of the two other villages, and hold the whole Zemindary as his absolute estate. No instalment was paid by the widow, nor yet was possession taken under the Razeenamah in her lifetime. The Respondent, however, alleged that it was by reason of an order of the Sudder Court, suspending the execution of the Razeenamah, in consequence of proceedings in another suit, that he failed to get possession.

It follows from this statement that the questions to be determined in the cause were, whether the Crown had any title by escheat to the lands; and if so, whether that title had been defeated, either absolutely or to the extent of any subsisting charge, by the acts of the widow in her lifetime. The latter question involved the consideration of the powers of a Hindoo female taking her husband's estate by inheritance, and whether the transaction relied upon by the Respondent was an act done *bona fide* in the exercise of her powers, or a mere colourable contrivance for transferring the property to the Respondent in spite of her disabilities.

In the judgment of the Sudder Adawlut, which was the subject of the first appeal, the Court had [546] dealt with the first of these questions only. It held that the property having belonged to a Brahminical family the Crown had no right to take it by escheat, though on the clearest failure of heirs; and therefore dismissed the suit on that ground, without adjudicating upon the other questions raised in it.

Upon the appeal, however, the whole case was more or less fully argued. Their Lordships came to the conclusion that the judgment of the Sudder Adawlut, was erroneous; that the Crown was entitled to take the property of a Brahmin, as of any other Hindoo subject dying without heirs; and that the question whether such property would be subject, in the hands of the Crown, to any trust in favour of Brahmins, that would be capable of enforcement, was one which could not be determined in that suit. After stating their reasons for this conclusion, their Lordships' judgment proceeded thus:—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the Zemindary in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her lifetime. In the latter case the Government will, of course, be entitled to the property subject to the charge. It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised touching the acts of Lutchmedavamah in her lifetime. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the [547] effect of the Collector's act in 1841, it is peculiarly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect of the proceedings by which the execution of the Razeenamah was suspended. In these circumstances, their Lordships do not feel that they can safely do more than remit the appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established."

Their Lordships also suggested to the parties the expediency of compromising the suit upon some such terms as the surrender of the Zemindary to Government upon payment of what might be due to the Respondent for the advances really made.

Upon the recommendation of their Lordships an Order was made by Her Majesty in Council, in July, 1860, pursuant to their judgment, and remitting the cause to the Sudder Adawlut.

The case went back to Madras, and was re-heard by the Sudder Adawlut there. In the judgment pronounced on the 22nd of October, 1860, the Judges stated that

they had ascertained that both parties having failed to come to an agreement, wished the suit to proceed. They further stated that they had not found it necessary towards their pronouncing upon the merits of the suit, to call for the additional evidence which their Lordships had indicated as appa-[548]-rently requisite. They accordingly proceeded to deal with the merits of the suit in the following way:—Admitting the right of the Crown to take by escheat property of which the last owner died without heirs, they held that where there had been an assignment by that owner, though a female, the Crown could not take the place of an heir to challenge her power to make that assignment. They, therefore, decided that the suit, having been brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, should be dismissed.

They next decided that, even if the Crown had the right contended for, it was estopped from asserting it by the acts of the Collector, and the sanction given by him to the Razeenamah of 1841.

They, lastly, decided that, even if the Crown could not challenge the alienation in question, the plaint had not been properly framed for that purpose.

It is with the appeal against this judgment that their Lordships have now to deal.

It has been argued for the Appellant that in ruling the first and third of the points the Court below has exceeded its powers, inasmuch as it has come to conclusions inconsistent with those expressed in or implied by Her Majesty's Order of July, 1860. In their Lordships' opinion, this objection is well founded. The Order of 1860, which, after argument here, recommended, if it did not enjoin, the Court below to take additional evidence on the question whether the acts of the widow in her lifetime were valid against the Crown, must be taken to assume that the question was one fairly open to the parties upon the pleadings.

[549] Again, the declaration that the general right of the Crown to take the property by escheat ought to prevail, unless it had been defeated by the acts of the widow in her lifetime, when followed by the direction to adjudicate upon those acts, seems to imply a decision that the Crown had established its right to maintain a suit of this nature.

The first conclusion of the Sudder Adawlut, however, involves a question of substance—an important question of law; and if their Lordships were satisfied that it was well founded, they would be disposed to prevent its being met by the objection, in some degree formal, of its inconsistency with the Order of Her Majesty, by taking measures to procure the variation of that Order. They, therefore, proceed to consider first whether the conclusion is, in fact, correct.

The principal argument in support of it, which has been very ably put by the learned Counsel for the Respondent, is that on the death of a Hindoo owner of an undivided estate without preferable heirs, the whole inheritance descends to and vests in his widow; and that, although it be true that her power of disposition over it is qualified, and only valid against the heirs next in succession when exercised for certain purposes, or with their consent, yet if there be no such heirs it becomes absolute; or, at all events, its exercise at her free will can be questioned by nobody. Her power of disposition was likened to that of the male owner of an undivided estate in that part of India in which the general Hindoo law obtains without qualification: he can dispose of that as he will if he has no adult sons, but if there be such sons their consent is necessary to render his disposition valid. The only difference between the two [550] cases was said to be that in the one the right of objection was confined to sons or other direct descendants; in the other it was possessed by all collaterals capable of inheriting to the deceased husband of the widow.

It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life estate, that great confusion arises from applying analogies derived from the English law of real property to the Hindoo law of inheritance; and that when so applied the terms by which we describe estates in land under the English law are more likely to mislead than to direct the judgment aright. It may, however, be doubted whether the argument on behalf of the Respondent does not really require some such process of reasoning to support it. The Hindoo widow, it was urged has an estate of inheritance, not a life estate; the original estate it is said, devolves on her in a course of succession derived from the husband, who had in him an estate of inheritance which she takes as heir. Yet

what is this, in effect, but to apply the English law regulating the descent of lands in fee simple from ancestor to heir?

It is clear that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindoo law that the extent and nature of the qualification can be determined.

It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot by her [551] own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper.

Nor does it appear to their Lordships that the construction of Hindoo law which is now contended for, can be put upon the principle of "*cessante ratione cessat et ipsa lex*." It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Menu downwards, may be cited to show that, according to the principles of Hindoo law, the proper state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir Thomas Strange (See Strange on "Hindoo Law," Vol. I. p. 242) cites the authority of Menu for the proposition that, if a woman have no other controller or protector, the King should control or protect her. Again, all the authorities concur in showing that, according to the [552] principles of Hindoo law, the life of a widow is to be one of ascetic privation (2 Colebrooke's Dig., 459). Hence, probably, it gave her a power of disposition for religious, which it denied to her for other, purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property; and free to squander her inherited wealth for the purposes of selfish enjoyment.

Their Lordships cannot but think that, if the consequences of the failure of heirs of the husband were such as they are now argued to be, there would be some decisions on a case so likely to have happened before; or, at all events, that there would be some trace of so startling an exception to the general rule of Hindoo Law touching females, taking by succession the property of males, in the ancient text-writers and commentators. The proposition, however, rests upon the argument founded on the nature of the Hindoo female's estate, as an estate of inheritance; upon a passage from a modern treatise by Strange, for which no authority is cited; and upon the opinion of the Pundits. The first, for the reasons already given, their Lordships consider unsatisfactory. The second cannot be treated as more than an opinion, though an opinion deserving of respect and attention. Upon the last, their Lordships can but repeat an observation made by them in the late case, *Myna Boyce v. Oottaram*, ante, p. 422, to the following effect:—Where an opinion apparently discordant from works of current and established authority is delivered by Pundits, it must not be taken on their authority to be a correct exposition of law. They should be questioned further [553] as to authorities, usage, and generally-received opinions. Such an inquiry might produce a conviction that the Pundits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindoo Law.

Their Lordships are of opinion that the restrictions on a Hindoo Widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want

of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

Their Lordships, therefore, dissent from the first ground on which, by the judgment under appeal, the Sudder Adawlut has dismissed the Appellant's suit.

The next consideration is, whether the Sudder Adawlut was right in holding that the Crown is estopped by the act of the former Collector, Mr. Grant, from disputing the title asserted by the Respondent under the Razeenamah. In their Lordships' opinion the principles of estoppel do not support this contention. On every reasonable presumption the facts relating to the creation of the original debt were known to the Respondent, or to the original Plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject; nor is he proved to have had actual knowledge. His advice to the widow, to the effect that unless she made an arrangement with the creditor, [554] the estate (which, the sale being an execution sale, must be taken to mean her right, title, and interest in the estate) would be sold, is not a statement at variance with the true state of things. The Razeenamah into which she entered, might, for aught that appeared, be satisfied by payment of the instalments in her lifetime. Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact, or in law, directly, or by implication, ratified the excess. The Collector in this case had certainly no authority to waive the rights to which Government might become entitled by the escheat; nor were his acts, when fairly viewed, calculated to give rise to the supposition that he had such an authority.

Their Lordships have already indicated their opinion that it is too late to assert, if it could ever have been successfully asserted, that it is not open to the Appellant on these pleadings to question the validity of the widow's alienation against the Crown. The reasoning of the Sudder Adawlut on this point seems to their Lordships to involve some misconception of the effect of the decree under which the Respondent claims. As regards the Appellant that decree is *res inter alios acta*. He is, therefore, in a very different position from one who, coming into Court to get rid of a decree binding upon him, has to allege and prove that it was fraudulently or collusively obtained, or is open to some other definite objection.

Again, though particular circumstances may shift the burthen of proof, the general rule certainly is, that it lies upon those who claim under an alienation [555] from a Hindoo female to show that the transaction was within her limited powers.

Their Lordships continue to think, that the evidence before them is not such as to admit of a satisfactory decision of the question whether the Razeenamah does to any and what extent constitute a charge on the Zemindary as against the Crown, and that there ought to be a further trial of that issue. Under the former Order of Her Majesty, the Sudder Dewanny Adawlut should have given to each party, if so disposed, an opportunity of adducing further evidence. It does not appear to have done this, but to have acted on its own impression that no further evidence was necessary. Such at least is their Lordships' understanding of the preliminary statements in the judgment under appeal.

In these circumstances their Lordships propose humbly to recommend to Her Majesty that the present appeal be allowed; that it be declared that the Crown, taking by escheat, has the same right to impeach the alienation by the widow which the next heirs of the husband (if such there had been) would have had, and is not estopped from asserting that right by the acts of the Collector in 1841; that the Crown is not bound by the decree; and that the widow was not entitled to alienate without the consent of the Crown, except in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the Respondent is, at all events, entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances, if any, made by the Respondent's father to the widow as were made for purposes for which, according to the Hindoo [556] law, she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, in so far as she had

not other estate of her husband to answer such purposes, and that the cause be remitted to the Sudder Adawlut to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the Razeeannah, and if not to inquire what advances, if any, were made by the Respondent's father to the widow, and whether all or any, and which, of such advances, and to what amount, were made for purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, and whether the widow had, when such advances were respectively made, other estates of her husband sufficient to answer such purposes; and the parties respectively are to be at liberty to adduce further evidence touching the matters aforesaid, or any of them, as they may be advised, and the Sudder Court is to proceed in the cause according to the result of the said inquiries.

[See *Mussumat Thakoor Deyhee v. Rai Baluk Ram*, 1866, 11 Moo. Ind. App. 175. For other proceedings, see last preceding case and *Cavalay Vencata Narrainapah v. Collector of Masulipatam*, 1867, 11 Moo. Ind. App. 619.]

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1861-64. By EDMUND F.
MOORE, Barrister-at-Law. Vol. IX.

MUSSAMUT KHOOB CONWUR, guardian of BABOO BIJNATH PERSAUD, the minor son of Baboo Deanut Roy, deceased, BABOO JOYKURRAN LAUL, MUSSAMUT CHEYT CONWUR, and TEK CONWUR,—*Appellants*; BABOO MOODNARAIN SINGH, and, after his death, MUSSUMAT ISMEDIA CONWUR and SUNDEEP CONWUR, the widows of Baboo Moodnarain Singh,—*Respondents* * [Nov. 27 and 28, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Suit in the nature of ejectment to recover possession of certain mouzahs and to set aside a sunnud, or deed, under which they were held, on the allegation that the deed, had been altered after execution, and its purport entirely changed by the insertion of words of limitation, creating hereditary rights. The decrees of the Courts in India respecting the alleged alterations being conflicting the Judicial Committee, upon motion to that effect, ordered the original deed to be transmitted for inspection at the hearing of the appeal [9 Moo. Ind. App. 17, 18].

Though the *onus* of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it, yet the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed, and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified and tampered with after execution by the party claiming under it.

The Judicial Committee upon appeal reversed the decree of the Sudder Dewanny Adawlut, and upheld the deed, as originally containing the words of limitation, being satisfied that the deed had been tampered with while in the custody of the Record-keeper of the Sudder Ameen's Court.

This suit, brought by Baboo Moodnarain Singh against Mussamut Man Conwur and others, as of the nature of an action of ejectment to obtain [2] possession of certain mouzahs, or villages; and also to set aside and cancel so much of a sunnud, or deed, in the Persian language, as purported to be a grant and conveyance of the villages in question, which was alleged by the Plaintiff to be a forged and fabri-

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

cated document, so far as regarded certain defacements that appeared on the face of the deed. The fact of the execution of the original document by the late Maharajah Mitterjeet Singh, the father of the Plaintiff, was admitted in the suit.

The principal question raised in the Court below and upon appeal had reference to the impeachment by the Plaintiff of this instrument. The contention of the Plaintiff was, that the original deed was a lease only for the life of the grantee, and had been fraudulently altered by the Defendants, or those under whom they claimed, by inserting words of limitation giving hereditary rights. The Defendants' case was, that the deed had been defaced by, or through the means of the Plaintiff while in the custody of the Record keeper of the Sudder Ameen Court, pending a suit there in the year 1812, and that it was originally a grant in fee.

The material evidence and the facts of the case are fully stated in the judgment of their Lordships.

[3] The deed in question was under the seal of the late Maharajah Mitterjeet Singh in favour of Lalla Hoonooman Dutt, one of the sons of Roy Prithce Singh, the Dewan of the Maharajah, and since deceased, reserving a rent of S. Rs. 1880, payable yearly into the Treasury of the Maharajah.

This instrument, translated, as it appeared when filed in this suit, was as follows:—"Mocurrery sunnud, dated 8th Shaban, 1209 (1st of March, 1795) Hijree. Pootah Koul Kurar (by way of agreement)." "This Mocurrery Istemrari, in the name of Lalla Hoonooman Dutt, 'O mai broderan Hukekee, nuslun bad nuslun O butnun bad butnun' (and together with uterine brothers from generation to generation), of mouzahs, Irkee, with the chunks appertaining thereto, and Chelowree, in Purgunnah, Sunwot; and Junooawan, appertaining to Purgunnah, Bhilawur; and Muniaraburdhia, Sukhea, and Sarsara, appertaining to Purgunnah, Nurhut, Puttie (division) Katowa, as per the following schedule, is, without objection, given at an absolute and fixed jumma of Rs. 1880 (a moiety of which is S. Rs. 940), of the current coin, and of the full weight and value, from the Fuslee year 1202, with the exception of one thousand two hundred beegahs of land for Khyrat, Bishenpret, Sayer Rahdaree, Chaharuntar, and embankments. The persons alluded to should confidently believe themselves to be the actual Mocurreyders of the aforesaid mouzahs, keep in good faith the tenants satisfied and pleased, till and cultivate the mouzahs with care and attention, and pay the rent thereof, according to the Kaul Kurar (terms) of the Pootah Mocurrerys Istemrari, Lal ba Lal (year by year) into my treasury, without any objection on the [4] score of drought and inundation, which they must consider as appertaining to their Mocurrery tenure. Whatever profits they may derive from the attention and care to be bestowed by them on the mouzahs in question, will, of right, belong to the Mocurreyders. The tenants and cultivators of these mouzahs will consider the person alluded to as 'Mocurreydar nuslun bad nuslun,' and exert themselves to their full in cultivating the lands. They should consider all praises and defamation of the Mocurreydar as affecting themselves. Save and except the fixed rent, not a single pice will be demanded from the aforesaid Mocurreydar. Consequently, these few words are written as a Mocurrery and Istemrari sunnud, that it may be a document hereafter." The deed was registered.

This deed, when produced at the hearing, bore marks of erasures, alterations and defacements, particularly in the expressions which created the limitation of hereditary rights.

On the 2nd of June, 1851, the suit out of which the present appeal arose was commenced, after a possession of fifty-six years from the date of the execution of the deed, and after a possession of thirty-two years by the successive heirs, who inherited the mouzahs since the death of Lalla Hoonooman Dutt, the original grantee, and more than twelve years after the title of Moodnarain Singh accrued. The plaint was filed by Moodnarain Singh against Mussamut Man Conwur, since deceased, Mussamut Tek Conwur, Mussamut Neem Conwur, since deceased, Lalla Deenan Roy, Joykurran Lul, Inderjeet Singh, Totnam Sheo Suhac Singh, and Mullick Dawar Hossein, and sought to recover the possession of the mouzahs, by cancella-[5]-tion of the deed, which was charged by the plaint to be a spurious Mocurrery Pottah, and for the recovery of Rs. 46,800, on account of mesne profits, appropriated from 1249 to

1257 Fuslee era, corresponding with 1841-2, and 1849-50 A.D. The plaint alleged, that the Mocurrery sunnud, admitted to have been executed by Maharajah Mitterjeet Singh, was only an Istamrarry Pottah, and contained originally a grant of the mouzahs for the term of the life only of Lalla Hoonooman Dutt, the grantee; and that from Roy Prithree Singh his father having been then, and his grandson, Lalla Nujee Laul, having been afterwards, Dewan to the Maharajah, everything was in their management, and that he, the Plaintiff, was kept in ignorance of the true nature and condition of the Mocurrery sunnud; and the plaint charged that the sunnud was forged; that the Defendants having erased therefrom the word "Istemrar," and substituted the words, "Mai broderan Huckeekee, O nusun bad nusun O butnun bad butnun," ("with brothers uterine, and seed after seed, and womb after womb"), it ought to be cancelled; and that, according to the Hindoo law, and also according to the Regulations of Government, Maharajah Mitterjeet Singh had no power to make such a Mocurrery Istamrarry settlement of any of the villages in his ancestral Zemindary, as the Defendants relied upon.

The answer of the Defendants alleged, that the sunnud was tampered with and defaced while deposited in Court, pending another suit, by the Plaintiff and his servants, in collusion with the Record-keeper. The answer also stated, that when Lalla Hoonooman Dutt, the grantee, died in the year 1818-19, his heirs and those of his brothers remained in possession of the land [6] for a longer period than twelve years previous to the bringing of the present suit, and relied on the provisions of the Ben. Reg. III. of 1793, sec. 14, as a bar to the suit.

The hearing of the suit took place on the 5th of August, 1854, when the Principal Sudder Ameen (Syed Mahomed Rafiq Khan Bahadoor) of the Civil Court of Behar made a decree, supporting the deed, on the ground that the Court did not find that the deed had been tampered with or erased by the Defendants. The Sudder Ameen in his judgment expressed his opinion that, "On inspection of the Mocurrery document, it appeared clear that the words, 'mai brotheran, Huckeekee, nusun bad nusun,' in the first line, and 'butnun bad butnun,' in the second line, and again, 'nusun bad nusun,' in the twelfth line, which have been tampered with and defaced with a pen, originally existed in the deed, but had, while in the office of the Sudder Ameen, been so tampered with and defaced by corrupt and unprincipled men. Besides, it appeared from copy of the same document, given under the seal of the Cazi, and filed by the Defendants, that it was not written solely in the name of Lalla Hoonooman Dutt, as the Plaintiff contended it was, but was written exactly as the Defendants stated it was; because it abounds with plural terms, such as, 'persons alluded to,' 'Khorda' (themselves), 'Kunnud' (ditto), 'Ahenasund' (recognized), which stand in their original features, and have not been at all tampered with or defaced. Had the document been originally written in the name of one individual, what was the reason of using the above plural terms?"

The Plaintiff appealed from this decree to the Sudder Dewanny Adawlut at Calcutta, and on the [7] 31st of December, 1856, that Court, consisting of Messrs. Colvin, Sconce, and Torrens, pronounced a decree reversing the decree of the Civil Court, and adjudging possession to the Plaintiff. The judgment was as follows:— "As both parties admit that an effacement of the document has occurred, we have no inquiry to make on the bare fact. It is shown to have remained in the custody of the Respondents up to the date of its delivery to the Sudder Ameen's Court on the 9th of February, 1842; and if alteration, not mere effacement, as pleaded by Respondents, has taken place, it is clearly, as argued by Mr. Allan on the part of Appellant, for Respondents to show that such alteration was not effected at their instance. Having very fully considered the proceedings held by the Sudder Ameen in 1842, we find nothing therein whatever to show or lead even to the remotest conclusion either that the tampering extended merely to an effacement, so as to be consistent with the allegations against Appellants on this point, or that there was anything but a downright and positive alteration of the terms of the document, extending to a change of the title in the tenure, so as to render it beneficial to the claim of the Respondents. It is to be recollected that Respondents impute to Appellant only that the true and existing Persian characters in the document, where it refers to hereditary rights, had been blemished at the instance of the Appellant or the officers, by collusion with the Sudder Ameen's Amlah, so as to make it appear that the words and characters had been altered, when, in fact, they stood

as originally inserted. Now, we have intrinsic evidence, in the words and context of the documents, that this representation of the Respondents cannot be correct. [8] In the first place, we observe at the commencement of the Pottah, where it is usual to specify the name, residence, and birth of the recipients of a tenure of the kind, that, after the name 'Hoonooman Dutt,' there occurs a very palpable erasure and interpolation, not a mere defacement of characters before existing; and the Pottah is made to run that it was given to the above, and, according to the words occurring after his name, to his brothers and heirs. 'O mai broderan Huckeekee, nuslun bad nuslun, O butnun bad butnun.' The copulative conjunction here used would, to make the passage at all idiomatic, have been altogether unnecessary, except that the difficult and somewhat ingenuous erasures and interpolations made required its introduction; and the insertion of the condition of the tenure in this part of the Pottah is as altogether singular as the omission of the residence of the Mocurreydar. The insertions of the recipient's own brothers in general is, likewise, quite unusual; and the words used, as well as the evident erasure of the Persian characters, most fully denote a positive alteration. Next, it is to be observed that Respondents do not contend that any defacing took place except at this part of the document and lower down, where the words 'nuslun bad nuslun' afterwards occur; but, looking very carefully over the document opposed to the view of the Principal Sudder Ameen, we find that the verbs and pronouns have been most palpably altered from the singular to the plural, so as to make the sequel of the deed correspond with the insertion of the words 'mai broderan Huckeekee'—that is, it was granted in favour of Lalla Hoonooman Dutt, along with his own brothers, instead of, as the Appellant contends, to Lalla [9] Hoonooman Dutt only for life. Thus, where the pronoun 'khoodra,' alluding to the conditions which the single Mocurreydar was himself to perform, occurs throughout the document, the word has been altered to the plural 'khoodhra;' so, likewise, in the words specifying what the Mocurreydar was to consider himself liable for, what to perform, and how to treat the estates and Ryots, the verb is throughout most palpably altered from the singular to the plural. The above description of the document shows at once, without any doubt whatever in our minds, that the terms were actually altered, and that there had not been merely defacements perpetrated by Appellant; and as such alterations are altogether fatal to the Respondents, it is ordered that the decision of the lower Court be reversed, and that a decree for possession, with wassilat from date of suit, and costs, be passed in favour of Appellant."

The Appellants filed a petition in the Sudder Dewanny Adawlut for a review of judgment, and they offered to produce fresh evidence, and, amongst other documentary proofs, the Registrar's book, containing the copy of the original sunnud, as it had been discovered after the decree of the Sudder Court had been made; that the old books were not really missing, as had been reported by the Registrar of deeds, but that they were found extant in the office of the Judge. The Appellants produced, with their petition, a copy from the Judge's office and from the Registrar's books, of their original sunnud, from which, as it was stated in the petition, the fraud of the Plaintiff would be apparent and proved. The Judges of the Sudder Dewanny Adawlut, by a [10] proceeding of the 30th of May, 1857, rejected the application for the review of judgment.

The Appellants appealed to England from the decree of the 31st of December, 1856. After the transcript had been transmitted to England,

Mr. Leith (Feb. 6, 1861 *) moved for an order on the Court of India to transmit the original Persian deed to England for inspection of the defacement at the hearing, as was done in the cases of *McCarthy v. Judah* (12 Moore's P.C. Cases, 47), and *Mason v. The Attorney-General of Jamaica* (4 Moore's P.C. Cases, 228).

Lord Kingsdown.—We think, in the circumstances, that the application is reasonable, and will make an order, directing the transmission of the deed.

The deed was sent to England and inspected by their Lordships, and a Persian translator examined the same at the hearing of the appeal.

Mr. Forsyth, Q.C., and Mr. Leith, for the Appellants, in support of the appeal, insisted, first, that independently of the sunnud, it was sufficiently established from

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

the admissions of the Plaintiff, that the mouzahs in question were granted by the late Maharajah in perpetuity, and under an hereditary tenure; and the finding of the Zillah Court of Behar, that the Plaintiff, or the Record-keeper, had sur-[11]-reptitiously caused the alterations and defacement of the sunnud, was supported by the evidence in the cause. Second, that as the suit was in the nature of ejectment, the Plaintiff could not recover, the Appellants having had from the death of the grantee a good possessory title for thirty-two years against the Plaintiff, and that the suit was, therefore, barred by effluxion of time, citing Ben. Reg. III. sec. 14, of 1793. They also referred to Ben. Regs. V. of 1812, sec. 2, and VIII. of 1819, sec. 2, as to the power of the Maharajah to alienate a part of the Zemindary.

The Solicitor-General (Sir R. Palmer), and Mr. W. Field, for the Respondents, contended, first, that the instrument in question was a lease, and was granted only for the life of Lalla Hoonooman Dutt, and that the words of inheritance therein contained, as it appeared from the instrument itself, had been fraudulently interpolated by the Appellants, or those under whom they claimed; that the limitation was expressed by the Persian words "Mocurrery Istenrariy," which by themselves did not convey hereditary rights, and had been so registered, without any mention of any hereditary rights being transferred; and they further insisted, that the deed must be strictly proved to render it admissible in evidence. *Bunwaree Lall v. Maharajah Hetnarain Singh* (7 Moore's Ind. App. Cases, 148). And, secondly, that the Maharajah, being in possession of the Zemindary, which was ancestral property, had no power while a legitimate son was living to alienate the mouzahs in perpetuity, which would be the case if the deed could be supported with the words of inheritance which it purported to contain.

[12] Judgment was delivered by

The Lord Justice Knight Bruce (Dec. 21, 1861).—The facts upon which this appeal arises may be thus stated. In the year 1795, Maharajah Mitterjeet Singh Bahadoor, who appears to have been a person of considerable position in the Province of Behar, granted a Mocurrery Istenrariy lease of the property which is the subject of this suit. That the grant was by a sunnud in the Persian language; and that the instrument produced in the cause is that sunnud, and bears the genuine seal of Rajah Mitterjeet Singh, are undisputed facts. It is also admitted, that the only grantee described by name was Lalla Hoonooman Dutt, the eldest son of Roy Prithee Singh, who, at the date of the grant, and for many years afterwards, up to the time of his death, was the Dewan of the grantor. But the substantial question in the cause is, whether the grant was expressed to be to Lalla Hoonooman Dutt, solely and simply, or to him "together with his uterine brothers from generation to generation;" in other words, whether the Persian words which now appear on the face of the sunnud, and import the addition in question, have, as the Respondents contend, been fraudulently substituted for other words, or, as the Appellants insist, have always formed part of the document.

On the former hypothesis the tenure would, as the law has been settled by a course of decisions, commencing at latest in the year 1817, have determined with the life of Lalla Hoonooman Dutt. The addition of words importing "from generation to generation," would make the grant one of a perpetual lease to Lalla Hoonooman Dutt and his heirs. The [13] further addition of the other words in question would, of course, make it one to him and his brothers jointly, and to their respective heirs. Lalla Hoonooman Dutt had two brothers, Gumess Dutt and Mahadeo Dutt; and some time in 1806 or 1807 a partition of the property comprised in the sunnud was made between the three, by or with the sanction of their father, Roy Prithee Singh. He died in 1839. His son, Lalla Hoonooman Dutt, certainly predeceased him, and though the precise date of his death is not clearly proved, there seems no reason to doubt that it took place, as stated by the Appellants, in or about the year 1819. In 1839, Rajah Mitterjeet Singh granted to his son, Moodnarain Singh, a Teeka lease of his interest in certain mouzahs, including those in question in this suit; and the latter were then treated as being still the subject of a subsisting Mocurrery tenure. In 1840 the Rajah died, leaving two sons, Hetnarain Singh and Moodnarain Singh. They made a partition of his estate, and the property in question fell to the share of Moodnarain Singh. On that occasion it was again treated as held by a subsisting

Mocurrery tenure, a circumstance which must have been considered in estimating the share to be allotted to each brother.

In 1841, Moodnarain Singh instituted three separate suits, conformably to the devolution of the property under the Appellants' version of the original lease, for the recovery of arrears of Mocurrery rent alleged to be due in respect of certain mouzahs, parts of the property comprised in the sunnud, and claiming to have the Mocurrery tenure in those mouzahs respectively cancelled, on the ground of the arrears. These proceedings, therefore, [14] assumed the existence of the Mocurrery tenure in the lands in question in 1841; and also that they were thus held in severalty by the descendants of Roy Prithee Singh, recognizing to that extent the partition of 1807. In one of these suits, and on the 9th of February, 1841, the original sunnud was produced by the representatives of Lalla Hoonooman Dutt. On the following morning, if not on that night, it was inclosed in an envelope sealed with the seal of the Court. It was certainly from the time of its production up to the 22nd of March in the custody of the Court. On the last-named day the envelope was opened in Court in the presence of the Vakeels of both parties. The appearances which cast suspicion on the sunnud were then for the first time discovered. On the 30th of March, 1842, the Sudder Ameen, before whom the case was pending, passed a decree in favour of the Plaintiff for a small sum of arrears, but dismissed his suit so far as it sought for the cancellation of the tenure. On the same day he proceeded to hold an inquiry into the supposed tampering with the sunnud whilst in the custody of the Court. His proceeding resulted in the dismissal of the Record-keeper.

There were various other proceedings in these suits, of 1841 by way of appeal to the Sudder Adawlut, and of remand to the Court below, and in the course of the litigation Moodnarain Singh appears to have raised, by petition of amendment, some new issues founded on the appearance of the sunnud. The three suits, however, seem to have been finally disposed of by the decree of the Sudder Ameen, dated the 17th of June, 1846. The effect of the decision was that the Plaintiff was entitled to some arrears of Mocur-[15]-rery rent, though to considerably less than the amount claimed by him, and that he had shown no ground in those suits for the cancellation of the tenure.

From 1846 to 1851, Moodnarain Singh took no step; in June of the latter year he commenced the present suit, which embraces the representatives of all the three sons of Roy Prithee Singh, and is for the recovery of the whole property comprised in the sunnud, with mesne profits since 1842, and for the cancellation of the sunnud, as spurious.

His case, so far as it is necessary to state it, is that the sunnud as granted by his father was a grant of a Mocurrery Istemrary lease to Lalla Hoonooman Dutt alone, and, therefore, that the tenure legally determined on Lalla Hoonooman Dutt's death; that the document has been fraudulently altered by those who claim under it, the Persian words importing a grant in favour of his brothers jointly with Lalla Hoonooman Dutt, and of the heirs of all in perpetuity, having been written in substitution of words descriptive of Lalla Hoonooman Dutt, or of other words erased, and words in the singular number having throughout been converted into words plural, wherever the alteration was necessary to make the instrument consistent. He tries to explain the continued enjoyment of the lands, as under a Mocurrery tenure, after Lalla Hoonooman Dutt's death; and other circumstances which are apparently inconsistent with his theory of the original grant by the alleged influence of Roy Prithee Singh over the Maharajah; and malversations in office by him and his grandson and successor in the Dewanship.

The case of the Defendants is also that the sunnud, as it now exists, has been tampered with, but they [16] contend that this tampering took place whilst the document was in the custody of the Sudder Ameen's Court in 1842, and was the act of the Plaintiff's agents in collusion with the Record-keeper: that it consisted only in disfiguring certain material passages of the instrument without altering its tenor, in order to cast suspicion upon it, and to give colour to the case now made against it. They also insisted that the present suit was barred by lapse of time under the Regulations of limitation.

It does not very clearly appear whether there has been any adjudication on this last plea. The Sudder Adawlut treated it as decided by the Sudder Ameen against

the Defendants, who had not appealed against his decision. But in the proceedings before this Committee there is no trace of any other of the Sudder Ameen on this plea against which the Defendants could have appealed. His final decree of the 5th of August, 1854, is in their favour.

Proceeding much upon the finding of his predecessor on the inquiry of the 30th of March, 1842, into the conduct of the Record-keeper, he adopts the Defendants' theory of the tampering, and thereupon dismisses the Plaintiff's suit, declining to consider any of the other issues in the cause. He relied also on a copy of the lease bearing the Cazi's seal, which was given in evidence by the Appellants and is consistent with their case.

On appeal this decision was reversed by the Sudder Adawlut, which held that there had been a fraudulent alteration of the terms of the sunnud, and decreed in favour of the Plaintiff. On the second hearing of the case upon a petition for review of judgment, the Court adhered to its former decision, and rejected [17] some fresh evidence that was tendered on the part of the Appellants. The propriety of that rejection is not now questioned, but against the substance of the decree of the Sudder Adawlut, the present appeal is preferred.

The decision of the Sudder Court rests entirely on the evidence which, in the opinion of the Judges, the inspection of the document and the consideration of its contents afforded of the falsity of the explanation of its suspicious appearance given by the Appellants. Their judgment affords no ground for concluding that the corroborative proofs in support of the Appellant's case had been duly presented to the Court, and overruled by them. Their Lordships, however, think this case cannot be properly decided without weighing the whole evidence on either side, and applying the presumptions from conduct thence fairly arising, to the consideration of the opposite statements or theories with respect to the alteration of the instrument, that have been put forth by the respective litigants. It may be conceded that, in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document.

But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And, such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would [18] prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is, that one of the issues to be determined is, what was the condition of the document when it was first produced by those who claim under it. The Appellants may fairly contend, that the rule above stated is not applicable to them, until this question has been decided against them.

In dealing with the whole evidence, their Lordships will first consider that derived from the actual inspection of the document.

After close and careful examination, they are unable to concur in the conclusion of the Judges of the Sudder Adawlut that such inspection alone affords decisive proof of positive alteration by erasure. It would, in the opinion of their Lordships, be a most difficult, if not impracticable, task, to efface by erasure, on paper such as that on which the sunnud is written, words covering the space which a full line would occupy, without plainer signs of that mode of tampering, than any which this document presents. Their Lordships would expect to find on paper of this quality so dealt with, more breaking of the surface, more running of ink into blots, and a more decided attenuation of the substance of the paper, discernible from a view of its reverse side when held to the light. They are also struck by the apparently insurmountable difficulty of so completely erasing so many words, that no trace of original words or letters should be discernible with the aid of a strongly magnifying glass. The nature of the particular paper and ink seems to render so perfect an erasure so improbable, that success in the attempt is not readily to be conjectured. Yet [19] the fact of alteration by erasure is essential to the Respondent's case.

Again, the addition of a plural termination to the pronoun "khud," an addition totally unnecessary on either theory of the original import of the instrument, is

capable of being attributed to either side. If a falsifier of this instrument had grammatical skill enough to see the propriety of converting the singular nouns and verbs into the plural, it is reasonable to suppose that he would know, as their Lordships believe to be the case, that the pronoun " khud " was applicable to either number. To add a plural inflection to it would be to impose upon himself in that place an additional difficulty. The existence of a single noun in the singular when the strict sense required it to be in the plural would, in a case unattended with suspicion, naturally be ascribed to oversight or ignorance, or to the use of a singular noun in a collective sense. The word " Mocurredar " remains in this instrument in the singular where the plural termination " an " should have been added. This, it was contended, proved that the document, as it originally existed, had contained only the name of a single person as " Mocurredar." That argument assumes that the falsifiers had overlooked in a short instrument an important word, and whilst altering the other words, had by oversight neglected to convert that word into the plural. Such an oversight certainly may have occurred; but it is at least as probable a conjecture that the word stood originally in the singular, and was either advisedly used in a collective sense, or was inserted by misadventure in the singular instead of the plural number. The words in the singular, though ungrammatical, would not [20] have been inconsistent with the operation of the instrument for which the Appellants contend: their existence now in the plural cannot be relied on as in itself alone decisive evidence to turn the scale in a doubtful case against the Appellants, the Respondent's theory of erasure presenting, on the inspection, difficulties no less grave. The case on the argument founded on mere inspection cannot be viewed as other than a doubtful one.

The Appellants meet the arguments against them, with those which the appearance of the letters as blurred over and painted, the improbability of so great an erasure leaving so faint a trace, and the presence of the trace of the letter " mim " above the line, afford in confirmation of their theory of the tampering. The appearance of the paper in that part is certainly favourable to the supposition that that letter there existed, and its existence there is not reconcilable with the theory that words of mere description occupied originally the place where the disputed words are now found. On the whole, then, the inspection appears to their Lordships to furnish no certain or satisfactory grounds for deciding the case.

The next material inquiry is, what evidence is there as to the state of the instrument when first produced? This, so far as it goes, is in favour of the Appellants. If the document was fraudulently altered by them, it must presumably have been so altered before it was produced in Court in the year 1842. It is not conceivable that they would produce an instrument destructive of their own title, which in the ordinary course would be examined on its first production, on the chance of being able fraudulently [21] to alter its tenor whilst it was in the custody of the Court. Again, if the alteration was made before its production in 1842, the document must then have presented appearances even more suspicious than those which it now presents: since the lapse of eighteen years, and frequent manipulations in Court, must have tended to soften rather than to aggravate the marks of tampering. Those appearances could hardly have escaped the attention of one conversant with the Persian language who then examined the instrument. The Sudder Ameen, however (a Mussulman by his name, and, therefore, presumably the more conversant with Persian), has in a solemn proceeding declared, that he did carefully peruse the paper when it was produced, that it did not present the appearances which it afterwards presented, and that, if these had then existed, he must have observed and would have recorded their existence. He added that his attention to this part of his duty was well-known. The Solicitor-General sought to avoid the effect of this statement by suggesting that the Sudder Ameen, conscious of having neglected his duty, sought to avoid responsibility by stoutly asserting its performance, and throwing blame upon an innocent subordinate, his Record keeper. It is to be remarked, however, that his argument assumes the point in dispute, and it is further to be observed, that the Judge followed up his declaration by an important act, the dismissal of the Officer: and that there is no trace of any appeal from that act to any superior authority. The argument then assumes a violation of duty, of which there is no proof: and their Lordships cannot treat [22] the declaration of this native Judge, so solemnly and publicly made, as undeserving of credit.

It is next to be considered whether the Respondents have satisfactorily accounted for the non-production of evidence which would naturally be in their power, and would conclusively show what were the terms of the original grant. The evidence for the Respondents shows that there was, as in the ordinary course of business there would be, a Kuboolyet, or counterpart of the Mocurrery lease executed by the grantee to the grantor. His witnesses state that in 1839, when Baboo Moodnarin Singh took the Teeka lease from his father, inquiry was made about this Kuboolyet; and that Nujeeblal, the grandson of Roy Prithee Singh, who then acted as Dewan, stated that it was lost. The imputation on Nujeeblal seems to be that he or his grandfather abstracted this and other papers. The explanation, however, cannot be accepted as satisfactory. It is said that at the time it did not satisfy either the Maharajah or his son; and it is not easy to see why the latter, who seems even then to have been sufficiently alive to his own interests, did not take other steps either to enforce the production of the paper, or to ascertain by other means what was the purport of the original grant. The statement of Nujeeblal was calculated to excite rather than to allay suspicion.

It is, moreover, difficult to conceive that, independently of the Kuboolyet, and of the copy in the missing register-book, there has not been in the family of Maharajah Mitterjeet Singh's clear knowledge of the terms of the original and admitted grant of the tenure in question, at least during a considerable part [23] of the long period of enjoyment under it. It is no doubt suggested that the Maharajah was, in the latter part of his life at least, incapable of attention to business, and much under the influence of his Dewan. But there is no proof, and hardly a suggestion, of such incapacity in 1795, or for many years afterwards.

It is consistent with the habits of men of his rank to attend to and have a knowledge of their affairs, and to hold a sort of domestic *forum* for the transaction of business in their Cutcheries. The grant of a Mocurrery Istenrary lease to the son, or sons of the Dewan, and probably in recognition of his services, was an act likely to take place with some pomp and publicity. The terms of the grant would be notorious to many; they are not likely to have been slipped from the memory either of the Maharajah or of those of his dependants to whom they were known. Yet when we come to test the truth of the conflicting statements as to those terms by the presumptions arising from the conduct and acts of both families, what do we find? Their Lordships would not lay much stress on the mere fact that some of the family of Roy Prithee Singh continued in the enjoyment of the tenure after the death of Hoonooman Dutt. This, though *prima facie* inconsistent with the Respondents' case, might be referred to the favour shown by the Maharajah to the family of the Dewan. But in 1807, when the grant was still comparatively recent, we have the partition between the sons of Roy Prithee Singh. That was a transaction perfectly consistent with the sunnud as it now stands, but utterly inconsistent with the hypothesis that the grant was to Lalla Hoonooman Dutt alone, and for life only. It [24] was a transaction which can hardly have escaped the knowledge of the Maharajah, or of those who would soon have made it known to him. If it were known to him, he could not have treated it as other than an impudent usurpation, and an alteration of the terms of his grant to his prejudice effected by his Dewan, unless he was conscious that it was in fact consistent with the true import of the grant, and authorized by it.

Again, this partition was clearly known to Baboo Moodnarin Singh when he commenced the suits of 1831, if not when he took the Teeka lease in 1839. The very form of his proceedings recognized this partition, and admitted the subsisting rights of Mocurredars, though long after the death of Lalla Hoonooman Dutt, and this at a time when he was hostile to them. This act of his is conceivable if the terms of the grant were known to be what the Appellants say they were; inconceivable, if they were known to be what the Respondent says they were; and highly improbable if they were then doubtful.

It is also obvious that, when the partition took place between Baboo Moodnarin Singh and his brother, the traditions and belief of the late Maharajah's family must have been in favour of the existence of a valid Mocurrery tenure in these lands; and the fact that they were held in severalty by the divided branches of Roy Prithee Singh's family must have been notorious.

Here again is a solemn act of the grantor's family which is consistent with the

Appellants' case, and inconsistent with that of the Respondents. The evidence of the Respondents' witnesses as to the Kaboolyet is also inconsistent with a statement in his pleadings concerning them, which was remarked upon by Mr. Forsyth in his reply.

[25] Their Lordships think that by the presumptions thus arising from the acts and conduct of the parties during a long series of years, this case must be decided. They do not say that it is free from difficulty, or that either side has succeeded in explaining satisfactorily the state of the Persian sunnud. But against whatever inference to the prejudice of the Appellants may be drawn from that circumstance (and it is at least doubtful whether any such can fairly be drawn), may be set the presumption arising from the non production of the Kaboolyet by the opposite party. The actors in the original transaction are all long since dead, and the Respondent is seeking to recover the property from those who have been for many years in the enjoyment of it. In any view of the case, he has been guilty of great laches in the assertion of his alleged rights. The difficulties (if any) which arise from the loss of evidence, and the other consequences of lapse of time, ought, in justice, to fall on him.

It is essential to his case to establish that the original grant was to Lalla Hoonoo-man Dutt alone, and for life only. The weight of the evidence, independently of the disputed sunnud, seems to their Lordships to be against this allegation, and in favour of the title insisted upon by the Appellants; that preponderance of proof is also necessarily in favour of the Appellants' theory of the alteration of the document.

The copy of the lease, verified by the Cazi's seal, cannot be treated as any corroboration of the Appellant's case, as there is a total absence of evidence concerning the time, mode, and cause of its execution and presentation to the Cazi.

This being their Lordships' view, it is unnecessary [26] to consider whether the plea that the suit was barred by lapse of time and the Regulations of limitation is still open to the Appellants, or could have been successfully maintained by them.

Upon the merits of the case, their Lordships propose humbly to recommend to Her Majesty that the appeal be allowed, that the decision of the Sudder Adawlut be reversed, and that of the Zillah Court affirmed; and that the Respondents do pay the costs of the appeal to the Sudder Adawlut and of this appeal.

[On point as to transmission of documents (9 Moo Ind. App. 10) see *Rance Sar-nomoyee v. Maharajah Suttreeschunder Roy, Bahadour*, 1864, 10 Moo. Ind. App. 134, and footnote.]

ANUNDMOYEE DOSSEE and Others, *Appellants*; POORNOO CHUNDER ROY and Others,—*Respondents* * [Nov. 20, 1861].

On appeal from the Sudder Decanney Adawlut at Calcutta.

Act, No. XVI. of 1845, amending Act No. XXIX. of 1841, enacts, that it is competent to the Sudder Court in the case of the dismissal of an appeal for want of prosecution; upon the application of the Appellant within three months after the appeal has been dismissed, to readmit the appeal, if the Appellant satisfies the Court, that the dismissal was "occasioned by the default of his Vakeel, or by unavoidable accident."

An appeal was made to the Sudder Court at Calcutta, but in consequence of the absence from illness of the Appellant's Mookhtar, the written reasons of appeal were not lodged within six weeks, the time prescribed by Act, No. XV. of 1853, sec. 6, and the appeal was dismissed. Upon application for re-admission of the appeal, the evidence showed, that there had been no wilful delay, and that the Appellant was in ignorance of the fact of the reasons of appeal not having been filed. Held, reversing the decree of the Sudder Court, that

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

such circumstances constituted a case of "unavoidable accident," within the meaning of the Act, No. XVI. of 1845, and the appeal ordered to be re-admitted on the file of pending causes.

In reversing the decree of the Sudder Court, the order of that Court that the costs of the application to re-admit the appeal should be paid by the Appellants, was confirmed; but as the Appellants were successful in obtaining a reversal of the decree of the Court below, the costs of the appeal in England against such decree were ordered to be paid by the Respondents.

This appeal was brought from an order made by a single Judge of the Sudder Dewanny Adawlut at Calcutta, dated the 19th of September, 1859. By a [27] previous order of that Court, dated the 21st of June, 1859, an appeal by the Appellants then pending in that Court, against a decree of the Zillah Court of the Twenty-four Pergunnahs, was ordered to be struck off the list of pending causes, under the provisions of Act, No. XXIX. of 1841, on the ground, that the Appellants' written reasons in support of their appeal had not been filed within the period of six weeks, the time prescribed by Act, No. XV. of 1853, sec. 6, and the same Judge, by the order, dated the 19th of September, 1859, refused to re-admit the appeal, on an application for that purpose made by the Appellants, supported by affidavits explaining the cause of the delay in filing the reasons of appeal (a).

The facts of the case, so far as they are necessary to the question of practice raised in the appeal, were as follows:—

The Appellants were Defendants in a suit brought [28] against them by the Respondents in the Court of the Sudder Ameen of the Twenty-four Pergunnahs, and appealed to the Sudder Dewanny Adawlut from the decree of the Sudder Ameen, made on the 23rd of September, 1858. The petition of appeal was lodged on the 2nd of October, 1858.

On the 2nd of April, 1859, the Deputy-Registrar of the Sudder Dewanny Adawlut passed an order in that appeal, calling upon the Appellants, pursuant to the provisions of 6th section of Act, No. XV. of 1853, to prefer their grounds of appeal from the decision of the Lower Court within six weeks. The Appellants failed to do so within that time, and on the 3rd of June, 1859, the Deputy-Registrar made an order as follows:—"Although six weeks had expired from the 18th of April, the day on which the notice (pursuant to the above order of the 2nd of the same month) was affixed, yet the Appellants have not filed their grounds of objection and reasons of appeal. Wherefore, the Appellants having neglected to proceed with the case within six weeks, and it being considered liable to be struck off the file according to the provisions contained in Act, No. XXIX. of 1841, it is ordered, that the case be referred to the Judge now sitting in the miscellaneous department, for his orders to strike it off the file of the Court."

Accordingly, on the 21st of June, 1859, the matter came before Mr. Samuells, a Judge of the Sudder Dewanny Adawlut, who ordered the case to be struck off the list of pending causes.

It appeared, that the Appellants were kept in ignorance by their Mookhtar of these proceedings; but as soon as they were made aware of them, they applied in the usual manner to have the appeal re-admitted, [29] and filed two petitions for that purpose, dated respectively the 7th of July, 1859, and the 20th of the same month. These petitions stated, that the Appellants had not been guilty of any negligence, that they had retained Vakeels, previous to the notice being affixed; and that the default was occasioned by the severe illness and absence of their Mookhtar, to whom was confided the conduct of the appeal; that the Appellants were altogether ignorant of

(a) Act, No. XVI. of 1845, declares, that the provisions of Act, XXIX. of 1841, are inconveniently severe as regards appeals, and that it was expedient to mitigate the strictness thereof: and by sec. 1, it is enacted, that it shall be competent to the Court which shall have dismissed such appeal to re-admit the same, if the Appellant shall make application for that purpose, on the stamp prescribed for miscellaneous petitions, within three months after the appeal shall have been dismissed, and shall satisfy the Court that the dismissal was occasioned by the default of his Vakeel, or by unavoidable accident.

such illness and absence, and of the non-filing of the reasons of appeal within the prescribed period, and they prayed that the Court would overlook the default on lapse of time, agreeably to the provisions of Act, VIII. of 1859, sec. 347, and re-admit the appeal case to the file. The Appellants filed an affidavit in support of this application, in which, after stating the information which they had then recently received of the illness and absence from Calcutta of their Mookhtar, and that they were wholly ignorant and unacquainted with what had transpired concerning the appeals, until the 25th of June, 1859, when they received a letter from a third party informing them that he had heard their appeal had been struck off, deposed that they had caused inquiry to be made as to the truth of the statement of the Mookhtar, concerning his departure from Calcutta and alleged illness at Hooghly, and believed both the circumstances to be true; but that, even if true, it was the bounden duty of the Mookhtar to have given them information when he left Calcutta for Hooghly, so that they might themselves have taken steps for filing their grounds of appeal in due time; which notice, however, he wholly omitted to give; that whilst believing the probability and truth of the statements of the Mookhtar, they also laboured under the apprehension that the Mookhtar might have been tampered with by the Mookhtar or agents of the Respondents; but whether that was so or not, the result was, that their interests had, through the conduct of the Mookhtar, amounting either to unavoidable absence from illness, or from wilful neglect of duty, been sacrificed, and they had been debarred, without any negligence on their part, from prosecuting the appeals before the Sudder Court, in cases relating to disputed property of the value exceeding a lac of rupees.

On the 1st of July, 1859, and pending these proceedings, Act, No. VIII. of 1859, the new Code of Civil Procedure came into operation, which by section 347, provides, that "if an appeal be dismissed for default of prosecution, the Appellant may, within thirty days from the date of the dismissal, apply to the appellate Court for the re-admission of the appeal; and if it shall be proved to the satisfaction of the Court that the Appellant was prevented, by any sufficient cause, from appearing when the appeal was called on for hearing, the Court may re-admit the appeal."

On the 30th July, 1859, by a proceeding held by the same Judge, it was ordered that the Mookhtar should file an affidavit in the matter.

An affidavit of the Mookhtar was filed, which stated, that he acted as Mookhtar for the Appellants, that within ten days after the date of the decree of the Sudder Ameen, under the instructions of the Appellants, he caused to be lodged a memorandum of appeal in the Zillah Court against the decision, on their part; that after the appeals had been lodged in the Zillah Court, he only waited for the usual Ishtihar to be issued from the Sudder Court to sign the Vakeelutnamahs, and had retained pleaders; that up to [31] the 16th April, he was in daily attendance at the Sudder Court for the purpose of ascertaining if such Ishtihar had been issued, but that none having been up to that date issued, and having received intelligence of the dangerous illness of his son, he abruptly left Calcutta for his family house at Buripore, in the District of Hooghly, where he arrived on the 17th of April, and then found that his son was under medical treatment and seriously ill, so much so that his personal care and attendance became absolutely necessary, and that he accordingly attended on him up to his death, which took place on the 30th of April; after that date he himself fell dangerously ill, and continued in such state, quite incapable of attending to any business, until the 17th of June, when he returned to Calcutta, and there, for the first time, learnt that the Ishtihar, calling on the Appellants, his employers, to file their grounds of appeal, had been issued on the 18th of April, and that the six weeks usually allowed for filing the reasons of appeal from the date of the Ishtihar, had run out, and that, for such default of prosecution on the part of the representatives of Muttyloll Seal, deceased, and also of Sreemutty Dossee, the two appeals had been referred to the Judges of the Sudder Court for the purpose of being struck off. That, on obtaining such information, he filed a Vakeelutnamah in the case on the 20th of June, 1859, and that the two appeals were struck off the file on the following day, the 21st of June, 1859. That when he left Calcutta, on the 16th of April, he gave no information of his departure to the Appellants, as he fully expected to return to Calcutta in a few days; but that, owing to the severe and fatal illness of his son in the first instance, and his own [32] personal illness in the second, he was detained at Hooghly until the 17th of

June, as before stated, and whilst so absent, he failed to communicate to the Appellants, either the fact of his departure or his illness, of neither of which circumstances they had any information or knowledge, until after the appeals had been struck off the file for want of prosecution. And he admitted that it had been entirely owing to his culpable but unintentional neglect that the necessary steps were not taken for prosecution of the appeals, the duty connected with which solely and exclusively devolved on him as Mookhtar, and that the Appellants were wholly ignorant that the appeals had been struck off, until they learnt the intelligence from other sources, which led to the discovery of his neglect and inattention to their interests, which caused his dismissal from being any longer their Mookhtar.

On the 19th of September, the hearing of this application took place before the same Judge in the Sudder Dewanny Adawlut, when that Judge made an order rejecting the application for the re-admission of the appeal, stating his reasons as follows:—"At the first hearing of the petition, it was contended for the Petitioners, that the application might be re-admitted, under the provisions of sec. 347 of the New Code of Procedure, on the Petitioners showing sufficient cause," to the satisfaction of the Court, for their default. But the Court were of opinion, that as the default had occurred prior to the enactment of the New Code, and was a totally different description of default from that treated of in sec. 347 of the Code, the petition must be disposed of in accordance with the provisions of the old law. The Petitioner's [33] pleaders were accordingly called upon to satisfy the Court that the dismissal of their appeal had been occasioned either 'by the default of the petitioners' Vakeel, or by unavoidable accident;' the only conditions on which, under the stringent terms of Act, No. XXIX. of 1841, and Act, No. XVI. of 1845, the Court were empowered to re-admit a case which had been dismissed for default. It was argued for the Petitioners, that the affidavits in the case were uncontradicted, and disclosed a clear case of accidental default, for which his client was in no way to blame. The sudden departure of the Mookhtar, without notice, his unexpected detention, and his unlooked-for illness, were all, it was said, facts which would come under the category of 'unavoidable accident;' and, on this point, the case of Gooroo Pershad Dutt, decided on the 7th of March, 1849, by Mr. Sconce, was quoted. On the other hand it was contended that, even if the Court did not look upon the case as one of unavoidable accident, it was, on the face of it, a default of the legal agent of the Petitioners—the person who was employed in the conduct of the suit, and who was standing at the time in the place of the Vakeel. A liberal construction of the law, such as, it was urged, the Court should put upon the Act, would, therefore, it was said, allow the same effect to the default of the Mookhtar in this case as to the default of a Vakeel; and the case of *Gudadhur Parshad Tewarree v. Moosumat Soonderkoomaree* (6 Moore's Ind. App. Cases, 201) was quoted, to show that in the case of a rule regarding default, equally stringent with Act, No. XXIX. of 1841, the Privy Council refused to construe the rule harshly to the injury of the Appellants. The [34] Courts, the learned Judge observed, are always disposed to deal with cases, in which the default does not appear to be wilful, as leniently as the law will permit them; but, at the same time, they are bound to take care that any idea they may form of the hardship of a case shall not induce them to strain the law in favour of one party to the detriment of the other. To entitle him to claim re-admission for his appeal, a Petitioner must show that his case comes fairly within one of the two classes to which the law extends its indulgence, viz. defaults occasioned by the conduct of his Vakeel, or by unavoidable accident; and, in all cases, he must satisfy the Court that he himself was not to blame. Now, after a full consideration of all that has been urged for the Petitioners in this case, I do not see how they can successfully contend that the default was attributable to any other cause than their own gross negligence and lax habits of business. Here were men who had cases in Court, involving large sums of money, who reside in the immediate neighbourhood of the Court, and are aware, or ought to be aware, of the very stringent law which enacts that any suit not prosecuted for six weeks shall be dismissed, and yet they leave everything in the hands of a single Mookhtar, do not send for him for months, or make a single inquiry how the case was going on. Had they placed their case when they appealed, in the hands of the respectable Vakeels whom they employed, with instructions to file the grounds of appeal at the proper time, and to

conduct their case through all its stages, they would have been perfectly safe; but, like many of the suitors in this Court, they preferred, for reasons best known to themselves, to defer filing the [35] Vakeelnamah till the latest moment, and in the meantime entrusted the management of their case to a Mookhtar, over whom they appear to have exercised neither check nor control. This, it appears to me, is the very conduct against which the stringent provisions of Act, No. XXIX. of 1844 are levelled—the failure of suitors either to use diligence themselves in the prosecution of their suits, or to employ Vakeels of Court who may take the necessary steps for them. Act, No. XVI. of 1845, allows the suitor to plead the default of his Vakeel, but of no other person. The Mookhtar is not a legal agent, recognized by the law, and cannot claim, under any circumstances, to stand in the shoes of the Vakeel. He is merely the private servant of the suitor; and the default of the Mookhtar is, in the eye of the law, the default of the suitor himself. The only plea which the law allows a party to a suit to put forward in exculpation of his own default, is that of unavoidable accident; but, as I have already intimated, I can see nothing of the kind here. It was not accident which caused the Petitioners to leave their Mookhtar to deal with the case as he thought proper, without taking the most ordinary precautions in the matter themselves; and it was not accident which led to the Mookhtar's absenting himself without notice, or to his masters permitting his absence to pass unobserved. It was nothing, on the part of both masters and servant, but extreme negligence and unbusiness-like habits. The cases which have been quoted in support of the Petitioners' application are quite irrelevant. In that of Goorooopershad Dutt, where the Appellant, residing in the Mofussil, despatched a servant with a Mookhtarnamah, and the papers of the case to Calcutta, [36] that he might appoint a Vakeel, and the Mookhtar fell ill on the road, the Court after taking evidence, held it to be a case of unavoidable accident, for which the Appellant was not to blame, and replaced his suit on the file. The case was precisely as if the Appellant himself, journeying to Calcutta to appeal, had been struck down by sudden illness. It is scarcely necessary to point out how very widely that case differs from the present, where there is apparent, a long course of negligence, and where the Petitioners, had they used ordinary vigilance, would have ascertained the absence of their Mookhtar in time to take the necessary steps for prosecuting the appeal themselves. The case of *Gudadhar Purshad Tewarree v. Moosamat Saander-koomaree*, and the case of *Seto Lutcheechund v. Seto Zoramur Mull* (6 Moore's Ind. App. Cases, 204), rather make against the Petitioners than otherwise, as they show that the Privy Council would not have relaxed the rule referred to in these decisions, except under the very special circumstances which the cases disclose. The dismissal of the Petitioners' appeal, then, being neither occasioned by the default of their Vakeel, nor by unavoidable accident, but purely by their own inexcusable negligence, the application is necessarily rejected, with costs."

The present appeal was from this order.

Mr. Forsyth, Q.C., and Mr. Leith, for the Appellants.—As the affidavit of the Mookhtar sufficiently explained the cause of the delay in filing the reasons of appeal within the period of six weeks, the limit prescribed by the Act, No. XV. of 1853, sec. 6, the refusal of [37] the Judge to re-admit the appeal to the list of pending causes upon a mere question of procedure, on the ground that the default must be occasioned by the "Vakeel," or by "unavoidable accident," was erroneous and cannot be upheld. The alleged default of the Appellants, on account of which their appeal was dismissed, was caused by "unavoidable accident" within the meaning of the Act, No. XVI. of 1845. According to the equitable construction of that Act, a party who suffers from the default of his Mookhtar, under such circumstances as existed in this case, is entitled to the same indulgence as if the negligence had been occasioned through the "default of his Vakeel," and we submit, that the ruling of the Sudder Judge was wrong in holding that the Act did not apply to the default of a Mookhtar. Again, the Judge was wrong in his judgment, in holding that the provisions of sec. 347, of the Act, No. VIII. of 1859, which contains the new procedure of the Court and came into operation on the 1st of July, 1859, were not applicable to the present case.

Mr. Andrew, for the Respondents.—The decision of the Sudder Judge upon the question now raised, is in accordance with the law as it stood at the time of the

Appellants' default. They failed to file their grounds of appeal within the prescribed time, and that default was solely attributable to their own gross negligence. It cannot be successfully urged, that the evidence adduced by the Court below, with a view of inducing that Court to re-admit the appeal, disclosed sufficient grounds to entitle them to the indulgence they asked. The Act, No. XIV. of [38] 1845, enumerates two instances only where relief can be given; first, default of the Vakeel, and, secondly, unavoidable accident, neither of which instances can be construed to apply to the present case.

The Lord Justice Knight Bruce.—The evidence shows that this is a case of "unavoidable accident" and is within the provisions of the 1st sec. of the Act, No. XVI. of 1845. The decree of the Court below, therefore, cannot stand; and we shall humbly advise Her Majesty to reverse it. As to the costs of the application in the Court below, their Lordships are of opinion, that the Court below was right in ordering them to be paid by the Appellants, but the costs of the appeal must be paid by the Respondents (in the case of *Sreemutty Dossee Poornoo v. Chunder Roy* and others, the circumstances of which were exactly similar with the above case, and which was heard by the Judicial Committee on the same day, a similar order was made, re-admitting the appeal).

[39] RANEE COWULBAS KOONWUR.—*Appellant*; BABOO LOLL BAHADOOR SINGH and Others,—*Respondents* * [Dec. 4, 1861].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Heard *ex-parte*.

Construction of an Ikrarnamah, or deed of agreement and partition, of an ancestral estate, among several brothers: Held that the terms of the deed were not restrictive upon the power of each brother, to alienate his separate share.

A., one of the brothers, had his share registered on the Collector's Books as owner, and by deed of sale conveyed such share to his daughter, who was also his heir. The Collector, upon the objection of one of A.'s brothers (who denied A.'s right to alienate, on the ground that it was ancestral property), refused to register the daughter's name as proprietor. Held, that the Collector was bound by Ben. Reg. VIII. of 1800, sec. 21, to register her name as purchaser, but that such mutation of name was to be without prejudice to the question of the right of succession.

It is beyond the power of the Court to make a declaration in a decree, upon a point not recorded in the issues, as required by Ben. Reg. XXVI. sec. 10, of 1814.

This was a suit brought by the Appellant against the Respondent, Baboo Loll Bahadoor Singh, and Baboo Bhowanee Partaub Singh, for himself, as guardian of Baboo Jobraj Singh, his minor son. The chief object of the suit was to obtain a declaration of the Court on the construction and effect to be [40] given to an Ikrarnamah, or instrument of agreement and partition, executed by four brothers named Loll Bahadoor Singh, Bhowanee Partaub Singh, Run Bahadoor Singh, and Odey Partaub Singh: and raised the question of the power of Baboo Loll Bahadoor Singh to alienate his share of the ancestral property which was formerly jointly held by himself and brothers. The suit was instituted at the instance of the Government Commissioner of Revenue, who refused, without a decision of the Civil Court, as to the construction to be put on the Ikrarnamah, to affirm an Order of the Collector, which directed that the name of the Appellant as purchaser should be substituted

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

in the Collector's books for that of Baboo Loll Bahadoor Singh, the vendor of the mouzahs, or villages, the subject of the suit.

The facts were these:—

The above-named four brothers were Hindoos, and in joint possession as co-sharers of certain landed property, consisting of numerous mouzahs in Zillah Behar and Shahabad, and being desirous of effecting a partition and division of the same among themselves, executed, on the 22nd of October, 1845, an Ikrarnamah, which was duly registered.

This Ikrarnamah was in these terms:—"Whereas, it is mutually necessary for us to divide by lot, villages, properties and revenues and malikana of the minabee villages, of Pergunnah Ceris and Kotumba, in Zillah Behar, and of the settled villages and malikana of the minabee villages of Pergunnah Havellee Ruhtans of Zillah Shahabad, and of the Moeurrery villages in Pergunnah Pullamon, and of the lands Gurbagh in Moorarpoor, in Pergunnah Gyah, and of the debts of [41] Mahajuns and the zurpeshgee of Tikadars, etc.; for this purpose a Punchayet has been appointed, viz. Sreemunth Ram Chunder Bhartee, Baboo Tejnarayn Singh, Baboo Bishen Nath Singh, and Baboo Daad Bahadoor Singh, and we have filed an Ikrarnamah punchayuttee (arbitration bond) before the Punchayet, under our signature, but on account of the non-fulfilment of the conditions of said Ikrarnamah, the said members of the Punchayat have declined to act. Now, with our voluntary and free will, in the presence of Lala Dabee Purshaud, our Mookhtar, we have submitted a hyut-bundee (specification) of the villages and of the malguzary, after giving a deduction of mouzahs Tehrah and Bhorosah and Sandusee, uslee and rujokee and mulhdowah, uslee with dakhillee of Pergunnah Kotumba in Zillah Behar, and of Mouzahs Sunlona and Korenaha, Pergunnah Havellee Ruhtans in Zillah Shahabad, all of which belong rightfully to Baboo Run Bahadoor Singh, that is to say, in right of primogeniture, and the debts of Mahajuns, zurpeshgee, of Tikadars, etc., and each sharer has obtained the hyut-bundee, and is in possession of the share accordingly. Under these circumstances, there is no dispute or contention existing with reference to the partitioned villages, and the debts of Mahajuns, etc. The malguzary of Mouzah Duldhar and mouzah Daoodpoor, appertaining to Havellee Ruhtans, according to the ticea writing of the Tikadars down to the Fuslee year 1255, is collected, and each sharer is to take an equal share of it. From 1256, we shall continue to make collections of the malguzary of the villages, as mentioned in the hyut-bundee. We, therefore, declare and give in writing, that in case of necessity, we four brothers [42] are competent, in order to liquidate expenses, debts of malguzary, debts of Mahajuns, etc., in case of our having no means at hand, to make alienations in the best way we think proper of shares of our villages, by deed of irreversible kabala, bybil-wuffa, mortgage, ijarah and zurpeshgee, bhurna, etc. We shall continue to pay debts of Mahajuns, zurpeshgee, of Tikadars, etc., in proportion assigned in the hyut-bundee to each sharer, and whatever besides becomes payable during the period of coparcenary. We, nor our heirs, shall make any objection in respect of the deed of bhurna, burnahurree, tomusooks, bybil-wuffa, ijarah, tunkhahee chittees, and receipts, bearing date previous to this Ikrarnamah. Cases which are pending or will be brought in the Civil Courts, Foujdary Courts, Collectorate, and other lower Courts of the Zillah, and in the Sudder, during the period of coparcenary, the expenses of the prosecution and defence thereof are chargeable to all four brothers; should any of us, declarants, or our heirs, swerve from these conditions, in that case, the said objection will become void."

After the execution of the Ikrarnamah the brothers individually exercised acts of ownership over their several separated shares, some of them selling the mouzahs assigned to them.

On the 16th of September, 1848, Baboo Loll Bahadoor Singh, having no male issue, sold the mouzahs in question in this suit, constituting his share of the joint estate, for the sum of Rs. 75,501, to his daughter, the Appellant, and at the same time executed a deed of sale, which was registered in the office of the Register of Deeds of Zillah Behar.

The ordinary petition was presented to the Collector by the Appellant and the vendor, stating the [43] purchase and deed aforesaid, the payment of the purchase-money, and the possession of the Appellant, and praying that her name might be

recorded in the Collectorate in place of that of the vendor on his assent at the time given. Bhowanee Purtaub Singh, one of the vendor's brothers, thereupon filed a petition of objections, on behalf of himself and his minor son, alleging that Baboo Loll Bahadoor Singh had no power to alienate by sale ancestral property in favour of the Appellant during the lives of the Petitioner and his son, and praying that the name of the vendee might not be recorded. Afterwards a second petition was filed by the same party, referring to the terms of the Ikrarnamah, and contending that only conditional sales—namely, for the liquidation of debts and Government revenue, were permitted under that instrument, and that, therefore, Baboo Loll Bahadoor Singh was not competent to make any alienation. The vendor filed a petition by way of answer, in which he stated, that he and his brothers were separate, and that their property had been divided among them, and that sales had been made by them severally of mouzabs out of their respective shares, and that the names of the purchasers had been duly recorded in the Collectorate.

The hearing of the petition took place before the Assistant Collector, when that Officer ordered as follows:—"Whereas it appears from a copy of the Ikrarnamah filed by the Mookhtar of the objector that it has reference only to the fact that a sale is allowable for liquidation of debt under decrees, etc., and in the bill of sale adduced by the Petitioner there is no mention of 'necessity' for making the sale. Under these circumstances, the vendor is not competent to [44] make any alienation. Ordered, therefore, that this case be struck off the file."

The Appellant appealed from this decision to the Collector, and on the 23rd of December, 1850, the hearing of the appeal took place, when the Collector referring to the terms of the Ikrarnamah, declared the competency of the vendor to alienate the mouzabs sold, reversed the decision of the Assistant Collector, and ordered, to the effect, that the name of the vendor should be struck out from the Government records, and the name of this Appellant as the purchaser should be substituted. The objector being dissatisfied with the order, filed a petition of appeal in the Court of the Commissioner against this decision. The hearing of the appeal took place before the Commissioner on the 3rd of June, 1851, when by a proceeding of that date he declared, that the mutation of names was not valid; and that, although the Collector in his proceeding had declared the competency of the vendor to alienate the share sold under the Ikrarnamah, and ordered that the name of the female purchaser might be registered, and that of the vendor struck off, yet that a decision on the terms of the Ikrarnamah rested with the Civil Courts. Hence, in the opinion of that Court, the Collector's order could not be admitted or confirmed, and it was ordered by the Commissioner that the Collector's order, dated the 23rd of December, 1850, be reversed.

In consequence of this decision of the Commissioner, the Appellant brought the suit from which the present appeal arose against Baboo Loll Bahadoor Singh and Bhowanee Purtaub Singh, and his minor son, Jobraj Singh. In the plaint the Appellant stated, [45] that the mouzabs were held by the Defendant, Baboo Loll Bahadoor Singh as his own absolute property under the partition and division aforesaid, and the Ikrarnamah above mentioned; that he sold the same under the registered deed of sale, and for the consideration aforesaid, to the Appellant, who was put into possession, and then still continued in possession thereof. The plaint further stated the proceedings before the Assistant Collector, the Collector, and Commissioner, submitting that the order of the Commissioner was opposed to the provisions of sec. 21, of Ben. Reg. VIII. of 1800, and precedent, No. 4, cited in the Circular Order of the Sudder Board of Revenue, dated 25th of March, 1851; and prayed that orders might be passed by the Court to have the Appellant's name recorded in the Collectorate in place of that of the vendor, in respect of the mouzabs.

The answer of the Defendant, Bhowanee Purtaub Singh, after objecting that certain mouzabs of Zillah Shahabad were left out of the plaint, and the omission of mention of the price of each mouzah insisted that the record of name was intended for the person in possession, but that the present Appellant was never in possession of the mouzabs, and had never paid the consideration money. The answer also stated, that the mouzabs were acquired by the common ancestor of the four brothers; and it submitted, whether by law an ancestor had the power directly or indirectly to make alienations in the face of the real successor,

and to his deprivation. It then stated, that of the brothers only one, viz. the Defendant, had male issue, and insisted that the Ikrarnamah only permitted a sale to pay revenue or other debt of the sharer.

[46] The answer of the Defendant, Baboo Loll Bahadoor Singh, supported generally the statements in the plaint, and expressed assent to the mutation of name prayed for therein, praying that he might be dismissed the suit, with costs, having been made unnecessarily a party.

The replication stated, in respect to the Ikrarnamah referred to in Bhownsee Purtaub Singh's answer, that it nowhere contained a condition that a brother was not competent to alienate property mentioned in that instrument or otherwise, when he had brothers or nephews alive, but that rather the whole tenor of the deed was, that such sharer was competent to make alienation of his share.

The pleadings having been closed, the usual proceeding by the Principal Sudder Ameen, under sec. 10, Ben. Reg. XXVI. of 1814, took place, when the issues to be tried in the suit were recorded as follows:—Pleas in bar in admission of suit.—First, is this suit admissible or not, according to Circular Orders of the 11th of January, 1839, and the 30th of September, 1847, as certain mouzahs of Zillah Shahabad have been left out from the plaint; and also whether omission of the mention of the price of each mouzah is or is not in contravention of sec. 3, Reg. IV. of 1793, and reports of regular cases decided on the 12th of March, 1850, and 13th and 18th April of that year? Second, is the suit of Plaintiff, claiming the record of her name, although out of possession of the purchased property, without first suing for possession, admissible or not? Facts arising which require to be determined in accordance with clause 2, sec. 10, Reg. XXVI. of 1814. The first point relative to fact to be determined, which Plaintiff may adduce and the Defendant [47] deny. First, It is to be seen first whether the bill of sale dated 1st of Assin of the Fuslee year 1256, is correct or not in conformity to Regulation, and whether the Plaintiff is in possession of the purchased property or not; and what is the condition of the Ikrarnamah; and is the vendor competent to sell or not; and is the Plaintiff rightfully entitled to get her name recorded in the Collectorate or not, in reversal of the roobakaree of the Commissioner? Is the intent of the Circular Order of the Sudder Board, dated 25th of March, 1851, in bar of the mutation or not? The second point relative to fact to be determined, which Defendant may adduce and the Plaintiff deny. "It is to be seen first what the form of sale and purchase is, and what are the terms of the Ikrarnamah, and is Plaintiff in possession of the same or not, and whether the vendor is competent to make alienation of the property in dispute or not, and whether Baboo Loll Bahadoor Singh, one of the Defendants, ought to be exonerated from this claim."

Evidence was adduced by both parties under these issues, and witnesses were examined on behalf of the Appellant, who proved the sale and purchase, and her actual possession thereunder. There were also witnesses examined on behalf of the Defendant, Bhownsee Purtaub Singh, in contradiction to the witnesses of the Appellant, to prove that she was not in possession. It was further proved in the course of the examination of the Defendant's witnesses, that the four brothers separated, and that a division was made among them, and that the mouzahs in question fell to the lot of Baboo Loll Bahadoor Singh.

[48] The hearing of the suit took place before the Principal Sudder Ameen (Moulvee Sayyad Mahamed Rafeeq Khan Bahadoor), in the Court of the Zillah of Behar, on the 20th of August, 1853, when he made a decree in favour of the Appellant, in the following terms:—"In this case, the claim of the Plaintiff is as stated above, and that the answer of Baboo Loll Bahadoor Singh, vendor, is in support of the plaint of the Plaintiff, and prays his own exoneration from the claim; and that the answer of Bhownsee Purtaub Singh is to the effect that the plaint is irregular, by reason of omitting the mouzahs in Zillah Shahabad, mentioned in the bill of sale; that the Plaintiff is not in possession; that no mention is made of price; that the vendor is not competent to make alienation of the property claimed under the deed of partition, and that the vendor has no male issue, but nephews, as stated expressly, in the answer. But no irregularity is found in the plaint, as the defect is cured by supply of supplementary stamps. This action is merely to get her name recorded in the Collectorate. It became necessary, therefore, to try this point only, viz. whether or no the vendor has the right to sell the property in dispute, and is, or is

not, Plaintiff rightfully entitled to get her name recorded in the Collectorate, and to ascertain who is the person in possession of the property in dispute. The decision thereupon is this:—This case was instituted to effect the record of names in place of others to be expunged. The vendor admits the sale, and the opposing Defendant also does not deny the fact of the right of the vendor, but he declares that the vendor is in possession, [49] which is not established, because, by the testimony of witnesses on the part of the female Plaintiff, her possession is proved. From copies of bills of sale, and roobakaree of mutations, and documents filed by the Plaintiff, it is evident that Baboo Run Bahadoor Singh, and Baboo Odey Purtaub Singh, and the opposing Defendant, have sold their mouzahs, mentioned in the deed of partition, in proportion of shares mentioned in the papers aforesaid, and the mutation of names has been effected, and not one of them has protested against it. Under these circumstances, there appears no ground why a sale of the property in dispute should not be effected. The passage, that in case of necessity, for expenses and payment of revenue, and debt of Malajuns, etc., and by reason of their having no cash with themselves, the four brothers are competent, in the best way they are able, to raise money by sale absolutely, and by *bybil-wuffa*, and mortgage, and by leasing out and by usufructuary *peshgee*, etc., of the villages of their own shares, is mentioned in the deed of partition, dated the 6th of Kartick, 1252, *Fuslee*; and is, in my opinion, no bar to the sale made, but, on the contrary, the clause fortifies the sale. If such were not the case, then how did these people sell as well as the opposing Defendant? If this sentence, namely, ‘If sale is made without necessity, it is void, and in case of necessity, it should be incumbent to prove the validity of the same,’ were in the deed of partition: in that case there may have been something. Such, however, is not the case, nor is the word ‘necessity’ used in the sale of those vendors. The bare allegation of the witnesses of the Defendant, in respect of possession of the vendor, is not sufficient in [50] this case. His *Thicadars* have also deposed to the possession of the vendee. Under these circumstances it is ordered, that this case be decreed the Plaintiff.”

The Defendant, Bhowanee Purtaub Singh, appealed from this decree to the *Sudder Dewanny Adawlut*.

The hearing of the appeal took place before the Judges of that Court, consisting of Messrs. Trevor, Samuells, and Money, on the 18th of April, 1857, when the Court decreed as follows:—“On the merits it was argued by the Appellant, that the clause of the deed of partition was restrictive, and that the Plaintiff’s father was only empowered to sell under circumstances of urgent necessity, which he was bound to prove. The sale, moreover, it was contended, was manifestly fictitious, no proof of the payment of the consideration-money, which the deed alleged, having been given, and the whole circumstances of the case showing the transfer of the property to have been merely nominal. For the Respondent, it was contended, that these were not pleas which the Appellant, who had no immediate interest in the property, was competent to raise; that the Plaintiff’s suit was merely for registration, to which she was entitled, on the acknowledgment of the transfer by the vendor, and proof of possession of the estate, which, it was maintained, she had given; that she had not sued to establish her title, and that under the provisions of the registration law, *Ben. Reg. VIII. of 1800*, it was unnecessary for her to do so. We entertain no doubt of the Defendant’s competence to raise the question of the *bona fides* of the sale in this action. His rights as the nearest, or one of the nearest heirs who can [51] take absolutely after the death of Baboo Loll Bahadoor Singh, are clearly attacked by the sale, and the recognition of her title as purchaser and absolute proprietor under the purchase, which the Plaintiff seeks to obtain, would altogether destroy the reversionary interest which, in the absence of a sale, the Defendant possesses in the property. We are not of opinion, that the terms of the deed of partition are not restrictive to the extent of compelling the shareholder, who may part with his share, to prove the necessity under which he acted. On the contrary, while recognizing the abstract impropriety of parting with ancestral property, except under the pressure of necessity, the deed clearly constitutes each shareholder the judge of that necessity in his own particular case; and the particular clause quoted has, we think, been inserted to obviate any objection which might otherwise have arisen under the *Mithila* law, to sales effected by any one of the shareholders without the consent of his brethren. But, we see no evidence in the case before us,

that any *bona fide* sale has taken place; nor do we consider that the Plaintiff has established the material averments on this head, which her plaint contains. Her averments are, that her father, being in want of money, sold to her the whole of his landed property for the sum of Rs. 75,501, and put the Plaintiff in possession on receiving the full amount of the consideration money. Now, no evidence as to the payment of this large sum is tendered. Only one witness to the deed of sale is examined, and he expressly says, that no consideration passed in his presence when the deed was executed. It is not even suggested from what source the daughter of the vendor, who is represented as being himself in want [52] of money, could have obtained the necessary funds, nor is any proof furnished that the vendor was in want. The evidence as to the Plaintiff's possession of the property goes merely to show that notice of the transfer was given to the tenants, and that they paid their rents in to her account; but this is quite consistent with the supposition of the transfer being a benamsee one, and it is not shown that the money thus received was applied separately for the daughter's benefit, or indeed that she had any establishment distinct from that of her father. Under these circumstances, we cannot but regard the sale to the Plaintiff, and her possession under that sale, as alike fictitious, and we accordingly reverse the decision of the Principal Sudder Ameen, and decree the appeal with costs."

The present appeal was from this decree.

As the Respondents did not appear, the case was heard *ex parte*.

The Solicitor-General (Sir R. Palmer) and Mr. Leith, for the Appellant. At the time of the alienation, Baboo Loll Bahadoor Singh was separate from his brothers, having, under the deed of partition of the family property, held the mouzabs afterwards sold by him to the Appellant, his daughter, as his own separate and divided share; and, therefore, he was competent by Hindoo law, to make sale or gift of the mouzabs, as his own absolute and exclusive property; and the Appellant's name, as proprietor, ought to have been registered by the Collector, pursuant to Ben. Reg. VIII. of 1800, sec. 21, as the rights of succession are not changed by mutation of names on the registry. With respect to the title to [53] the mouzabs, on the death of the Baboo Loll Bahadoor Singh, intestate and without male issue, the Appellant, as his daughter, and not his nephews, would have succeeded to the mouzabs as his heir-at-law according to Hindoo law, supposing that the sale of them had not been made. Even if Baboo Loll Bahadoor Singh and his brothers and nephews had remained members of a joint and undivided Hindoo family, which was not the case, and that no partition of their family property had taken place, he, having no male issue, would have been competent, according to Hindoo law and custom, to alienate his own undivided share. It cannot be maintained, therefore, that the provisions of the Ikrarnamah executed by the brothers, limited or restricted the power of Baboo Loll Bahadoor Singh, as a divided member of a Hindoo family, to alienate any portion of the separate share vested in him under the partition and division of the family property effected by himself and brothers. Lastly, we submit that the ground on which the suit was decided against the Appellant in the Sudder Court was not open between the parties, having regard to the issues recorded by the Zillah Judge under cl. 3, sec. 10, Ben. Reg. XXVI. of 1814.

The Lord Justice Turner.—Their Lordships have fully considered this case. They do not think it would be right for them to order this deed to be put upon the register in any mode that would give a colour of the opinion of their Lordships as to the validity of the deed, considered without reference to the clauses contained in the partition deed; but, with reference to the clauses in the partition deed, their Lordships agree with [54] the Zillah and the Sudder Courts in the opinion, that those clauses did not prevent Baboo Loll Bahadoor Singh from alienating the property in any mode he might think fit.

Their Lordships cannot agree with the decision of the Zillah Court, which puts the case upon the footing of a purchase, and registration as a purchase, nor can they agree with the conclusion of the Sudder Dewanny Adawlut, which Court seems to have entered into a matter not very distinctly in issue in the suit, and as to which there had been no points recorded.

It appears, therefore, to their Lordships, that the proper course to take in this case is, to reverse the decree of the Sudder Dewanny Adawlut, and also the decree

of the Zillah Court, and to declare, that by the clauses contained in the deed of partition, Baboo Loll Bahadoor Singh was entitled to alienate the property in question, and that the Appellant is entitled to have her name put upon the register, but to provide that the order is to be without prejudice to any other question of title or right that may be raised against the Appellant, or her representatives, in any other suit, or proceeding.

Their Lordships do not think this a case to give any costs.

[55] RAJAH NURSING DEB,—*Appellant*; ROY KOYLASNATH and Others.—*Respondents* * [June 25, 1862].

On appeal from the Sudder Dewanny Adawlat at Calcutta.

The Zemindar in possession by a sunnud conveyed to A., as the head of a branch of the grantor's family, an estate, part of the Zemindary, in lieu of maintenance to which A. was entitled out of the Zemindary; "to hold and enjoy possession, from generation to generation," subject to an allowance for maintenance to a certain class of the family described as "Lowahokans and Motalokans" (dependants and relations). A.'s heir afterwards alienated a part of the estate for a valuable consideration. Held, first, in the absence of evidence of any class of persons answering the description of "Lowahokans and Motalokans" (which might have created a trust), that A. took an absolute estate in the lands assigned to him; and

Secondly, that the limitation in the sunnud "from generation to generation" did not create such an estate as to operate as a bar to alienation by sale.

The question is this appeal turned upon the construction of a sunnud, in the nature of a deed of a maintenance, dated the 8th of August, 1799, by which certain villages and lands were granted by Chytun Singh, the Rajah in possession, to Joy Singh Deb, to hold "possession, of the villages, and lands, etc., and support his Lowahokans and Motalokans (dependants and relations) from generation to generation," and the point raised was, whether Joy Singh Deb had any power under this deed to alienate the property beyond the term of his own life; or whether, notwithstanding his alienation, the villages and lands did not vest in his descendants "from generation to generation," they maintaining such [56] dependants and relations out of profits of the estate so conveyed to the grantee.

The circumstances under which the deed was executed were as follow:—

The villages and lands were formerly part of the Raj of Bissenpore, of which the grantor, Chytun Singh, and his cousin, Radha Damoodhur Singh (descendants of a common ancestor named Gopaul Singh, the former Zemindar), were in the year 1771 jointly possessed.

Some time after Gopaul Singh's death, Chytun Singh instituted a suit against Radha Damoodhur Singh, for the purpose of having it declared that, in accordance with a custom which prevailed in the family, Chytun Singh, as nearest heir, was alone entitled to the Zemindary. This claim was recognized by the Governor-General and the Council (who at that time had jurisdiction on appeal), and who, by their order dated the 14th of April, 1780, so decreed; but they also, by a subsequent order dated the 21st of September, 1781, assigned one-half share of what is called Butter-jant land to Radha Damoodhur Singh for his maintenance.

Radha Damoodhur Singh died, leaving his son, Bahadoor Singh, his heir, who

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instituted a suit claiming a share in the Zemindary, which, on the 22nd of January, 1795, resulted in a decision of the Sudder Dewanny Adawlut, confirming the order of the Governor-General, dated the 14th of April, 1780, the Court declaring that Bahadoor Singh and his connections were entitled to maintenance at Chytun Singh's hands, for which, if kept back, it was competent for him to maintain a suit to recover. Bahadoor Singh subsequently died, leaving his son and heir, Joy Singh Deb, and also leaving a half-brother of Joy Singh, named Rughoonath Singh; and the provision for [57] maintenance of Joy Singh and his branch of the family not being regarded by Chytun Singh, a suit was instituted, and Joy Singh Deb obtained a decree against Chytun Singh, which decree fixed the yearly maintenance to be paid by him to Joy Singh Deb, and the other heirs and descendants of Radha Damoodhur Singh, at Rs. 4200.

Instead, however, of allowing this sum to remain as a permanent charge, Chytun Singh determined to appropriate specific villages and lands; and he assigned Rs. 1500, as the provision for the maintenance of Rughoonath Singh and the branch of the family of which he was the head; and, to secure it, Chytun Singh, by a sunnud, assigned to Rughoonath Singh certain lands in lieu of the Rs. 1500. In like manner, in order to provide permanently for the maintenance of Joy Singh Deb, and the branch of the family of which he was the head, and who were entitled to maintenance under the decree, Chytun Singh, on the 13th of Sraban, 1206 B. S. (1799), assigned to Joy Singh Deb the villages and lands which were the subject of the present suit, and the annual income from which was about Rs. 2000.

The sunnud by which these villages were assigned was in the following terms:—
 "To the seat of all happiness, my grandson, Sree Sree Rajah Joy Singh Deb, I do hereby execute a 'sunnud Khooro Poos' (deed of maintenance), to the following effect:—The Zemindary of Pergunnah Bistopore, etc., were jointly of the late Rajah Radha Damoodhur Singh, your grandfather, and of me. Afterwards, disputes having arisen with the late Rajah Radha Damoodhur Singh, your grandfather, and the late Rajah Bahadoor Singh Deb, your father, regarding the Zemindary, the Zemindary of the whole Pergunnah [58] aforesaid has been decreed to me; but, in the said decree, it is ordered that I shall have to grant maintenance out of the Zemindary to the 'Lowahokans,'—*i.e.* members of the family of Rajah Damoodhur Singh, and to the 'Motalokans'—*i.e.*, the dependants of Rajah Bahadoor Singh. For this, according to the order of the Sudder Dewanny Adawlut, it being necessary to allow maintenance to those 'Lowahokans' and 'Motalokans' from the Zemindary of the Pergunnah aforesaid, the sum of Rs. 3500 is fixed. Out of this, to Sree Sree Rughoonath Singh and others, agreeably to separate Ismuveesee (list), a separate sunnud of this kind has been granted for 1500 beegahs of land, in lieu of Rs. 1500. Deducting that in lieu of Rs. 2000 for your maintenance, I do give unto you the entire mouzahs and lands, as per schedule of allotment at foot. Holding and possessing the mouzahs and lands, etc., and giving maintenance to the 'Lowahokans' and 'Motalokans' on your side, continue to hold and enjoy possession at ease, uninterruptedly, from generation to generation. Besides this, whoever has got a decree for the Dewutter shall hold and keep in possession separately of it."

Joy Singh Deb obtained possession of the lands mentioned in the sunnud, and continued in possession of them, and out of the income derived therefrom maintained his family down to the year 1832, when, in payment of certain debts and a judgment, he executed a deed of conveyance, by way of absolute sale of the lands to one of the Respondents, named Gunga Narain Roy, who was thereupon put in possession.

Joy Singh Deb died in the year 1846, leaving the Appellant's father, Cheyt Singh, his heir and legal representative; Cheyt Singh claimed the villages and lands, on the ground that they were not alienable; and [59] ultimately, on the 8th of October, 1852, he filed a plaint in the Court of the Principal Sudder Ameen of the Zillah Court of West Burdwan, against Gunga Narain and Koylashnath Roy, then in possession, praying to be put in possession of the lands, alleging that the lands assigned by Chytun Singh agreeably to the order of the Court for the maintenance of the relations and dependants, were inalienable, and could not be transferred by sale or gift.

Gunga Narain Roy and Koylashnath Roy by their joint answer set up the sale

by Joy Singh Deb to Gunga Narain Roy as an absolute and valid sale, and also pleaded the Ben. Reg. of limitations, sec. 14, and III. of 1793, on the ground that there had been more than twenty years' possession of the land in question under Gunga Narain Roy before the institution of the suit.

The cause came on for hearing before the Principal Sudder Ameen (Sree Gobind Chunder Bidyarutho), upon the 24th of November, 1856, who decreed in favour of the Appellant (who had in the meantime succeeded his father), holding that Joy Singh Deb could not alienate any part of the lands to the injury of the next heirs in reversion, or charge, except so far as his own life interest extended; and, further, holding that the law of limitation did not affect the Appellant's claim, inasmuch as he had brought his suit within six years from the date of the death of Joy Singh Deb, on which date he considered his right of action first accrued.

The Respondents appealed to the Sudder Dewanny Adawlut, at Calcutta; and the hearing of the appeal took place before Messrs. Raikes, Patton, and Torrens, three of the Judges of that Court. These Judges pro-[60]-nounced their decree on the 29th of April, 1858, reversing the decree of the Principal Sudder Ameen, and dismissing the suit of the Appellant. The decree was as follows: "In order to determine the point of limitation raised in this case, it is necessary first to ascertain and decide whether the Lower Court has rightly maintained the inalienable nature of the grant, as pleaded by the Plaintiff; as, if the contrary be established, we consider both the evidence on record and the judgment of the Lower Court on the long possession of Gunga Narain Roy under the registered Kubala of 1239, fully entitle the Defendants to demand the dismissal of this claim as barred by lapse of time, without the Court expressing any further opinion as to the technical informality of the deed under which that possession was originally required. We are told that the Zemindary of Bissenpore was held jointly at one time by Chytun Singh and his younger brother, but that, disputes occurring, Chytun Singh sued to hold the estate singly, in accordance with family custom, and his claim was conceded, with the proviso that he should provide for the maintenance of his younger brother. An action was then commenced by Bahadoor Singh for their maintenance, and the Court decreed that it should be fixed at Rs. 4200, yearly. When this decree was passed it would appear that the recipients were Joy Singh Deb and Rughoonath Singh, the sons of Bahadoor Singh; and on the 13th Sawun, 1106 B. S., Chytun Singh executed a sunnud, assigning to Joy Singh Deb certain lands and villages in lieu of the maintenance allowance fixed by the decree. This sunnud recites that a separate assignment had been made to Rughoonath Singh, and others, in discharge of the same decree, at the computed [61] value of Rs. 4500, yearly income, and that the grant to Joy Singh Deb was for the yearly value of Rs. 2000. Thus we see that in lieu of the yearly allowance, fixed by the Court at Rs. 4200, for the maintenance of Bahadoor Singh's relations and dependants, lands and villages were assigned by Chytun Singh, and the computed value of the allowance reduced by the recipients to Rs. 3500 per annum. This further purport of the deed has been held by the Lower Court to have conveyed to Joy Singh Deb the lands mentioned therein as a maintenance for himself and family, to be enjoyed by them generation after generation, and to be inalienable by any member of the family. The question which has been raised and argued before us is whether the grant purports to be a grant to the family generally, or to Joy Singh Deb individually leaving him to provide for their maintenance from the proceeds of the property, and releasing Chytun Singh from all responsibility on that account. We have no hesitation in holding that this last is the proper interpretation to put upon the deed. The deed was without doubt a compromise under the decree, and, in full discharge of it, Joy Singh Deb, as head and representative of his branch of the family, was the recipient of the allowance settled upon them by the decree, and in the assignment made in full discharge of that award his name alone is mentioned; and while there is no doubt the grant was intended to do for the family all that the decree provided for, there is none also that the grantor must have taken upon himself all responsibility on that score. The wording of the deed will, it is admitted, bear this interpretation, though it is also argued that it may be construed as meaning that Joy Singh Deb's relations and dependants will derive their mainte-[62]-nance generation after generation from the lands and mouzahs of the grant. There is, however, no specific proviso against

alienation, and the most reasonable inference to be drawn from the whole transaction, and one consistent with the general terms of the deed is, that Joy Singh Deb intended it as in full discharge of the decree, and took upon himself the responsibility of providing for his own dependants. That such a responsibility should fall on the head of the family is natural, and that the party undertaking it should consider the acquisition of landed property the best mode of ensuring to himself the means of so providing for his relations, accounts in an intelligible way for the grant being created for his benefit. After the lapse of so many years, and after ascertaining from the record before us that Joy Singh Deb did not hesitate to meet this assignment as conveying to him absolute right over the property, it would require very cogent evidence to induce the Court to supersede his acts, on the understanding that he had wilfully or inadvertently misconstrued the terms on which the assignment had been made in his favour. No sort of evidence has, however, been submitted to us in proof of a restrictive power having been vested in Joy Singh Deb, or that other members of his family had ever opposed him in dealing with the property. Believing this sunnud to have conveyed to him the power of sale, etc., we see no reason to doubt either the fact of the particular sale pleaded by the Appellant, or the possession under it by Gunga Narain Roy and the Appellant for more than twelve years before institution of this suit. The present claim, then, cannot be one which only arose after the demise of Joy Singh Deb. It brings in question a registered deed which has never been disputed since its execution to the present time, and under which possession had continued for upwards of twelve years. The suit is manifestly barred by the law of limitation, and reversing the judgment of the Lower Court we decree the costs of the suit to the Appellant."

The appeal was from this decree.

The Solicitor-General (Sir R. Palmer), and Mr. W. Field, for the Appellant; and Sir Hugh Cairns, Q.C., and Mr. Leith, for the Respondents.

On the part of the Appellant it was contended, that the only question involved was, whether by the terms of the sunnud of 1795, Joy Singh Deb had power to alienate the mouzals as against his rights. W. H. Macnaghten's "Princ. of Hindu Law," Vol. I. p. 9, and whose right of possession, it was insisted, with reference to the Law of limitation of suits, only accrued on Joy Singh Deb's death.

The Respondents' case was, first, that the sunnud conveyed an absolute estate of inheritance to Joy Singh Deb, without any restriction upon the general power of alienation given by the law of Bengal to a Hindoo father in possession of an estate of inheritance: that even if there had been such limitation, it would have been inoperative, as being contrary to the spirit and policy of the Hindoo Law as administered in Bengal: that the six mouzals being a portion only of the lands granted by the sunnud, were sold and conveyed to Gunga Narain Roy absolutely by Joy Singh Deb for a valuable consideration. Secondly, that it did not appear that there were at the time when the suit was brought any [64] persons in existence who could properly come within the designation or description of "Lowahokans," or "Motalokans," on the side of the late Rajah Joy Singh Deb in the sunnud mentioned, or if there were, that their claim was against the heirs of Joy Singh Deb, or the estate left by him, and not against the Respondents in respect of the mouzals purchased by Gunga Narain Roy.

The Lord Justice Knight Bruce.—Their Lordships, in this case, agree with the Counsel for the Appellant, that the question of the construction of the instrument of 1795 was, if not the only question, at least, that alone which it is necessary for their Lordships to decide.

Their Lordships are of opinion, that the reference to maintenance was merely for the purpose of showing what we should call the consideration for the instrument, or the transaction.

The question is not, whether the maintenance of the two classes of persons here described was, or was not, the condition of the grant so as to render it void, or voidable, in the event of the maintenance not being afforded—a point upon which their Lordships give no opinion—nor is it a question before us whether it is what English lawyers would call a trust, or a charge, affecting the lands in favour of the class be maintained. Upon that point also, we think it unnecessary to give an

opinion. The question is, whether land dedicated permanently to maintenance of a particular class, is to remain inalienable in the hands of the person to whom the grant was made, and his descendants, as long as there should be descendants of his, for ever, so as to prevent a sale and to render it perpetually inalienable. Whether that be the law [65] which governs landed property of this description, their Lordships also do not mean to intimate any opinion, but assuming for the sake of the argument, that it can be, it does not appear to their Lordships that this is a case of that description. They do not collect from the instrument an intention that from son to son, it should remain in the family: with the head of the family for the time being, in order to enable him to afford the maintenance.

Their Lordships are of opinion, that giving the land to a member of the family to whom it was given, had the same effect, and was an act of the same character as giving a sum of money to him absolutely, in lieu of any claim for maintenance burdened with the duty upon his part of maintaining those who ought to be maintained. If that had been done, their Lordships are of opinion, that the money would have been absolutely the property of the person to whom it was given, and that would have well discharged the duty incumbent upon the person who should have paid the same.

We think, that the words at the end of the instrument, rightly construed, render this construction sufficiently certain: for the words are "continue to hold and enjoy possession to us uninterruptedly from generation to generation." Every part of that portion of the deed appears to their Lordships to refer to the enjoyment of the land, and not the identity, or the persons, or the continuance of the persons of those who were to be maintained.

Their Lordships are of opinion, therefore, that the judgment immediately under appeal is right; that the Sudder Dewanny Court rightly differed from the Zillah Court, and that the appeal must be accordingly dismissed with costs.

[66] NARAGUNTY LUTCHMEEDAVAMAH.—*Appellant*; VENGAMA NAIDOO.—*Respondent* * [Dec. 3 and 4, 1861].

On appeal from the Sudder Dewanny Adawlut at Madras.

The nature of the Polliam tenure in Madras investigated.

A Polliam is ancestral estate of the nature of a Raj; and although it may belong to an undivided family, yet it is not subject to partition. It can be held by only one member of the family, who is styled the Polligar. The other members of the family are entitled to maintenance out of the Polliam [9 Moo. Ind. App. 86]

The succession to the Naragunty Polliam, being ancestral estate, held to vest in the nearest undivided male cousin of the Polligar last seized, who died without issue male, in preference to his widow.

The presumption is, that a Hindoo-family remains undivided: the *onus* is upon a party claiming, as upon a partition, to prove division of the joint estate.

In 1847, A. presented a petition to the Civil Court of Chittoor for liberty to sue in *forma pauperis* for recovery of a Polliam. The Court was of opinion that, under Mad. Reg. IV. of 1831, A. could not be permitted to sue without obtaining the authority of the Government. In May, 1848, A. obtained the sanction of the Government, and in October of that year he presented a petition for leave to sue in *forma pauperis*, and, at the same time, lodged his plaint. On the 13th of November, 1848, the plaint and petition were ordered by the Court to be filed. The order for service of the petition and

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plaint requiring the Defendant to show cause why A. should not be allowed to sue in *forma pauperis* was not served until August, 1849. No cause was shown, and the proceedings stood in that position on the 16th of September, 1849, when twelve years (the time limited by Mad. Reg. II. of 1802, sec. 18 cl. 4), from the 16th of September, 1837, when the cause of action accrued, had expired. The plaint was by a subsequent order of the Court filed on the 1st of March, 1850. Held:

First, that the proceedings of the Civil Court of Chittoor, on the 13th of November, 1848, were by Mad. Reg. VII. of 1818, sec. 5, irregular, as the course there directed was to serve the petition and plaint on the party proceeded against, to show cause within a certain time why the Plaintiff should not be allowed to sue in *forma pauperis* [9 Moo. Ind. App. 95].

Secondly, that the suit was not barred by Mad. Reg. II. of 1802, sec. 18, cl. 4, as A. had preferred his claim within the prescribed period to a Court of competent jurisdiction, and had been prevented from commencing his suit in proper time by the irregular proceedings of the Court [9 Moo. Ind. App. 95].

The native Courts in India, in receiving evidence, do not proceed according to the strict technical rules adopted in England. According to the practice there, a copy of a public document, authenticated by the signature of the proper Officer, is received as *prima facie* evidence, subject to further inquiry, if it is disputed [9 Moo. Ind. App. 90].

It is not the practice of the Judicial Committee to advise the reversal of a decision of the Court below, merely on the effect of the evidence or the credit due to witnesses, as the Judges in India have better means of determining questions of fact than the appellate Court [9 Moo. Ind. App. 87].

In this case, the suit was brought in the Zillah Court of Chittoor against the Appellant by Kooppy [67] Naidoo, the father of the present Respondent, to recover from the Appellant the Polliam of Naraguntty, with mesne profits.

The principal question involved in the suit was with respect to the right of succession to the Naraguntty Polliam: whether in an undivided family, the Polliigar last seized dying without issue male, the widow, or the nearest male cousin of the deceased Polliigar, was entitled to succeed to the Polliam.

The facts were these:—

The Naraguntty Polliam was an ancestral estate, of which Anantappa Naidoo was the original Polliigar. He was succeeded by his elder son, Vengama Naidoo, the second Polliigar, whose son, Venkatachellapathy died before him, leaving two sons, Venkatappa Naidoo and Anantappa Naidoo, both infants, the estate remaining undivided. It appeared, that the next Polliigar was Krishnappah, or Krishnama Naidoo, younger brother of Vengama Naidoo, the paternal grand-[68]-father of the first Plaintiff; and that he was succeeded by his son, the first Plaintiff's father, Vengama Naidoo, and that the Polliam remained undivided. On his death, as the Plaintiff and his brothers were very young, and as Venkatappa Naidoo and Anantappa Naidoo were men of influence, and as the two branches of the family lived in harmony, Venkatappa Naidoo became Polliigar of the estate, which continued undivided. Venkatappa Naidoo having no son, adopted his nephew, Vengama Naidoo, son of his brother, Anantappa Naidoo, and died shortly after, but Vengama being too young at the time, his natural father, Anantappa Naidoo succeeded to the Polliam. Vengama Naidoo, on his father's death, succeeded him as Polliigar, and having no sons, he adopted his sister's son, Venkatappa Naidoo. In the year 1820, the Polliam was taken under management of the Government, pending the liquidation of the Polliigar's debts, but in the year 1825, the Polliam was discharged from the attachment, and restored to Vengama Naidoo. Whilst the Polliam was under attachment, allowances were made by the Government to the Polliigar, Vengama Naidoo, who thereout allowed Kooppy Naidoo, the Respondent's father, as a member of the undivided family, a portion for his expenses. On the 8th of December, 1828, Vengama Naidoo died, whereupon two claimants asserted their right to the Polliam, Venkatappa Naidoo, as the adopted son of Vengama Naidoo, and Kooppy Naidoo, the Respondent's father, under a Kararnamah, dated the 8th September, 1825, by which he alleged he was appointed his successor, and as next heir of an undivided family.

Koopy Naidoo had two elder brothers, Kristnappa Naidoo and Moodoo [69] Kristnana Naidoo; but they, by two Kararnamahs, or transfer deeds, dated respectively the 19th of January, and 1st of July, 1831, assigned all their rights in the Polliam to their brother, Kcoopy Naidoo.

On the 6th of December, 1831, Koopy Naidoo, commenced a suit in the then Central Provincial Court against Venkatappa Naidoo and others, to obtain possession of the Polliam, claiming as the next heir of the undivided family on the death of Vengama Naidoo without male issue, and disputing the validity of the adoption by the latter of Venkatappa Naidoo. By a decree of the Central Provincial Court, dated the 31st of December, 1836, that Court after admitting evidence of the relationship and the common descent of Vengama Naidoo and the Plaintiff from Anantappa Naidoo, the root of the family, and that the Plaintiff's grandfather and father had been in possession of the Naragunty Polliam held, that Vengama Naidoo had legally adopted Venkatappa Naidoo the late Polligar, as his son, and pronounced him to be the heir to the Polliam of Naragunty. In consequence of this decision, Venkatappa Naidoo remained in possession as Polligar until the 16th of September, 1837, when he died without male issue, leaving the Appellant, his widow, him surviving, who took possession of the Polliam, claiming it as his heir. The possession of Venkattappa Naidoo was not acquiesced in by Koopy Naidoo; but the latter omitted to prosecute his appeal from the decree of the 31st of December, 1836, for want, as it was alleged, of means. On the 3rd of September, 1838, Koopy Naidoo made an application to the Sudder Adawlut for the admission of an appeal in *forma pauperis* from the decree of the Central Provincial Court [70] of 1836, stating the death of the Appellant's husband without male issue subsequent to the decree. On the 22nd of October, 1838, the Sudder Dewanny Adawlut passed an order, refusing the admission of such appeal, the period for appealing having long expired, and stating that any new ground of action by the Petitioner for the recovery of the estate could only be asserted by a new suit. Accordingly, Koopy Naidoo, in the year 1847, presented a petition to the Civil Court of Chittoor, praying for leave to institute a suit in the Court for the recovery of the Polliam; but the Court, in December of that year, held, that no such order could be given unless he produced the authority of the Government to that Court, directing it to entertain the suit. In the meanwhile the first Plaintiff's elder brothers, Krishnappa Naidoo, and Moodoo Kristnama Naidoo having died, Koopy Naidoo, the Respondent's father, became the nearest heir of Vengama Naidoo, and on the 13th of May, 1848, he presented a petition to the Governor of Madras for an order permitting him to establish his right to the Polliam, by means of a regular suit, under the provisions of Mad. Reg. IV. of 1831; and on the 30th of May, 1848, an order was made by the Government permitting him to prosecute such claim in the Courts.

Accordingly, on the 5th of October, 1848, a petition was filed in the Civil Court of Chittoor by Koopy Naidoo and the Respondent, his son, for leave to file a plaint, in *forma pauperis*, against the Appellant, which leave was granted on the 13th of November, 1848, though the order for service of the petition and plaint on the Appellant was not made by the Court until the 31st of July, 1849. The plaint [71] was by an order of the Court filed on the 1st of March, 1850, and set forth the above genealogy of the Plaintiffs, alleging that the Plaintiffs and the Defendant's husband were members of an undivided Hindoo family, tracing their descent from the original Polligar, Anantappa Naidoo, it also stated that the Polligars were taken sometimes from the elder branch and sometimes from the younger branch of the family, and that from the latter branch the Plaintiffs were descended. That the Polligars whilst in possession, made allowances to the members of the other branch: and, particularly, that the Polligar, Vengama Naidoo, had made allowance to the first Plaintiff, and by a deed had named him his successor. That on the death of Vengama Naidoo, the Defendant's husband, Venkatappa Naidoo, claimed to be Polligar, as his adopted son: and after stating the proceedings in the original suit of 1831, the appeal therein, and the permission from the Government to sue, it alleged that the Defendant's husband having died without male issue, she had no legitimate title to the Polliam, which had been his undivided estate. That the first Plaintiff was entitled to the Polliam, as next heir and successor of the undivided family, and after stating the annual net profit at Rs. 10,000, or thereabouts,

the Plaintiffs claimed mesne profits from the 22nd of October, 1838, to the date of the plaint, at the above rate, amounting to Rs. 92,920; and prayed that the above sum, and the Polliam of Naraguntty, might be awarded to them, as against the Defendant.

The Defendant by her answer alleged, that her husband and his ancestors were Polligars of Naraguntty, but not the first Plaintiff's father or grandfather, who she insisted had no manner of title thereto. That her [72] husband having died without male issue, she, under the Hindoo law as his chief heiress, was entitled to succeed to the Polliam, which the Government had continued to her. That the suit of 1831, before the Central Provincial Court, having been decided against the Plaintiff, the present suit was barred by sections 9 and 10, of Mad. Reg. II., of 1802. That the suit was further barred by clause 4, section 18, of the same Regulation. That it was unknown whether any relationship existed between the ancestors of the Plaintiffs and those of the Defendant's husband; and even if any had existed, that it might have become extinct in course of time, and she finally insisted that the Plaintiffs and her late husband, were not members of an undivided family.

Both parties entered into evidence. On the part of the Plaintiffs, among other documents, a copy of a genealogical table of the Naraguntty family, dated Fusly 1211 (A.D. 1802) sent by Anantappa Naidoo to the East India Company, procured from the records of the Collector of Chittoor, was filed. This document was as follows: "Anantappa Naidoo, Polligar of Naraguntty, had two sons, viz. Vengama Naidoo and Krishnappa Naidoo, both of whom held the Polliam. The former had a son named Vencatachellapaty Naidoo, who had two sons, Venkatappa Naidoo and Anantappa Naidoo. Vencatachellapaty Naidoo died without ever holding the Polliam, and his son, Venkatappa Naidoo, succeeded to it, but having had no issue adopted his brother's son, Vengama Naidoo. I, Anantappa Naidoo, now hold the Polliam. The said Krishnappa Naidoo's son, Vengama Naidoo, was Polligar, and his sons are Krishnappa Naidoo, Mooddoo Krishnappa Naidoo, and Kooppy Naidoo." The Record Keeper of the Collector's cutcherry, was [73] called by the Court to prove the record and copy of this genealogical tree, which it appeared was filed with similar lists of families of other Polligars in the Collector's office. Other documents, consisting of a copy of an arzee from Vengama Naidoo, the Polligar of Naraguntty, to the Principal Collector of North Arcot, dated the 17th of November, 1823, stating that he had no concern with Defendant's husband, who had left his protection. A Mahzarnamah executed by the Polligars in the Chittoor Talook to the East India Company, dated the 1st of April, 1828, giving therein the names of the possessors of the Naraguntty Polliam for the last century and a half, and showing both branches of the family to be entitled; a Mahzarnamah executed by the Enamdars, Kurnums and public officers attached to Naraguntty Polliam to the same effect; a Kararnamah executed to Kooppy Naidoo, the Respondent's father, by his elder brother, Kristnappa Naidoo, on the 1st of July, 1831, in which the latter resigned to the former his claim on Naraguntty Polliam; a Kararnamah executed by his other brother, Mooddoo Kristnamah Naidoo, on the 19th of January, 1831, to the same effect. They also examined witnesses to prove the relationship of the families; that the family was undivided, and the value of the annual profits. Witnesses were also examined by the Defendant, some to prove their ignorance of the relationship; and others, to prove the value of the annual profits.

The following question was propounded by the Court to the Pundits of the Sudder Adawlut:—"This Polliam, the ancestral property of a family said to be undivided, has descended to an adopted son K, and, on his death without male issue, is taken possession of [74] by his Widow L. The Polliam is now claimed by H and J, the cousins of I, the adoptive father of K, as their inheritance. Is such claim valid? or is L, the widow of the adopted son K, who died without male issue, entitled to succeed to the Polliam?"

The Pundits answered as follows:—"The Hindoo law books, '*Vijnyaneswara*,' etc., declare, that all the members of an undivided family have a joint right in their ancestral property, although only one of them, being capable, continues in possession thereof. I, who had no issue, was not justified in adopting K, a stranger, as son, to the exclusion of his undivided cousins H and J; but, as he adopted him, he (K) became a member of the said undivided family, and the said H and J, being his undivided cousins, still retain their joint right in the ancestral property of the

family. It is only when a family is divided that a widow succeeds to the estate of her husband, who died leaving no son; but when the family is undivided, the right of succession rests, not in the widow, but in the undivided cousins. This being the rule of the Hindoo law, H and J, the undivided cousins of I and K, are alone entitled to inherit the ancestral Polliam referred to in the question. L, the widow of K, has no right to succeed to it."

On the 4th of March, 1856, the Judge of the Civil Court of Chittoor, Mr. A. S. Mathison, passed a decree in favour of Respondent's father. This decree was, in substance, as follows:—First, that the decree of the Central Provincial Court in 1831 was no bar, as it appeared by that decree that the first plaintiff then claimed the Polliam, not from the Defendant, but from her husband, on the ground that the adoption of the latter was illegal. But the adoption being con-[75]-firmed, and the first Plaintiff's suit of 1831, dismissed on that ground, the Plaintiff could not be prevented from bringing the present action on the different ground of his claim to succeed to the estate being preferable to that of the widow of the former Defendant, the last Polliar. Second, that the Plaintiffs had proved their descent from the younger son of the founder of the Naragunty family, and that the first Plaintiff was the eldest surviving male member of the younger branch, his elder brothers being dead. Third, that the Plaintiffs were members of the undivided family, with the Polliar, Vengama Naidoo, and his lineal ancestors, the Polliars of Naragunty. Fourth, that the evidence, both oral and documentary, fully proved that the first Plaintiff was the undivided cousin of Vengama Naidoo, a similar conclusion having been come to by the Central Provincial Court, as shown in their decree in the former suit. Fifth, that the first Plaintiff was entitled to succeed on the demise of the Defendant's husband, who died without male issue, in preference to the widow; the answer of the Pundits of the Sudder Court being considered decisive on that point. Sixth, that as to the extent of the income from the Polliam during the past years claimed by Plaintiffs, it was unnecessary to decide, as under the Mad. Reg. IV. of 1831, a suit could only be entertained in the Court under the authority of the Government, dated the 30th of May 1848, allowing the first Plaintiff to prosecute his claim in the established Courts; and as the Defendants had been up, to that time, in possession given to her by Government, she could not be called upon to refund any past profits; and lastly, the Court admitted the right of the first Plaintiff to the ancestral estate, and adjudged [76] the Defendant to deliver the Polliam over to him, but disallowed the claim for past profits, and decreed the Defendant to pay a proportion of the costs of the suit.

An appeal from this decree was interposed to the Sudder Adawlut. In the petition of appeal the Appellant took four specific grounds of objection to the decree appealed from; first, that the plaintiffs had no new ground of action in the present suit; secondly, that they were barred by the regulation of Limitations, Mad. Reg. II. of 1802, secs. 9 and 10, and also by cl. 4, sec. 18 of that Regulation; thirdly, that the first Plaintiff failed to prove his claim as an undivided cousin of the late Vengama Naidoo; and lastly, that he was not entitled by the Hindoo law to succeed to the Polliam in preference to the Appellant. The petition also entered into a minute objection to the nature of the evidence of the first Plaintiff being the undivided cousin of the late Vengama Naidoo, and of his relationship; and also to the reception of evidence by the Court below, particularly with respect to the genealogical table; submitting that the original document was not produced, as it ought to have been, but a copy without signature, and evidently not the original document had been improperly admitted, and urged that as the Record keeper deposed that the original was in the Record office, the original ought to have been produced.

On the 5th of March, 1857, the Sudder Adawlut, consisting of Messrs. Anderson and Goodwin, pronounced a decree, affirming the judgment of the Civil Court, and observing on the Appellant's four objections to it in order, as follows:—First objection.—Whether the Plaintiff's suit was not barred by sections 9 and 10, Regulation II. of 1802. That the causes of action in the suit, No. 24, of 1831, [77] and the present suit were entirely different; that the original suit, No. 24, of 1831, was dismissed as the adoption of Defendant's husband was established, while in the present suit the first Plaintiff's cause of action was, that he being nearest male heir in an undivided family, had a preferable claim to that of the Defendant, the sonless

widow of the party whose adoption had been so upheld. Second objection. That the first Plaintiff's claim was barred by cl. 4, section 18, Regulation II. of 1802. It was not denied that the Defendant's husband died on the 16th September, 1837, consequently the twelve years had not expired in 1848, the year when the present suit was commenced by the presentation of the pauper plaint, etc. Third objection.—That the first Plaintiff had failed to prove his claim as an undivided cousin of the late Vengama Naidoo; that the decree of 1831, to which both parties referred, showed that the Defendant's husband then tacitly admitted that the first Plaintiff was an undivided collateral cousin, though maintaining that a collateral cousin's claim was inferior to his own, as an adopted son. That the acting Civil Judge of Chittoor was right in stating that the Central Provincial Court came to the conclusion, that the first Plaintiff was the undivided cousin of Vengama Naidoo; that in the present suit the Defendant's denial of the Plaintiff's relationship to the Naraguntty Polligar was by no means so clear and decided as might have been expected if he was not an undivided collateral heir. That a strong *prima facie* presumption was, therefore, raised in favour of the truth of the Plaintiff's claim, and the Court agreed with the Civil Judge respecting the relationship existing in the Naraguntty family. And, on the fourth and last objection, the Sudder Court decided, that [78] the first Plaintiff was not entitled by the Hindoo law to succeed in preference to the Defendant. That there appeared to be no reason why the Polliam in question should not be considered as an ancestral estate, the succession to which was regulated by Hindoo law. That if, as alleged by the Appellant, "succession in each individual instance is dependent on the will of Government, and as such the widow of the late incumbent is the legal heir to the estate in preference to any distant male relation," the Government would have disposed of the first Plaintiff's claim, and not have referred him for redress to the Civil Court: and lastly they declared that the answer of the Pundits that the right of succession rests, not in the widow, but in the undivided cousin, was in strict accordance with Hindoo law. The appeal was, therefore, rejected by the Court, with costs.

This appeal was from such decree.

The Respondent's father having died since the decree in his favour, his rights descended to the present Respondent, his son and heir, by whom the appeal was revived.

Sir Hugh Cairns, Q.C., and Mr. Badeley, for the Appellant.—First.—We submit that the Polliam in dispute is not an ancestral estate, nor were the parties in the suit members of an undivided Hindoo family. The reasons given by the Court below for holding the contrary opinion are insufficient. Much of the Plaintiff's evidence in the Civil Court of Chittoor was inadmissible, particularly the genealogical table, purporting to show the relationship, which is not entitled to any weight, and ought not to have formed the basis of the judgment of that Court, or the Sudder Adawlut on appeal. The latter [79] judgment is most unsatisfactory; it contains not the slightest examination either of the oral or of the documentary evidence adduced in the Court below; and although the objections to the Plaintiff's evidence had been carefully brought before the Sudder Adawlut in the petition of appeal, and much of it was shown to be inadmissible and untrustworthy, there was not the slightest attempt to sift or to deal with it, and the adoption of it in a lump, when parts of which were clearly bad, is sufficient to invalidate the judgment. Again, the view of the Hindoo law which the Sudder Adawlut took in the conclusion of its judgment is wholly at variance with the law as declared by the Pundits and admitted in the original suit of 1831, and even, if taken to be correct, is inapplicable to a state of things like the present suit.

Then, upon the question of limitation of suit, the judgment is clearly erroneous. In the first place, it proceeds upon the mistaken notion that the cause of action in the present suit, was not the same as the one which had been decided in the Central Provincial Court in the year 1836, and consequently, that it was not barred by sects. 9 and 10 of Mad. Reg. II. of 1802: whereas it is clear from the judgment in that suit, that the cause of action there, was substantially the same as here, both suits being to recover the same estate, and brought by the same Plaintiff upon the same alleged title; the only difference being, that the Defendant in the second suit was the widow of the Defendant in the first. But still, as his widow and representative, she

only claimed through him. In such a case, it is obvious, that the mere change of parties could make no difference in the merits of the action; and that between the parties then contesting the estate, the judgment in the previous suit of 1831, [80] operated as a direct estoppel; and, as in every action of ejectment the Plaintiff must recover, if at all, upon the strength of his own title alone, and not upon the weakness of the Defendant's, the first Plaintiff, in either suit, was bound to establish his title generally, and must be considered to have failed to do so, in the opinion of the Central Provincial Court. The Plaintiff's claim, therefore, could not lawfully be revived in the Civil Court of Chittoor after such an adjudication. As, therefore, the then Plaintiff allowed the whole period for appealing against that adjudication to pass without any attempt to reverse it, he surely must be deemed to have admitted its validity and the insufficiency of his own title. Secondly, it is submitted, that the Sudder Adawlut was wrong in holding that the Plaintiff's claim was not barred by the Regulation of Limitations, cl. 4, sec. 18, Reg. II. of 1802, for his cause of action, if any, commenced when his alleged title accrued; and this, according to his own showing, was upon the death of Vengama Naidoo, in the year 1827 or 1828, more than twenty years before the commencement of the present suit, and, therefore, much longer than the period of twelve years, fixed by that Regulation. Even, therefore, if the suit was commenced within twelve years, as reckoned either from the date of the judgment of the Central Provincial Court in 1836, or from the death of the Appellant's husband, which event seems somewhat uncertain, he could not, when the original suit of 1831 had not been kept up, give a fresh title, or a new cause of action, by merely instituting another suit against a Defendant, whose right to the possession of the estate had been already ascertained by the previous decision. In the third place, it must be observed, that the manner in which the Sudder Court [81] professes to deal with the Plaintiff's proof of his title in the Civil Court of Chittoor is most unsatisfactory, and such as cannot be admitted in any real adjudication upon the merits of that part of the case. The judgment, moreover, is in fact inconsistent with itself, as well as wholly unfair, for it rests upon the decree in the original suit of 1831, and the supposed admission of the Appellant's husband in that suit as destroying the Appellant's case, although it just before declared that the causes of action in that suit, and in the suit then before them were entirely different and that the decree in the suit of 1831, did not bind or affect the Plaintiff in the existing suit, or entitle the Appellant to make use of it against him. But if the cause of action was entirely different, and the Defendant in the second suit was a stranger to the first, it is difficult to see upon what grounds, either of law or equity, the Court could adopt such a principle of decision. If the decree of 1831 and the proceedings in that suit were good against the Appellant, they surely were equally good for her, and if so, she was entitled therewith to estop the Plaintiff. The judgment appealed from upon that ground, stultifies itself.

The Solicitor-General (Sir R. Palmer), and Mr. W. W. Mackeson, for the Respondent.—First.—As to the nature of the Polliam of Naragunty. This peculiar tenure is described in the 5th Report on the affairs of the East India Company, in 1812, pp. 117, 150, 730-1. It is a species of tenure which in olden times was held by petty chieftains, for services rendered to the State and although the Polligars acknowledged the State as paramount, yet [82] they were, in fact, almost independent. Such tenure is recognized by Mad. Reg. IV. of 1831, and a Ghatwal tenure, of a similar nature was upheld by this Court, *Raja Lelanund Sing Bahadoor v. The Bengal Government* (6 Moore's Ind. App. Cases, 101). It is ancestral and indivisible as in the case of a Raj, and descends to a single heir. Strange's "Hindu Law," Vol. I., pp. 198, 208, 236; Strange's "Manual of Hindu Law," p. 47; the other members of the family are not co-parceners, but constitute an undivided family, Strange's "Hindu Law," Vol. I., p. 199, and are only entitled to maintenance, without partition, Colebrooke's Dig. Vol. II., pp. 532-3, citing Narada. Our case is, that the late Polligar, Venkatappa Naidoo, being a member of an undivided family, the Respondent, as his next undivided cousin, was entitled to succeed to the Polliam, in preference to the Appellant, the widow of the late Polligar. Where, by family custom, a Zemindary has always been held by a chief male heir, the brother takes in preference to the childless widow. *The widows of Raja Zorawur Sing v. Koonwur Pertee Sing* (4 Ben. Sud. Dew. Rep. 57), *Koonwur Bodh Singh v. Seonath Singh* (2

Ben. Sud. Dew. Rep. 97). No doubt can be entertained as to the relationship, or that the Respondent's father was the next heir. His elder brothers, Krishnappa Naidoo and Mooddoo Krishnama Naidoo, had released to him their rights to the Polliam, and moreover they being dead when the present suit was brought, the Respondent's father was, undoubtedly, the next heir. The relationship was but faintly denied by the Appellant in her pleadings. The Respondent's witnesses speak positively from their own knowledge; whereas the Appellant's witnesses [83] merely express their ignorance of any relationship. The genealogical table produced from the Collector's records is decisive upon this question. It purports to have been sent by the then Polligar to the East India Company in the year 1802. The Polliams of Chittoor had been acquired by the East India Company, by treaty, in the year 1801; and the genealogies of the Polligars in that District were presented at the same time with the jumlabundy account, to enable the Government to fix the permanent settlement. The Mahzarnamals, which are documents signed by other Polligars of the District, and by the Enamdars, Kurnims, and other public officers of the Polliam itself, are equally clear in support of the relationship. This kind of evidence is frequently resorted to in order to arrive at facts, which are matters of public notoriety in particular Districts.

Secondly, as to the family constituting an undivided family. Naragunty is an ancestral estate of considerable standing, and the *onus* of proving division falls on the Appellant. The presumption is in favour of union, as the Hindoo law presumes joint tenancy as the primary state of every Hindoo family, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229) Strange's "Hindu Law," Vol. I, p. 225, Strange's "Manual of Hindu Law," p. 49, but the Appellant has given no evidence of division of the ancestral estate. The genealogical table, and the Mahazanamals prove that the family was undivided. It was distinctly in evidence that the Polligars came from the elder and younger branches, as most capable persons presented themselves, and that the rest of the family lived and messed together, or received allowance from the head [84] of the family. With respect to the right of succession in undivided families, the law, as expounded by the Pundits, in this case is undisputed, namely, that if a member of an undivided family dies without male issue, his undivided cousin is preferred to his widow.

Thirdly, the decree in the original suit in 1831, was no bar to the present suit under Mad. Reg. II. of 1802, secs. 9 and 10. That suit was brought to try the validity of the adoption of the late Polligar. The present suit is entirely different, and brought to try a new question, which only arose at his death, namely, the disputed succession between the widow and the undivided cousin. The issues in the two suits were, therefore, entirely different.

Lastly, the suit is not barred by the Regulation of Limitations. Mad. Reg. II. of 1802, sec. 18, cl. 4, prescribes twelve years as the limit. Here the right accrued on the death of the late Polligar, on the 16th of September, 1837; and the present suit was commenced, at all events, on the 13th of November, 1848. In calculating the period of limitation, the circumstance of the application to sue in *forma pauperis* must not be lost sight of. *Ram Khan v. Bikram Samce* (7 Ben. Sud. Dew. Rep., 96), *Mahatab Chand v. Mirdad Ali* (5 Ben. Sud. Dew. Rep., 268), *Futteh Jan Bebee v. Noorunnissa v. Chowdraine* (14 Ben. Sud. Dew. Rep., 175). Macpherson, on Civil Procedure, p. 65, citing Sel. Rep. 20th January, 1838, vol. 7, p. 8; 14th June, 1842, vol. 7, p. 96, lays it down that no effect can be given to a plaint to sue in *forma pauperis* till authority is given to sue, and that the period of limitation ends on the day on which the plaint is lodged. No irregularity of the Court in the proceedings that took place in respect to filing the plaint, can prejudice the Respondent. If there was any laches, it was the act of [85] the Court, and that fact took the case out of the operation of the Regulation of limitations, as it came within the words of the Regulation, as an exception "for good and sufficient cause, whereby he was precluded from obtaining redress," and has so been decided in respect to the Ben. Regulation of Limitations II. of 1803, sec. 18, cl. 3. *Troup and Dyce Sombre v. The East India Company* (7 Moore's Ind. App. Cases, 104), *Rajah Enayet Hossein v. Sayud Ahmud Reza* (*ib.* 238).

Their Lordships' judgment was delivered by

Lord Kingsdown (Dec. 5, 1861).—Two questions were argued before us in this case:

First, whether the Plaintiff in the suit had established his claim.

Second, whether his suit was commenced within such a period after the accrual of his title, that the Court was warranted in entertaining his demand.

The subject of dispute is a Polliam called Naragunty, in the District of Chittoor, in the Presidency of Madras.

In order to make the facts of the case and the bearing of the evidence more clear, it may be convenient to state what is the nature of a Polliam.

A Polliam is explained in Wilson's Glossary to be "a tract of country subject to a petty Chieftain." In speaking of Polligars, he describes them as having been originally petty Chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read [86] at the Bar from the Report of the Select Committee on the affairs of India, in 1812. A Polliam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

The Polliam in dispute, at the time when the East India Company acquired the sovereignty of the District in 1802, was held by a family of the name of Naidoo. Possession of this and of several other Polliams in the same neighbourhood was assumed by the Company, and held by them for several years. They ultimately, however, restored the Polliam, Naragunty, to the Naidoo family, different members of which were at different times Polligars, and in 1837, Venkatappa Naidoo died in possession of the property.

He died without male issue, and the present Appellant, who was his widow, entered into possession, asserting title as heir of her late husband.

The present suit was instituted by the Respondent and by his father, Kooppy Naidoo, who is since dead, for the purpose of recovering possession of the Polliam from the widow.

The case which they made, was that the Polliam was ancestral property, that it belonged to the family of Naidoo; that the family was undivided, and that on the death of the last possessor the right to it vested in the next male heir of the family in preference to the widow, and that they (the Respondent's father and the Respondent) were such male heirs, Kooppy Naidoo being next male heir.

The Pundits consulted by the Court as to the rule of Hindoo Law on the assumption that the Plaintiffs [87] had established their allegations by evidence, were of opinion that they were entitled to succeed. This view was adopted by the Court below, and no objection to the decision upon this point has been urged at our Bar.

Both parties went into evidence as to the facts; and the Zillah Court first, and the Sudder Court afterwards upon appeal, were of opinion, that the Plaintiffs had sufficiently proved their case, and no difference of opinion existed amongst the Judges below.

It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion it must be shown very clearly that they were in error in order to induce us to alter their judgment; but in this case we think that the Courts could have come properly to no other conclusion than that at which they arrived.

The points to be established by the Plaintiffs were that the Polliam of Naragunty was an ancestral property; that it belonged to a family of which they (the Plaintiffs) were members, of which the Respondent's father was the next male heir; and that the family was undivided.

The Appellant by her answer had stated, "that it was unknown whether any relationship existed between the ancestors of the Plaintiff and those of the Respon-

dent's husband, and even if it did exist it might have become extinct in course of time; but that one thing was certain, that the Plaintiff and the Defendant's late husband were not members of an undivided family."

[88] The Plaintiffs, amongst other evidence, produced a document which, if it be genuine and correct, establishes beyond doubt that the Plaintiffs and the Appellant's husband were members of the same family; that the property was ancestral, that it had been enjoyed at different times by members of the elder branch to which the Appellant's husband belonged, and by members of the younger branch to which the Plaintiffs belonged, and that the family at the date of this document was an undivided family; we allude, of course, to the document, professing to be a copy of a paper in the custody of the Collector of Chittoor, sent to his office in Fusly 1211, corresponding with 1802 of our era.

It cannot be doubted, and was indeed hardly disputed by the able Counsel for the Appellant, that if the statement contained in this paper is to be taken as true, it goes very far towards establishing the case of the Respondent; but it was said, that it was a mere loose paper, the possession of which by the Collector was not satisfactorily accounted for; that the original had not been produced; that it did not appear to have any signature attached to it, and that it ought not to have been treated as of any authority.

But on inquiry it turns out that the circumstances under which the paper was lodged in the Collector's office are such as to give it the very highest authority.

When the East India Company took possession of these Polliams, as we have mentioned, in the year 1802, they made allowances out of the proceeds to the families of the Polligars, and contemplated the restoration at a future time, when order should have been established in the country, of the property so seized, to its owners.

[89] They thought it advisable, in order to give effect to these views, to procure and forward a statement of the particulars of the property so seized, and of the name and families of the existing Polligars.

They required, therefore, returns to be made by the Polligars of these particulars. The paper in question purports to be a copy of the return made on this occasion by Anantappa Naidoo, who then held the Polliam. The Appellant, in her petition of appeal to the Sudder Court, admits that such a genealogical table may have been given, but denies that there is any evidence that such table was the same as to its contents with the one filed by the Plaintiffs.

But the accuracy of the copy so produced, and the genuineness of the document, are made out beyond all controversy. It was not brought forward by surprise, nor received by the Court without full investigation.

On the 5th of January, 1855, the Plaintiffs made a motion to the Court in the following terms:—

"No. 121.

"To the Civil Court of Chittoor.

"Motion presented by Vencatacharry, Vakeel, on behalf of the Plaintiffs, in original suit, No. 24, of 1850.

"The Plaintiffs being the legal heirs to the Polliam, have brought this suit for the recovery thereof, with mesne produce. The Defendant utterly denies in her answer that they are in any way connected with the family. Soon after the country was brought under the British rule, there was a Circular Order issued, requiring all Zemindars to present genealogical tables, showing which of their ancestors held their Zemindaries. In compliance with this requisition, the Plaintiffs' ancestor also sent to the Collector of Chittoor, in Fusly 1210 or 1211, a statement of the above description; and this document is now on the records of the Collector, and it is material to the Plaintiff's case. In the same office there is also a statement, showing the average income of the Polliam for ten years, prepared when the Peishcush thereof was fixed by Government. The Plaintiffs pray that the Court will be pleased to grant a certificate requiring the production of those documents, in order that they may submit them, with their application, to the Collector, for copies thereof."

Having produced a copy of this document, authenticated by the signature of

the Collector of Chittoor, they submitted it to the Court on the 30th of January, 1855.

The native Courts of India, in receiving evidence, do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document, authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further inquiry, if it were disputed.

The accuracy of this copy was disputed by the Appellant, and on the 13th of March, 1855, she made a motion in the following terms:—

“To the Civil Court of Chittoor.

“Motion presented by Varathachary, Vakeel, on behalf of the Defendant, in original suit, No. 24, of 1850.

“1. The Plaintiffs, with their motion, No. 58, presented a copy of an alleged genealogical table in which the name of the first Plaintiff is inserted [91] as a member of the family. This is a document concocted by the Plaintiffs themselves, and introduced into the Collector's record. For if this were a genuine voucher, the Defendant's father-in-law would not have declared in an arzee addressed by him to the Collector, when he adopted the Defendant's husband, that he had neither uncles nor uncles' sons. Moreover, the said genealogical table neither bears the signature of the party who addressed, nor is attested by the then Collector. The Defendant prays that the Court will, on a consideration of these objections, reject the above document, and pass a just decree.”

Hereupon the Court directed a letter to be sent to the Collector on the 31st of March, 1850, “requesting him to send up to this Court his Record Keeper, with the original record with which the genealogical table of which the Plaintiffs produced a copy may be connected, or the book out of which the said copy might have been furnished.”

On the 7th of April, the Collector sent an answer by the Record Keeper, intimating “that, with reference to the letter received from this Court on the 31st ultimo, the Record Keeper was ordered to appear with the papers required;” and on the same day the Record Keeper attended accordingly. He was examined and cross-examined, and fully established the authenticity of the document, and the accuracy of the copy furnished. He must have had the original in Court, though it does not appear to have been called for. Moreover, there is documentary evidence in confirmation of the accuracy of several of the statements contained in this paper.

Their Lordships, therefore, have not the least doubt that this paper is what it purports to be, and [92] that it established the case of the Plaintiffs, unless it can be made out that the family, undivided at that time, became afterwards divided.

Now, the parol evidence of the Plaintiffs, if it is believed, clearly shows that there never was any division. The presumption is that a family remains undivided, and the *onus* is in the Appellant to prove division. Her evidence is rather directed to show that the Respondent's father was a member of a different family. At all events, it is quite insufficient to establish a division, when opposed to the evidence produced on the other side.

It is unnecessary to advert to the proceedings in the suit to set aside the adoption further than to say, that in that suit, which was instituted as early as 1831, Kooppy Naidoo insisted on the same facts and the same title which, in concurrence with his son, he asserted in the present suit. The Court was of opinion, that the adoption was good, and would prevail against the Plaintiff's title, assuming it to be made out in point of fact, and, therefore, no decision was pronounced upon that point.

On the whole we may state that, if the question on the effect of the evidence in this case had come before us now for the first time, and not by appeal, we should have arrived at the same conclusion with the Courts below, though in that case it would have been necessary to go more in detail into the particulars of the evidence on both sides, than it is requisite or proper to do, when we have merely to state our concurrence in the judgment already pronounced.

There remains the question whether the Plaintiff's suit is barred by the Regulation for the limitation of actions.

[93] That Regulation (Regulation II. of 1802, section 18, paragraph 4) provides

that a suit shall not be entertained which is commenced more than twelve years after the right accrued; but this is subject to exceptions, one of which is, if the Complainant can show by clear and positive proof, that he directly preferred his claim within that period for the matter in dispute to a Court of competent jurisdiction, or person having authority, whether local or otherwise for the time being, to hear such complaint, and to try the demand, and, "shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority, or other good and sufficient cause, he was precluded from obtaining redress."

Here the Sudder Court (for the objection does not seem to have been taken in the Zillah Court) has held that the suit was actually commenced in 1848, and, if so, the Plaintiff's title not having accrued till September, 1837, the time could not expire till the 16th of September, 1849, and, of course, the suit would have commenced in sufficient time not to fall within that Regulation.

With respect to this the facts stand thus:—

In 1817, the Respondent's father presented his petition to the Civil Court of Chittoor, for liberty to sue in *formâ pauperis* for the recovery of this estate. The Court was of opinion that, under Regulation IV. of 1831, he could not be permitted to sue without first obtaining the authority of Government.

In May, 1848, he obtained the requisite authority, and on the 5th October, 1848, he and his son, the present Respondent, presented a petition for leave to sue in *formâ pauperis*, and at the same time presented their plaint in this suit.

[94] The rules of the Court require that for the purpose of obtaining such order the Plaintiff must make an affidavit of his circumstances, and a list of all his property, and produce a certificate of a Vakeel that he has a good cause of suit.

All the necessary documents accompanied the petition, and on the 13th of November, 1848, the following order was made by the Court:—"1848, 13th November. On a perusal of the pauper plaint and its accompaniments put in by Kooppy Naidoo and another, Petitioners in miscellaneous petition 631, and on taking from them the prescribed affidavit, the said bill of plaint, etc., were ordered to be filed."

At this time, therefore, an order was made that the plaint to which an answer has since been put in, and upon which all the proceedings subsequently have taken place, should be received by the Court and put upon record. There seems strong ground for contending that this was the commencement of the suit; and the Court below, which must be the best judge of its own forms and practice, has held that it was so.

The practice is stated by Mr. Macpherson, at p. 85 of his valuable treatise, in these terms:—"The period of limitation ends on the day when the plaint is duly lodged by the complainant in a Court of competent jurisdiction, not on the day when the suit is placed by the Sudder Court upon the file of the Court which they deem most proper to try it, nor upon the day when the plaint is numbered and sent for decision; for if there be any delay in that process, it is the delay of the Court, and not of the Plaintiff."

But, if the preferring of the plaint with the order of the Court of the 13th of November, 1848, be not the commencement of the suit, these facts clearly [95] bring the case within the exceptions found in the Regulation.

There seems reason to suppose that the proceedings adopted by the Court on the 13th of November, 1848, were irregular, and that on that day it ought, according to the Regulation VII. of 1818, to have ordered immediate service of the petition and of the plaint on the Appellant, and to have fixed a day for her to show cause, if she could, why the Plaintiffs should not be allowed to sue in *formâ pauperis*.

If this course had been adopted on the 13th of November, 1848, the order, which was actually made on the 1st of March, 1850, which the Appellant contends must be treated as the commencement of the suit, might, and probably would, have been and long within the prescribed period.

The order for service of the petition and plaint on the Appellant, and requiring her to show cause, if she could, why the Plaintiffs should not be allowed to sue in *forma pauperis*, was not actually made till July, 1849. Service was made in August, and no cause was shown. The case, therefore, stood in this position on the 16th of September, 1849, when the twelve years expired: the Plaintiffs had preferred their claim within the prescribed period to a Court of competent jurisdiction, and had

been prevented from commencing their suit in proper time (if, in point of fact, it was not commenced in proper time) by no neglect on their part, but by the irregular proceedings of the Court to which their claim was preferred.

It would be contrary to all reason and justice to hold that, under such circumstances, the Plaintiff's suit could be barred by the Regulation.

We must humbly advise Her Majesty to affirm, with costs, the decrees complained of.

[See *Mussumat Jariintool-Butool v. Mussumat Hoseinee Begum*, 1867, 11 Moo. Ind. App. 207-213; *Oolagappa Chetty v. Arbuthnot*, 1873-4, L.R. 1 Ind. App. 281; *Collector of Trichinopoly v. Lekkamani*, 1874, L.R. 1 Ind. App. 311.]

[96] NANA NURAIN RAO, —Appellant; HUREE PUNTH BHAO, SREE NEWAS RAO and BULWUNT RAO, —Respondents * [June 25, 26, 27, and 28, 1862].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

By the Hindoo law as administered in the North-West Provinces, a Hindoo has power to make a testamentary disposition in the nature of a Will.

A disputed Will, made by a Hindoo, disposing of self-acquired estate among his family, established.

Charges of fraud, forgery and perjury having been made by the Respondents against the Appellant, the party who propounded the Will, costs of the Court in India, and upon appeal to England, were upon reversal of the decree of the Sudder Court, ordered to be paid by the Respondents.

This was an appeal and cross-appeal from a decree of the Sudder Dewanny Court at Agra. By that decree the Court reversed so much of the decree of the Zillah Court at Cawnpore, as sustained the Will, dated the 24th of January, 1852, of Ram Chunder Punth, Soobadar, formerly Resident of the military cantonments of the late Peishwa, Sree Muhunt Bajee Rao, at Bhitoor in the District of Cawnpore, the father of the parties to this appeal, but dismissed so much of the Respondents' claim as related to two villages, [97] named Lalpoor and Bulwapoor, in Pergunnath Bithoor, which they insisted were part of the estate of the Testator, but which the Sudder Dewanny Court held were the private estate of the Appellant, having been acquired by him by purchase out of his own moneys and formed no part of the Testator, Ram Chunder Punth's estate. A cross-appeal was by special leave (6 Moore's Ind. App. Cases, 461) brought against this latter part of the Sudder Dewanny Court's decree, and also against so much of the same decree as related to the valuation of the personal and immoveable property left by the deceased in case of his intestacy arrived at by the Sudder Court.

The Appellant was the eldest son of the deceased, and the Respondents his younger brothers.

The substantial questions raised and at issue in the appeal were, first, as to the power of a Hindoo to make a testamentary disposition in the nature of a Will, devising and bequeathing self-acquired property; and, secondly, the question of fact, upon the assumption of the existence of such power, whether the Will in question was sufficiently proved by the evidence in the suit, and was the free and voluntary act of the deceased. No objection was raised to Ram Chunder Punth's testamentary capacity.

In the view which their Lordships took of the evidence in respect to the validity of the Will, any further statement of the facts of the case are unnecessary; the evi-

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

dence upon that point being fully stated and considered in the judgment of their Lordships.

Mr. A. Stephens, Q.C., and Mr. Edmund F. Moore, for the Appellant, insisted, first, that by the Hindoo law, the Testator [98] Ram Chunder Punth, had power to make a Will devising and bequeathing real and personal self-acquired estate, citing Sir F. Macnaghten's "Cons. on the Hindoo Law," pp. 316, 318, 331, (a); and, secondly, that it was established by the evidence, which they fully investigated and commented upon, that the Ram Chunder Punth executed the Will in question.

The Solicitor-General (Sir R. Palmer) and Mr. Leith, for the Respondents, submitted that the *onus probandi* was upon the Appellant, and that he failed to prove by evidence that the Will was executed by the deceased, and further, that if the *factum* of the Will had been proved, the Will was invalid by the Hindoo law as laid down in the *Mitacshara*, which they insisted governed the case.

Mr. A. Stephens, Q.C., in reply.

The consideration of their Lordships' judgment was reserved, and was now delivered, as follows, by

Lord Kingsdown (July 16, 1862).—The question in the original appeal in this case is [99] as to the genuineness of an instrument alleged by the Appellant to be the Will of Ram Chunder Punth, deceased, the father of the Appellant and Respondents; the Appellant being the eldest, and the Respondents the two younger sons of the alleged Testator. The Zillah Court of Cawnpore decided in favour of the Will. The Sudder Adawlut of the North-Western Provinces reversed that decision, but held that certain property which the Respondents alleged to be a part of their father's estate belonged to the Appellant.

Against the decision on this point, and against a determination of the Court with respect to the amount of the alleged Testator's property, with which the Appellant is to be charged, there is a cross-appeal by the Respondents.

Ram Chunder Punth in his lifetime was Soobadar, an officer of rank and distinction in the service of the Maharajah, the ex-Peshwa. He had accumulated a large property, and had invested some part of it, not very considerable in proportion to the whole, in the purchase of land.

He had two wives and three sons, and at least one daughter. He had a residence at Bithoor, where he seems to have kept a large establishment of servants, and he had a smaller house—a Bungalow, as it was termed by one of the Respondents' Counsel, at Cawnpore—at the distance of about ten miles from Bithoor.

He appears to have lived on terms of great intimacy with many Europeans resident in his neighbourhood, and especially with Mr. Morland, an English gentleman who held some official situation at Cawnpore. It is in evidence in the case, that the [100] eldest son, the Appellant, had the general management of his father's affairs, and that differences had prevailed in the family between the sons, the eldest as it is said, acting with harshness towards his younger brothers.

The Soobadar died on the 22nd of July, 1853, and on the 10th of August, 1853, the Appellant presented a petition to the Judge of the Zillah of Cawnpore, in which he described himself as eldest son, heir, and executor of Ram Chunder Punth, Soobadar. The petition stated the death of the Soobadar, and that when in his perfect senses he constituted the Petitioner his executor and proprietor of his effects,

(a) See also upon this point, Strange's "Hindu Law," Vol. I., 254, *ib.* Vol. II., 438. W. H. Macnaghten's "Prin. of Hindu Law," p. 3; Steele's Law and Custom of Hindu Castes, pp. 62, 3, 75, 187, 237, 8. Morley's Dig. tit. "Will," (b) p. 613, *ib.* Second series, p. 390; (a) *Juggomohun Ray v. Sreemutty*, Clarke's Rules and Orders of the Supreme Court of Calcutta, p. 105; *Ramtonoo Mullick v. Ramgopaul Mullick*, 1 Knapp's P.C. Cases, 245; *Rewan Persad v. Mussamat Radha Bachy*, 4 Moore's Ind. App. Cases, 137; *Baboo Janakey Doss v. Binahun Doss*, 3 Moore's Ind. App. Cases, 197; *Nagabutchmee Umnal v. Gopoo Nadaraja Chetty*, 6 Moore's Ind. App. Cases, 309; *Sreemutty Soorjeeemoney Dossee v. Denobundoo Mullick*, 6 Moore's Ind. App. Cases, 526, and *post*, p. 123; *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee*, 8 Moore's Ind. App. Cases, 66; Ben. Rees, XXXVI. of 1793, and sec. 6 of XLIV. of 1795.

under a Will signed and sealed by the deceased, and bearing date the 24th of January, 1852; that during the lifetime, and to the day of the death of the deceased, the Petitioner held possession of all the real and personal estate and effects, in subordination to the deceased, and regulated and managed all his affairs, as people generally were well aware of, and of which the Court was equally well informed. He then stated that he found that he could not realize the assets of the Testator without obtaining a certificate of administration under Act, No. 20 of 1841, and he prayed a certificate accordingly.

He appended to his petition the alleged Will, with translations in English and Persian, and added the names of the four attesting witnesses and two persons by whom the translations were alleged to have been made under the Testator's directions, one an European, named Pownes, and the other a Hindoo, named Moleecooddeen.

On the 12th of August the Respondents presented their petition, alleging that the Will was a fabrication of the Appellant, and that they were joint heirs with him.

[101] Witnesses were examined for and against the Will, though it is said that the Judge improperly declined to examine some persons who were tendered by the Respondents for examination; and on the 8th of September, 1853, he ordered certificate of administration to be granted to the Appellant.

On the following day, the 9th of September, the Respondents filed their plaint in the Zillah Court of Cawnpore against the present Appellant, claiming two-thirds of the property, real and personal, of their deceased father, from the Appellant.

Evidence was gone into on both sides, and of course it was for the Appellant to establish the Will. It purported to bear date the 24th of January, 1852. The effect of it, according to the English translation, as made in the Zillah Court, was to declare, that the Testator was seventy-five years of age; that his eldest son had two sons and one daughter; that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives, and to pay them proper respect, and to provide also for his younger brothers, and for the Testator's dependants; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents [102] of two villages, mentioned in the Will, and pay over the proceeds to his younger brothers, as such proceeds were, from time to time, received; and he was further to pay to each the sum of Rs. 25,000. The Testator then gave Rs. 13,000, for the benefit of his granddaughter, the daughter of the Appellant, on her marriage and allotted Rs. 40,000, for what he calls the customary outlay in the first year after his death, including religious pilgrimages.

In the event of a pension which he enjoyed from the British Government being continued to his family there is some question as to the effect of the bequest, the first English translation provides, that in whatever proportions the British Government might allot it, the sons should enjoy it.

The Testator's property has been estimated by the Sudder Court as of the value, in the whole, of 5 lacs of rupees, or in English money of £50,000. The value of the two villages given to the younger sons is estimated at £5000; the two legacies of Rs. 25,000, would amount to as much more. They would take, therefore, £10,000; the granddaughter £1300; the funeral and other expenses, £4000; and there would remain a sum of £35,000, for the eldest son, charged with the maintenance of the wives and dependents of the Testator.

There seems nothing in this Will which to English notions would appear unreasonable. The eldest son was to maintain the rank and position of the family; he had issue which the younger sons (who had arrived at the age of manhood and appear by the Will to have wives) had not, and the provision seems to be such as a prudent Testator might be supposed very likely to make who was inclined to found a family.

[103] The evidence in support of the Will is singularly strong.

We have first the evidence of Apa Lagoo, who wrote the Will in the Mahrattée

character. He says, "it is all in my handwriting down to the words indicating the Arabic month, at the end, which were inserted by the Soobadar himself. The date is 2nd Rubee-ool-Akhir, and underneath it is written, Magh Soodee Teej, in my hand writing. Under that again is the Soobadar's signature. This Will was written under the Soobadar's orders. It was planned two days before, and it was reduced to writing on the 21th of the month." He then proceeds to depose to the signature of the Will, and its sealing by the Testator, and signature by the four attesting witnesses. He says that a draft of the Will had been previously made by him, the witness, and the draft, as well as the Will, was handed over by the Testator to the Appellant. He says that the two translations were made four days afterwards.

It was remarked upon as singular, that Apa Lagoo was not an attesting witness to the Will; but we agree with the observation of the Counsel for the Appellant in his reply, that, if the Will was not genuine, the person who had written it would most probably have been made a witness in order to make it more difficult for him to betray his employer.

This witness was in the service of the Soobadar, sixteen or seventeen years; employed in writing letters for him. He seems to give his testimony very fairly. He says that the Will was made in favour of the Appellant only because he was the eldest son, for the Soobadar was not displeased with the younger [104] sons. He does not know whether the younger sons were informed of the Will or not; but they were not informed of it in his presence.

Three of the attesting witnesses to the Will, Byjaba, Sookharam, and Dinkur Punth, all give the same account of the transaction, not as we too often find in these cases, all in the same words, not, indeed, concurring in all the minute particulars of what passed, but with that agreement in substance and that variation in unimportant details which are usually found in witnesses intending to speak the truth, and not tutored to tell a particular story.

Now, who are the witnesses, and are they of a character to attach credit or discredit to their testimony.

The first witness is Byjaba. He says he was a companion of the Maharajah in his lifetime; that he had been in his service from the age of ten years; that he was in the habit of receiving presents of 500, 400, or 1000 rupees from the Maharajah, and as a permanency the Maharajah allowed him 2 rupees a-day. He says there was an intimate bond of brotherhood between the Soobadar and himself, and that the Soobadar sent a messenger in a carriage to Bithoor to fetch him to Cawnpore, in order that he might witness his Will.

This witness, therefore, appears to be a person in a very respectable position in life: a person likely to be called upon by the Soobadar to take the part which he did in the completion of this instrument. The only objection suggested to him is, that he appears to be indebted to the Appellant in a bond for Rs. 500, payable by instalments, a circumstance which cannot weigh much, if anything, against his evidence.

[105] The next witness is Sookharam, who was in the service of the Soobadar, and received what we imagine is rather a considerable salary, Rs. 300 a-year, and held a confidential situation as keeper of the jewels. No objection was made to him except that he was now in the service of the Appellant.

The next witness is Dinkur Punth, who also appears to be in a respectable position. He was a Resaldar in the Maharajah's employ, and received a salary of Rs. 300 per annum. After the Maharajah's death this salary was reduced by the Soobadar to Rs. 200, which he continues to receive from the Appellant.

The remaining attesting witness, Kesho Rao, had given evidence, like the others, in support of the Will on the application for the certificate of administration, and he was produced on the present occasion, by the Appellant, and came from Bithoor to give evidence, riding, as he says, a horse supplied by the Nana Sahib. Instead, however, of confirming his former testimony, he says, that the whole of it was false: that the Will was written by the Appellant himself, and that he, the witness, signed it fifteen days after the death of the Soobadar, and that when he gave his former evidence, he was brought into Court in a state of intoxication, having been drugged. This latter statement is manifestly false. He was examined and cross-examined on the former occasion in the presence of the Judge, and there are no signs at all of confusion in his testimony.

The reason of this man's thus contradicting his former evidence may be conjectured with great probability. He is a Brahmin, and it appears to be contrary to the tenets of the Brahmins that a person [106] in the situation of the Soobadar, having several sons, should dispose of his property by a testamentary instrument in favour of one: they hold it to be contrary to the Shasters, as appears by the evidence given in this case by the Respondents. The witness says, " Since the month of Katik last (he was examined on the 28th of March, 1854), all the Brahmins of my brotherhood combined and put me out of caste for giving such false evidence." He is asked by the Court, " How did the Brahmins learn that you had given false evidence?" He answers, " All the Brahmins are well aware that the Will is a fabrication; nor, indeed, is it the custom or usage of the country that three sons should be masters of the property and a Will be made in favour of only one son only without giving notice to the others."

All the circumstances lead to the conclusion that this witness is not coming forward to correct false evidence previously given, but that he has been tampered with, and, under the pressure of his brotherhood, is attempting to destroy an instrument which he knows and had originally declared to be genuine.

The Zillah Judge who saw the witness, and observed his demeanour during his examination, remarks, " I am bound to record the very unfavourable impression given by the manner and appearance of this witness, which was, it seemed to me, shared by all present." After referring to a description of the symptoms of a false witness contained in the *Mitaeshara*, he says, " All these features of uneasiness were very visible, and it seemed to me that he was in fear of some persons in the body of the room who had been sent to watch his evil-[107]-dence;" and he intimates " a strong suspicion that the venal perjury of this witness was mainly relied on to support the present suit."

There remain of the witnesses who have been previously examined, the two translators, as they are called, though that expression does not quite accurately express what they did, Nuzur Moheewooddeen and Pownes.

The former is examined, and confirms in every particular his previous evidence. He says that two days before the end of January, what he calls the translation was made. The translation was made in this manner. The Soobadar held the *Mahrattee* Will in his hands, and dictated the terms of it in the *Oordoo* language, which the witness wrote down after him in the Persian character, and when this was done, the Soobadar signed it; that " the Soobadar's object in making this Will was solely to perpetuate his name and dignity and rank, and that the Nana might be enabled to protect and support other persons, for the Soobadar always spoke to that effect."

Mr. Pownes is not examined again, but his former deposition is put in, and what took place with respect to him is so extraordinary, with reference to the proceedings of both the Zillah and the Sudder Courts, that their Lordships think it necessary to call it to the attention of the Judges there.

The witness had been examined and cross-examined in the former proceedings, and had given a similar account of the transaction to that given by Moheewooddeen, viz., that the *Mahrattee* Will was held by the Testator, who read it and went on rendering it in *Oordoo*, while the witness wrote it out in English; that the witness did not take the original Will into [108] his hands to inspect it, but it was on the table, and he should recognize it if he saw it. He does recognize it, and he says he first made a draft, which he afterwards fair copied, and the Soobadar wrote something at the bottom of it which must have been his signature, but the witness is not acquainted with that character.

On the 28th of October, 1853, the Appellant presented a petition to the Court containing the following statement: that Mr. Pownes, a clerk of the Judge's Office, and employed as English translator, had previously deposed on oath to the Will; that on the 22nd of the present month, six days ago, he had called at the Petitioner's house and proposed terms to the Petitioner connected with a pecuniary reward, which Petitioner declined; that two days afterwards he sent word to the Petitioner by a trustworthy man to say, that he would now give evidence of a different purport, and thus throw obstacles in the suit, if the Petitioner did not consent to his proposal. That on receiving this message the Petitioner was astounded, but that he had done his duty by reporting the circumstance to the Court.

When a charge of this most grave character was brought against an officer of the Court placed in a situation of great importance to the due administration of justice, which, if the charge were true, he ought not to have been permitted for a single hour longer to retain, it would naturally be expected that a most strict inquiry would be immediately made by the Court into the truth or falsehood of this charge. Yet as far as we can discover, not the slightest notice appears to have been taken of it.

On the 17th of November, 1853, the petition containing this charge was ordered to be filed, and on the 27th January, 1854, on the petition of the Appellant the deposition of Pownes to which we have already referred was ordered to be filed.

How it happened that if the Court did not think it necessary to investigate such a charge against one of its officers; that that officer himself did not immediately insist on having his character cleared, it is difficult to understand; something may have been done, and some explanation may have been given of which no trace is to be found on the record, but if this were so it is to be regretted that nothing of the sort appears.

The Zillah Judge does not seem to have adverted at all to the deposition of Pownes. The Sudder Court do observe upon it, but in terms not very accurate, according to the record as it appears before us; and they object to it only on a ground which is quite unenforceable, namely that the witness did not appear to have been sworn before he was examined, though the contrary appears upon the jurat signed by the Judge himself. They complain that he was not examined in the suit, but they do not take any steps for the purpose of remedying the defect, nor allude to any proceeding as having been taken or as being fit to be taken for the purpose of investigating a matter of so great importance to the due administration of justice as the charge of gross corruption brought against one of the officers of the Court of Cawnpore.

In addition to the witnesses to whom we have referred, speaking to the *factum* of the Will, there is other very important testimony in support of it. There is one person, Baboo Porarkur, whose evidence [110] on this subject is of the greatest weight. If he is to be believed, he proves the whole case; he says that he was not present when the Will was made; that he was detained at Bithoor by the death of his mother; that the Soobadar informed him of the Will soon after it was made on the 6th or 7th of February; that the Will was shown by the Soobadar to his younger sons, the Respondents, who took it up and read it and then laid it down near the Soobadar, who handed it to the Appellant. He says that those who live in the Bara (which we understand to be the mansion of the Soobadar) must all have been aware of the Will; that he has heard from Nurain Rao Apa, a grandson of the Testator, that Dr. Cheek and Mr. Vincent were aware of it; and he states as of his own knowledge, that Mr. Kirk of the Bank of Cawnpore, was also informed of it; and he refers to a letter, of which we shall have something to say presently. He says that he was always with the Soobadar, and acted in some respects as his deputy.

Now, not only is there no impeachment at all of this witness, but there is strong testimony in his favour. Mr. Morland, on whose evidence against the Will the greatest reliance is placed by the Respondents, refers to this person as the confidential agent and constant attendant of the Soobadar, and as one who would have been asked to attest the Will, if any Will had really been made by the Soobadar.

A sufficient reason why he was not asked to attest it, appears incidentally, on his examination, viz., that he was detained at Bithoor by the death of his mother.

[111] This witness Baboo Porarkur, refers to Mr. Vincent, Dr. Cheek, and Mr. Kirk, as Europeans acquainted with the Will.

Now, with respect to Mr. Vincent, a letter of that gentleman, written to the Appellant at Cawnpore during the examination of the witnesses in the case, is found on the record. In the petition tendering the letter the Appellant says that Mr. Vincent, who is now in Cawnpore, is ready to attest the contents of it. It amounts, however, to very little, even if the contents were regularly proved, which they were not.

Dr. Cheek, a physician says, that in February, 1852, when he attended the Soobadar professionally, he had the following conversation with him:—"One day he was very ill, and I said to him, 'The state of your health is such that you should arrange your affairs, though I hope you will recover from your present illness.' To this he replied, 'I have arranged my affairs,' or words to that effect. He never made use

of the term 'I have made my Will,' though I was led to suppose he meant this from the above expression he made use of."

This was very soon after the date of the alleged Will, and appears to their Lordships important confirmation of the truth of the Appellant's case.

The third European referred to by Baboo Porarkur is Mr. Kirk of the Bank of Cawnpore. The communication to him is alleged to have been made by a letter signed by the Testator, which if it be genuine is admitted to be conclusive of the case.

This letter purports to have been written on the 9th of January, 1853, to Mr. John Kirk, at that time superintendent of the Cawnpore Bank.

[112] It appears that the Soobadar had at some antecedent period taken ten shares in the Cawnpore Bank, and had had those shares entered in the name of his youngest son, the Respondent, Hurree Punth Bhao. The Bank, in 1852, was winding up its affairs, and was about to return by instalments their capital, or a dividend upon such capital, to the shareholders. The Appellant had applied, as the manager of his father's affairs, to the Bank for payment of Rs. 250, the dividend then payable. Mr. Kirk, the Superintendent, refused to act upon his statement without the authority of the Soobadar, and thereupon the following letter is alleged to have been signed by the Soobadar, and sent to Mr. Kirk:—

"Dear Sir,—You have made an objection that the shares was held in the Cawnpore Bank by the name of my youngest son, Hurree Punth Bhao. Consequently you cannot pay the sum of Company's rupees (250), two hundred and fifty, to my eldest son, Nurain Rao Nana, being the amount of refund capital at the rate of 25 rupees per share on the ten shares in the Cawnpore Bank, which it is now going to discharge. In reply, I beg to inform you that in those days when the shares was taken, my elder son, Nurain Rao Nana, was in preparation to proceed to England for some business on the part of the Maharajah ex-Peishwa Bajee Rao. Consequently for namesake the shares in question was taken by the name of my youngest son, Hurree Punth Bhao, otherwise the shares were taken by the name of my elder son. Nurain Rao Nana has full authority over all my property at present and also in future. Moreover, I have already written down my last Will and bequeathed to him. There-[113]fore, I solicit your favour to remit the said amount to my elder son, Nurain Rao Nana, and also in future, whatever more shares will be liquidated on account of the said shares, kindly remit to my elder son, Nurain Rao Nana, and oblige.—Yours sincerely,

"RAM CHUNDER PUNTH, SOOBADAR.

"Cawnpore, the 9th January, 1853."

On the 19th of January, 1853, Mr. Stacy, who was then a clerk in the Bank, informed the Appellant, that Mr. Kirk had recognized his title, and had sent him a hoondie for Rs. 250.

Mr. Stacy's letter is produced and is proved by himself, and is in these words:—

"My dear Sir,—I am sorry Mr. Kirk will not agree to pay cash. He showed me your father's note, and he says he has now no further objection to recognize you as fully empowered to negotiate this business; but a hoondie is all he can give, and this for 250 rupees. I have accordingly the pleasure to inclose the same.—Yours truly,

"W. STACY."

Now, Mr. Stacy is examined, and his evidence is very important. He says that the Soobadar called upon him in company with the Appellant; and after giving a history of the shares, told him that though the shares were in the name of his youngest son, yet his eldest son was proprietor and manager of all his affairs, and the proper person to receive the money (dividends), and he requested the witness to call on [114] Mr. Kirk and get the money paid to the Appellant. He says that he had an interview with Kirk accordingly, who told him that he had received a letter from the Soobadar, and had no longer any objection to pay the dividends as requested, but could not pay cash; all he could do was to give a "hoondie" for the amount. Mr. Kirk read to him the Soobadar's letter, and he saw it too, but did not know the Soobadar's signature. He then verifies the letter which he had written, and looking at the other English letter addressed to the Bank, witness stated, that the contents of this letter were identical with those of the letter shown to him by Mr. Kirk.

It is clear, therefore, beyond all question, that some letter to the general effect of that stated by the Appellant was written by the Testator: that such letter had been sufficient to remove the difficulties felt by Mr. Kirk: and Mr. Stacy, on seeing the letter produced to him, declares the contents to be identical with that shown to him by Mr. Kirk.

It is said, however, that there is a passage in this letter which it is so improbable that the Soobadar should have written that it is in itself evidence of forgery. The passage is this:—"Nurain Rao Nana has full authority over all my property at present, and also in future. Moreover, I have already written down my last Will and bequeathed to him."

But on full consideration of all the circumstances their Lordships are not able to agree in that view. As to the first sentence it amounts to little, if at all, more than what Mr. Stacy says that the Soobadar stated to him, and when it is recollected that the Soobadar's object was to settle the matter then in dispute, not only with respect to the dividends then [115] payable, but as to future payments: that he was then seventy-six years old, and could not expect to continue much longer in life: and that he could only perpetuate the authority of his son by making a Will, and, according to the hypothesis, had done so, there does not seem any great improbability in his stating this fact. It was not one which he was desirous of keeping secret from indifferent persons, and there was a motive on this occasion for communicating it. The letter was written in January, 1853, and Mr. Stacy speaks to its contents in March, 1854.

It is said, however, that the circumstances under which it is brought forward throw great suspicion upon it. To their Lordships, on the contrary, it appears that those circumstances almost exclude the possibility of forgery.

The account of the Appellant is this:—He had originally found a copy of this letter in his father's letter-book, and he took the book containing it to Mr. Morland in October, 1853. Morland says, he remembers forwarding a letter to the "Secretary of the Bank regarding payment of instalments which were due in the name of the Soobadar." Again, he says, "When I came to Cawnpore, in October, 1853, the Defendant brought me a book, containing a copy of a certain letter which Defendant told me had been addressed to Mr. Kirk, regarding refund of the instalments."

It may safely be assumed that the letter, a copy of which he thus showed, or offered to show, to Mr. Morland, was to the same effect with that now produced. It was said that the letter-book was not produced by the Appellant, but he had in his pleadings tendered the production of it, and the Respondents might, if they had desired it, have called for its production. The original letter itself was referred to in the hands of Major Riddell.

Mr. Kirk was dead: his widow seems to have set up some business for herself, in which she employed a person named Read as a clerk. Major Riddell, a Magistrate at Cawnpore, had undertaken to wind up the affairs of the Bank, and, of course, would have the papers of the Bank in his possession. The Appellant alleges, that he applied to Major Riddell for the original of this letter: that Major Riddell searched for, but could not find it, and suggested that it might be amongst the private papers of Mr. Kirk in the hands of his widow, and promised to write to her on the subject. It appears that he must have done so, for on the 17th November, Mrs. Kirk, having found the letter, sent it to Major Riddell by the hands of her clerk, Read, and Major Riddell indorsed on it, "Received from Mr. Read, this 17th November, 1853." The Appellant put in his answer on the 19th of November, 1853, in ignorance, as far as appears, of the fact of this letter having been found: and on the 14th of December, he wrote to Mrs. Kirk, to inquire about this letter. On the 15th she sent him this answer:—

"Cawnpore, December 15, 1853.

"Sir,—In reply to your letter of yesterday's date, I beg to inform you that the letter I found from your father to my late husband has been duly forwarded by me to Captain Riddell, some time back, in order that the same might be made over to you."

The Appellant hereupon procured from Major Riddell a copy of this letter under his official seal, [117] and on the 26th of December, 1853, he put in his rejoinder to

the Respondent's replication, in which he referred to this letter as then in the possession of Major Riddell, and to the letters of Mr. Stacy and Mrs. Kirk, as establishing its genuineness.

The persons here referred to, Major Riddell and Mrs. Kirk, were both resident in Cawnpore. Mr. Morland, who was a strong friend of the Respondent's, was probably also there; every opportunity was afforded to them of inquiring into the truth of the facts alleged, and of disputing the genuineness of the document, if any reasonable grounds existed for doing so.

On the 27th of January, 1854, the Appellant, by his petition, tendered in evidence a copy of the letter of 9th of January, 1853, referring to the original as in the hands of Major Riddell, and the two original letters of Mr. Stacy and Mrs. Kirk.

These documents were accordingly filed.

On the 29th March, Baboo Porarkur was examined, and stated the circumstances relating to these Cawnpore Bank shares, and the effect of the letter written by the Soobadar on the occasion, which he says was, that the real proprietor of these shares was Nurain Rao, and that he, the Soobadar, had made a Will in his favour; he says that the letter was written by one William, who was occasionally employed as clerk in the house at Cawnpore, in English, at the Soobadar's dictation in his, Porarkur's, presence.

The Respondents, as it appears from the judgment of the Sudder Court, called for the production of the original letter in the hands of Major Riddell, and it was produced accordingly. An order for the pro-[118]duction was made on the 29th of March, and though there is some confusion in the documents printed for the purpose of transmission to this country, and some orders are referred to in the index which are not printed, we think that it is sufficiently clear, independently of the statement by the Judges of the Sudder Court, that the original letter was produced in consequence of the order of the Court, and shown to Mr. Stacy, and on a subsequent occasion to Mr. Morland. No evidence whatever was given by the Respondents to impeach this document, nor were any questions put to any of the witnesses with a view to show any improper dealing with it by the Appellant.

If the statement thus given be true, and no attempt has been made to impeach it by any evidence, it is difficult to see how any opportunity of forgery was afforded to the Appellant. The objections made by the Sudder Judges to it are of no weight; one is that the Appellant, in setting out the copy of the letter, had not stated the indorsement made by Major Riddell of the day on which he had received it; the other, that Read the messenger who carried the letter to Major Riddell, had, fifteen years before, been convicted of fraud, and sentenced to imprisonment.

In addition to all this evidence, there was proof by a grandson of the Soobadar that the Will was known in the family, and had been the subject of conversation in the Soobadar's house in his lifetime, and this was confirmed by the testimony of several other witnesses.

Against this mass of evidence there was really no testimony entitled to any weight. The strongest [119] evidence against the Will is that of Mr. Morland, a gentleman of position and respectability; he says that he often suggested to the Soobadar the propriety of making a Will, observing that his late master, the ex-Peishwa had made one; but the Soobadar always (as he terms it) scouted the idea, saying, "Why should I make a Will?—there are my sons to inherit my property." This witness says, that he was on terms of such close intimacy and confidence with the Soobadar, that he is firmly persuaded that if the Soobadar had made a Will he would not only have consulted him about it, but asked him to be a witness.

But there appears upon this gentleman's own depositions quite sufficient reason why the Soobadar, whatever might be his general confidence in him, should neither consult him about his Will, nor ask him to be witness to it, nor inform him that he had made it. Mr. Morland, it is clear, in the differences which prevailed in this family, supported the cause of the younger brothers, and was anxious to protect their interests against the elder, towards whom, whether with or without reason, he entertained feelings of dislike. He not only says, that he advised the Soobadar to make a Will, because he thought the Appellant was likely to claim much more than his share of his father's property after his death, and would do much to the prejudice of his younger brothers, but he admits that he had, on one occasion, at

the instance of the second son, represented to the Soobadar the alleged tyrannical conduct of the Appellant. The Soobadar, on that occasion, said he had an equal regard for all his sons, but did not admit the tyranny imputed to the eldest.

Now, if the Testator was determined to leave to [120] his eldest son the bulk of his estate, it was very likely that he would not communicate to Mr. Morland a determination so little in accordance with his advice or his wishes or ask him to authenticate the instrument.

The other evidence is hardly deserving of notice: it is disbelieved by the Zillah Judge, and is not adverted to by the Sudder Court. It consists of that sort of testimony with which, in these Indian cases, we are unfortunately too familiar—of witnesses who swear positively to matters of which they can have no knowledge: of witnesses who swear that they have heard the alleged Testator, after the date of his Will, declare that he had never made one: that they had heard the persons who had been parties to the instrument gratuitously declare to them that it was a forgery: of witnesses who declare that they had been solicited by the party in the cause, or his agents, to attest instruments, which they were told at the same time were fabricated. Witnesses of this description may be had, unhappily for India, in any number in that country.

The two wives of the Soobadar are examined as witnesses against the Will, but they really say nothing, nor, indeed, are asked anything that is important: each says in general terms, that the Soobadar never wrote anything in favour of any of his sons, and made no one proprietor: and that he regarded all his sons as equal, and each says the whole property of the Soobadar belongs to her. They are examined as to the property, with respect to which they may be able to speak. Other witnesses give their opinion as to the handwriting of the Testator, a species of evidence seldom of much value in contradiction to [121] positive testimony, and in this case rendered of still less value, as to some of the witnesses, by the circumstance that they deny the handwriting of the Testator to documents admitted to be genuine. The rest of the evidence consists of the testimony of Pundits, who say that the Soobadar was always obedient to the Shasters, and that the Shasters forbid a father who has several sons to appropriate by Will to one the property which by law ought to be equally divided amongst all. It is clear that in this District a strong feeling prevails amongst the Brahmins upon the subject of testamentary disposition, which, though at length established by law as to self-acquired property, is opposed to the ancient usages and feelings of the country.

On the whole it appears to their Lordships that the Appellant has sufficiently established his case. A course was taken in the Sudder Court, which is certainly unusual. The Judges ordered a translation to be made into English of the Oordoo Will, and they found that such translation did not, in form or in the order of the sentences, correspond in all respects with the translation made by Pownes, and from this, if we understand the meaning of the Judge who adverts to the fact, they drew an inference unfavourable to the Will. It may be observed that Mr. Morland, on being shown the English translation alleged to have been made by Pownes, says he has no doubt it is Pownes's writing. If any inference against the validity of the Will were to be drawn from the discrepancy between the two English translations, that discrepancy should have been called to the attention of the Appellant, and Pownes should have been further examined on the matter. The circumstance would have deserved [122] attention if Pownes's translation had been made from a written copy of the Oordoo Will, but it was not. It was translated, as we have already said, into English, from sentences read in Oordoo by the Testator from the Mahrattee Will, and the discrepancies, such as they are, appear to us to be fully accounted for by this circumstance.

We think the circumstances of the case are strongly in favour of the Will. It contains such a disposition of his property as it was extremely probable that the Testator should make, and extremely unlikely that the Appellant should introduce into a forged instrument. The Testator was of great age. He had placed his eldest son in his place with respect to the management of all his affairs in his lifetime. He might, very naturally, desire to keep together in his family the wealth which he had acquired by his own exertions, and to prevent its dispersion by division amongst his sons. His eldest son had issue, his other sons had none; and he had the example

of his master, the Peishwa, to follow, who had adopted a son and made a Will in his favour. The witnesses in favour of the Will are in general less open to exception than is usual in Indian cases, and some of them entirely unexceptionable. The Zillah Judge who has seen them has come to an opinion in favour of the Will, and appears to doubt whether the opposition to it is really the spontaneous act of the Respondents.

Their Lordships are of opinion, that the reasons assigned by the Sudder Court for its judgment are quite unsatisfactory. The view which they take of the original appeal makes any consideration of the cross-appeal unnecessary. It must of course be dismissed. They must humbly advise Her Majesty to [123] reverse the decree of the Sudder Court on the original appeal, and to restore that of the Zillah Court; and considering that the Respondents' case is founded on an allegation of fraud, perjury, and forgery, which, in their Lordships' opinion, fails, they think they cannot do justice without advising, that the Respondents should be ordered to pay all the costs of the suit in both Courts below, and of both the appeals to Her Majesty.

[See *Bahoo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, 1867, 12 Moo. Ind. App. 38; *Rao Balwant Singh v. Rani Kishori*, 1898, L.R. 25 Ind. App. 51.]

SREEMUTTY SOORJEE MONEY DOSSEY,—*Appellant*: DENOBUDDO MULLICK and Others,—*Respondents* * [Feb. 10, 1862].

On appeal from the Supreme Court at Calcutta.

There is nothing in the General principles of Hindoo law, or public convenience, to prevent a Hindoo testator devising self-acquired property by way of remainder, or executory devise, upon an event which is to happen on the close of a life in being [9 Moo. Ind. App. 135].

The Will of a Hindoo Testator, after devising all his real and personal estate among his five sons (a joint undivided family) contained this clause: "Should any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them, will get any share out of the share that he has obtained of the immoveables and moveables of my said estate. In that event of the said property, such of my sons and my son's son as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant to this, it is inadmissible. However, if my sonless son shall leave a widow, in that event she will only receive Co.'s Rs. 10,000, for her food and raiment." The family remained joint. S., one of the sons, died after the Testator's death, without issue male, but leaving a widow, his heiress-at-law. Held, that by the words "not leaving any sons from his loins, nor any son's son," the Testator meant, not an indefinite failure of male issue, but a failure of male issue of any one of his sons at the time of the death of that son.

Held further (1), that upon the death of S., without male issue, his interest in the capital of the estate determined, and that his widow became entitled to hold and enjoy as a Hindoo widow, a fifth part of the accumulations from the Testator's estate, from the time of his death to the death of his son, S.; and (2), that she was also entitled absolutely in her own right, to the interest and accumulations which since S.'s death arisen from such fifth part of the accumulations.

By the decree, S.'s widow was declared entitled to the Rs. 10,000, given by the Will, with the benefit of a residence in the family dwelling-house, and participation in the means of worship. The question of the amount of her maintenance as a Hindoo widow was left open by the Judicial Committee, as that

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. James W. Colville.

point could be raised on further directions after taking the accounts [9 Moore Ind. App. 139].

This was a suit brought by the Appellant against the Respondents, claiming as the sonless widow, heiress, and personal representative of Surroopchunder [124] Mullick, deceased. The Appellant, by the bill, sought to recover her deceased husband's one-fifth share of and in the surplus income of the joint family estate, with the accumulations: which estate was held by his surviving brothers, or their descendants, as members with Surroopchunder Mullick, of a joint undivided Hindoo family, subject to the trusts, conditions, and limitations contained in the Will of the late Bustomdoss Mullick, the father of Surroopchunder: the Appellant also claimed to be entitled to a legacy of Rs. 10,000 under the Will, bequeathed to such of the widows of the Testator's sons as should have no sons, for food and raiment.

The principal questions raised in the suit had reference to the construction and effect to be given to the above Will, and to the rights of the sons and their sonless widows, and especially as to the Appellant's claim as heiress of her husband Surroopchunder Mullick to one-fifth part or share of the accumulations of the proceeds and profits of the estate and property, during [125] the lifetime of her husband, which had been treated as an increment to the original corpus of the share, and as passing with it to the surviving brothers of the Surroopchunder Mullick, under the Will. These questions were argued on the hearing of a previous appeal to set aside two orders of the Supreme Court allowing two demurrers for want of equity to the Appellant's bill, and it was then held by their Lordships that, under the limitations in the Will, Surroopchunder Mullick's one fifth share in the family property went over, on his death, to his surviving brothers, but that the Appellant, as his widow and heiress-at-law, was entitled to the accumulations of income which had arisen from her husband's share of the Testator's estate during his lifetime. The facts and circumstances respecting the Will are fully stated in the report of the case in 6 Moore's Ind. App. Cases, p. 526, upon the hearing of the Appeal from the demurrers, and require now only a brief outline of what occurred subsequently in India.

The Testator, Bustomdoss Mullick, by the first clause of his Will devised his self acquired real and personal estate among his five sons. Clause II, upon the construction of which the questions in this appeal rose, was as follows:—"The Issore avert, but should peradventure any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them will get any share out of the share that he has obtained of the immoveables and moveables of my said estate. In that event of the said property, such of my sons and my sons' son as shall then be alive they will receive that wealth according to their respective [126] shares. If any one acts repugnant to this it is inadmissible. However, if my sonless son shall leave a widow, in that event she will only receive Company's rupees (10,000) ten thousand, for her food and raiment."

By an order of Her Majesty in Council, the order of the Supreme Court made upon the demurrers filed in the suit were reversed, and the demurrers overruled.

On the receipt of this order in India, the Respondents filed their answer in the suit so instituted, whereby they admitted the principal allegations in the bill as to the Will of Bustomdoss Mullick, and that the family lived after his death as a joint undivided Hindoo family, and also as to there being a large surplus of income over expenditure.

On the application of the Plaintiff, as a Hindoo lady of rank, a commission to examine her as a witness on her own behalf was issued, and her evidence was taken thereunder, by which she deposed that she was excluded against her will from the family house in which she and her husband had lived. The Defendants examined two witnesses: one, the Respondent, Brijobundo Mullick, who deposed to the mode in which the family accounts were kept, showing that all items of expenditure were borne by the joint family, even for individual members: and another witness, named Rajender Dutt, who, as member of a joint Hindoo family, was called to prove what the custom of joint Hindoo families were, but he was unable to prove any fixed and established custom as to joint families not having separate expenditure for individuals.

The suit came on in the Supreme Court, and was [127] heard before the Chief Justice, Sir Barnes Peacock, Sir Charles M. R. Jackson, and Sir Mordaunt L. Wells, Puisne Judges. At the hearing it was submitted on behalf of the Appellant that her husband, notwithstanding the Will of Bustondoss Mullick, was entitled absolutely to one-fifth of the corpus as well as of the accumulations; while, on the part of the Defendants, it was contended, not only that by the Will, Surroopchunder Mullick having died without male issue, his widow was excluded from all share in the corpus; but that by the Hindoo law governing families living jointly, as theirs did, the increment followed, and was blended with and became distributable in the same manner as the corpus; and that Surroopchunder Mullick, while so living in joint estate, must be considered as waiving his right to enjoyment in severalty of that portion of the estate which, under his father's Will, he would, if a partition had taken place, have been entitled to, and as having elected to take, in place therefore, the advantages which, in case he or his male issue had survived any of his brothers who should have died without male issue, might and would have accrued to him, Surroopchunder Mullick, or his male issue, by reason of the share of the brother or brothers so dying, of the accumulations becoming distributable in the same manner as the corpus, under the terms of their father's will; and the Respondent, therefore, submitted, that the Appellant was bound by the acts and conduct of Surroopchunder Mullick, and was not entitled to set aside an understanding and arrangement founded, as they alleged, on good consideration, and in accordance with Hindoo law and the custom of Hindoo families, and so long and uniformly acted on by Surroopchunder [128] Mullick, together with his brothers, in his lifetime, as to render impossible the proper taking of the account which the Appellant sought to reopen; and that she was not entitled to any portion of the relief which she prayed, except the payment of the legacy.

The opinion of the Court was delivered by Sir Barnes Peacock, as follows:—
 "In this case, the first question that arises is, whether the plaintiff is entitled under the Will to her husband's share in the corpus of the joint estate. Only one of the three learned Counsel for the Plaintiff has argued that she is so entitled. Assuming that the judgment of the Privy Council is not conclusive on the question, let us see what was the intention of the Testator. The first clause of the Will gives all the property, moveable and immoveable, to the five sons, but the gift is defeated by the eleventh clause.—[The learned Judge read the clause, *ante*, 125, and proceeded.] Only one learned Counsel for the Plaintiff argued in support of the position that the Plaintiff took her husband's share of the corpus. He contended that, according to English law, the gift over would create an estate tail in real property and an absolute interest in personalty. That might have been so as to real estate under the law as it stood before the Wills Act, but not so as regards personal estate; and, according to Hindoo law, there is no distinction between real and personal estate. There was an absolute gift to the four sons under the first clause of the Will. The words of the eleventh clause, 'Should any of my sons die not leaving any son, etc.,' would not, even according to the old law, have imported an indefinite failure of issue in the case of personalty, but at most merely a [129] failure of issue at the time of the death of the son. The limitation over was, therefore, valid as an executory bequest, and there was no necessity for any implication. Furthermore, there is no such estate known in the Hindoo law as an estate tail. The next question is, does the husband's share of the accumulation pass to his widow? It is admitted that the brothers continued joint, that all expenses were charged to the joint estate, and that the annual income and profits exceeded the disbursements. The Privy Council have held that the accumulations do not pass with the corpus under the executory bequest; but it has been contended, on the parts of the Defendants, that they should go with the corpus, under a contract to be inferred from the act of the parties in having carried the accumulations to the credit of the estate. It must, however, be first shown that, in having carried the accumulations to the credit of the estate, the parties intended an alteration of their rights; this has not been shown, and is not to be inferred from the evidence. It has also been said that the parties believed that the accumulations followed the corpus; if they believed this, why should they have contracted to treat the accumulations as forming part of the corpus, which we are asked to infer that they did. The Plaintiff is not entitled to any share of the corpus,

but she is entitled to a share of the accumulations, together with a share of the profits (if any) made thereon."

The following decree was made in the cause. — "Declare that the Plaintiff, as the widow and immediate heiress and representative of Surroopchunder Mullick, deceased, is entitled, for and during the term of her natural life, to one equal fifth part or share of [130] and in the accumulations which accrued during the lifetime of Surroopchunder Mullick, from or in respect of the joint estate which was of Bustondoss Mullick, deceased, the Testator in the pleadings named, and to one equal fifth part or share of the interest and other profits, if any, which have been made or received since the death of Surroopchunder Mullick, from the accumulations which, as aforesaid, accrued during his lifetime from or in respect of the joint estate, to be held, possessed, and enjoyed by her as a Hindoo widow, in the manner prescribed by Hindoo law. And this Court doth further declare, that under the last Will and testament of Bustondoss Mullick, the Plaintiff, as the widow of Surroopchunder Mullick, is entitled to receive, out of the joint estate, the legacy of Co.'s Rs. 10,000; and Counsel for the Defendants not objecting, this Court doth order that the Accountant-General and sub-treasurer for the time being of the Government of India, with the privity of the Accountant-General of this Court, do pay, indorse, and deliver over, for the Plaintiff, in full of the legacy of Co.'s Rs. 10,000, the Government securities and cash balance paid into Court to the credit of this cause, under an order bearing date the 28th day of July, 1856, together with all accumulations of interest accrued due thereon. And this Court doth further order, that it be, and it is hereby, referred to the Master of this Court, to take an account of the joint estate, moveable and immoveable, as the same stood at the time of the death of the Bustondoss Mullick, and also an account of the joint estate as the same, with accumulations thereof, stood at the date of the death of Surroopchunder Mullick, and also an account of the joint estate as the same, [131] with the subsequent accumulations thereof, stands at the present time; and the Master, in taking the account, is to make to all parties all just allowances, and, for the better taking of the same, all parties are to produce before the Master, on oath (if required), all books, accounts, papers, and writings, in their or any or either of their hands, custody, power, or control, or in the hands, custody, power, or control of their or any or either of their servants or agents, relating to or in any way touching or concerning the matters hereby referred to the Master; and the Master is to be at liberty to examine upon oath, or interrogatories, or *ex parte*, the parties, Plaintiff and Defendants, and to examine upon oath such witnesses as shall for that purpose be produced before him by any or either of the parties to the suit; and, Counsel for the Defendants not objecting, this Court doth order that the Plaintiff be at liberty during her life to reside in the family dwelling-house of the Testator, and occupy the rooms which were occupied by her and her late husband in his lifetime, and be also at liberty to attend the performance of the worship of the family idol. And this Court doth further order, that the Defendants, Denobundoo Mullick, Brijobundo Mullick, Toolseedoss Mullick, and Soobuldoss Mullick, do pay to the Solicitors of the Plaintiff her costs of and incidental to this suit, up to and including this decree, when such costs shall have been taxed by the taxing officer of this Court, to whom it is hereby referred to tax the same. And this Court doth reserve the consideration of all further directions, and of the subsequent costs of this suit, until after the Master shall have made his report; and, in the meantime, all parties are to be at liberty to apply to this Court, [132] from time to time, as they may be advised, and this decree is to be binding on the infant Defendant, Koonjoobeharry Mullick, unless he, being served with a subpoena to show cause against the same, shall, within six months after he shall attain his full age, show unto this Court good cause to the contrary."

The present appeal was from this decree.

The Solicitor-General (Sir R. Palmer), Mr. Rolt, Q.C.; and Mr. W. Pearson, for the Appellant. The point determined upon the previous appeal (6 Moore's Ind. App. Cases, 526) on overruling the demurrers had reference to the Appellant's right of accumulations of the income which had arisen from her husband's share of the Testator's estate during his lifetime. The question, whether she was also entitled to the corpus of that share, was not then determined, and is now open upon this

bill, notwithstanding the decision of this Court on the demurrers. By the Hindoo law as received in Bengal, only such an alienation as might be made *inter vivos* by gift, would be good by a Will of a Hindoo, as he cannot alter the character of the estate, W. H. Macnaghten's "Princ. of Hindu Law," Vol. I. p. 4; Strange's "Hindu Law," Vol. I. pp. 130, 265-6-7; *ib.* Vol. II. pp. 419, 428, 435. Although it is true by latter authorities it has been held, that a Will may be made by a Hindoo, yet it is admitted that the extent of the power of disposition by a Hindoo Testator is regulated by the Hindoo law, and must be in accordance with the rights of his family under that law, *Vegetutchnee Unmul v. Gopee Nadaraja Chetty* (*ib.* pp. 309, 345), *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (8 Moore's Ind. App. Cases, 66). The first clause [133] of the Will, if it be rightly interpreted as a bequest of the property, and not as a recognition of the rights which the Testator's sons, as his heirs, had, according to Hindoo law, is an absolute gift by the Testator of the whole of his estate, both real and personal, to his five sons, in equal shares. The eleventh clause is not sufficiently clear and unambiguous, to limit such absolute estate to an estate for life, on the contingency of a son dying without a son, or a son's son. Our contention is, that on the death of the Testator the Appellant's husband was entitled absolutely to one-fifth part of the estate, and not merely to a life interest therein, and that the Appellant, as his widow and legal personal representative, is entitled to that share, together with the additions and accumulations thereof made between the death of the Testator, and the death of her husband, to be held by her for life, as a Hindoo widow, who has by the Hindoo law a mere usufructuary inheritance in her husband's estate; Strange's "Hindu Law," Vol. II. p. 251; W. H. Macnaghten's "Princ. of Hindu Law," Vol. II. p. 33. At all events, we submit that the decree of the Court below is wrong, as the Appellant ought to have been declared entitled absolutely, and not merely during her life, to all the income which since the death of her husband has arisen, or may hereafter arise during the Appellant's life, as well from the accumulations, as from the capital of the share to which she is entitled; but if it should be determined that her husband took only a life interest in the one-fifth part of the corpus of the estate, then the decree ought to have declared that the Appellant as Surroopchunder Mullick's widow, was entitled to a proper sum by way of maintenance, consistent with her position in life, and the wealth whereof [134] her husband was possessed, out of the joint estate, to enable her to perform the religious acts required by the Hindoo law, in addition to, and independently of the legacy of Rs. 10,000, bequeathed her by the Will for her food and raiment; W. H. Macnaghten's "Princ. of Hindu Law," Vol. II. pp. 117-9, Strange's "Hindu Law," Vol. I., p. 63.

At the conclusion of the Appellant's argument

The Lord Justice Knight Bruce, on the part of their Lordships observed, that upon one point, probably the principal point in the case, their Lordships did not consider it necessary to hear the Counsel for the Respondents. His Lordship then proceeded as follows:—The chief question is, as to the meaning and effect of a certain provision contained in the Will of the Testator, Bustondoss Mullick, first, what was the sense, and next, is the Will (duly construed) at variance with Hindoo law? By the first clause of the Will the Testator, mentioning his five sons, one of whom has since died, and whose share of the property is now in dispute, gives them, in effect, all his property, in such a way as, if there were no more in the Will, would make them absolute owners of it. But in a subsequent clause (the eleventh) the Testator says—[His Lordship read the clause, *ante* p. 125, and proceeded]—A controversy has been raised whether, according to the true meaning of this eleventh clause, the Testator points to an indefinite failure of male issue of any one of his sons whose male issue should fail, or failure of male issue at the time of his death. Their Lordships, taking the Will to have been translated accurately, as it seems admitted on all hands to be, consider it to be perfectly plain that that to which the Testator [135] here points is not an indefinite failure of male issue, but a failure of male issue of any of his sons at the time of the death of that son. This happened in the case of the son, Suroopchunder Mullick, who died without leaving male issue living at that time. Accordingly, an event has happened that the Testator pointed out. The question then is, whether the Hindoo law prohibits such a provision.

Whatever may have formerly been considered the state of that law as to the

testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a Testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this Will the property was given over upon an event [136] which was to take place, if at all, immediately on the close of a life in being at the time when the Will was made, and seeing that that event has happened, consider that the Testator, in making this provision, did not infringe or exceed the powers given him by the Hindoo law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue. To that question, therefore, the Respondents' Counsel need not address themselves. The question or questions as to the accumulations, interest, and maintenance, they will be so good as to address themselves to.

Sir Hugh Cairns, Q.C., for the Respondents.—My Lords, I might, perhaps, respectfully beg to be informed, whether by the word “accumulations” your Lordships referred to the same question as “maintenance.”

The Lord Justice Knight Bruce.—Accumulations, interest, and maintenance; every question, in short, except as to the title to the mere corpus.

Sir Hugh Cairns, Q.C., and Mr. Leith, for the Respondents, were heard upon this point.

A Hindoo widow can only claim maintenance out of the estate left by her husband when it devolves on preferential heirs, but, in this case, the decree appealed from, declares the Appellant to be the immediate heiress of her deceased husband, and as such entitled to the whole of the property left by him, and in one of the averments in the bill, she estimates the accumulations at Rs. 3,50,000, to be enjoyed by [137] her as a Hindoo widow. Maintenance is a claim on the estate which has been given over by the Will, which fixes her maintenance at a sum of Rs. 10,000, and she claims that legacy, and we submit, by accepting that sum under the Will, bequeathed expressly for food and raiment, she is estopped from claiming any other sum out of the Testator's estate, even if she was otherwise entitled. The fact of the Appellant's succeeding to property as widow and heiress of her deceased husband prevents any claim attaching on the estate of the Testator, even if she had not been expressly excluded from the same by the terms of the Will. Indeed, no claim for maintenance, beyond the claim for the legacy, was mooted in the Court below. If necessary, she may raise the point of maintenance when the cause comes before the Court below on further directions when the account is taken.

The Lord Justice Knight Bruce.—Their Lordships are of opinion, that the declaration in the decree may be with propriety varied in the manner to be now read: as to which, however (though it is probably more a matter of form than of substance), their Lordships will readily listen to any observations that Counsel may wish to make. Their Lordships propose to report to Her Majesty, that the declaration in the decree of the Supreme Court at Calcutta, of the 25th of August, 1859, in the words following, namely:—This Court doth “declare that the Plaintiff, as the widow and immediate heiress and representative of Surroopchunder Mullick, deceased, is entitled, for and during the term of her natural life, to one equal fifth part or share of and in the accumulations which accrued during the lifetime of [138] Surroopchunder Mullick, from or in respect of the joint estate which was of Bustomdoss Mullick, deceased, the Testator in the pleadings named, and to one

equal fifth part or share of the interest and other profits, if any, which have been made or received since the death of Surroopchunder Mullick, from the accumulations which, as aforesaid, accrued during his lifetime from or in respect of the joint estate, to be held, possessed, and enjoyed by her as a Hindoo widow, in the manner prescribed by Hindoo law," be omitted, and that it ought instead to be declared, that according to the true construction of the Will of Bustomdoss Mullick, Surroopchunder Mullick became and was entitled to one equal fifth part of the estate, moveable and immovable, of Bustomdoss Mullick, but that such title was defeasible, nevertheless, upon the event of his death without leaving any son, or son's son, then living:—And that it ought further to be declared, that Surroopchunder Mullick having died without leaving any son, or son's son, his interest in the capital of the estate determined upon his death. But that it ought to be also declared, that Surroopchunder Mullick was at the time of his death entitled, and that the Appellant, as his widow, heiress, and representative, is now entitled to one equal fifth part of all accumulations which arose from the estate of Bustomdoss Mullick from the time of his death to the time of the death of Surroopchunder Mullick, the part to which the Appellant is so entitled to be held, possessed, and enjoyed by her as a Hindoo widow in the manner prescribed by Hindoo law. And that it ought to be declared, that the Appellant is entitled absolutely in her own right to all such interest and accumulations as, since the death of Surroopchunder Mullick, has or have arisen [139] from the one-fifth part of the accumulations to which she is before declared to have been entitled.

There remains the question of maintenance. It may be that the decree in its present shape, varied only in the manner which has been mentioned, decides and settles that question, whether on the ground of the Appellant having received the Rs. 10,000, given by the Will, and taken the benefit of a residence and participation in the means of worship which the decree mentions, or otherwise. If that is the effect of the decree, their Lordships are not disposed to interfere with it. They see no ground on which the Appellant can claim that interference; and, on the other hand, if the decree leaves the point open, leaves room for an application which, upon the state of the accounts as they shall ultimately appear, or otherwise, it may be reasonable to make consistently with the decree, their Lordships do not desire to interfere with that. They leave the matter as it is.

Then with regard to the costs. It is true that the decree will be to some extent altered; but, as to the main point of the contention, the appeal fails. It can hardly be said to succeed on any point, notwithstanding the slight alteration in language. And they see no reason why, in addition to the heavy costs which this lady heretofore has—their Lordships do not say improperly—occasioned to the estate, the costs of this appeal should also be thrown upon it. Their Lordships are of opinion that the costs of this appeal must be borne by the Appellant.

Does any observation occur to the Counsel upon the proposed alteration?

The Solicitor-General.—None occur to me, my Lord.

[140] Mr. Leith.—None, my Lord, to me.

The Lord Justice Knight Bruce.—The Counsel, of course, will understand that we leave the declaration as to the right of the Appellant to receive the legacy of Rs. 10,000, to have such effect as it may. There is no doubt, we suppose, that the accounts directed by the decree which we leave untouched, will bring out the whole condition of the estate, and enable the declarations to be carried into effect.

Mr. Leith.—I believe so. I believe that we take every account necessary to raise the question of maintenance.

[See *Jattendromohun Tagore v. Ganendromohun Tagore*, 1872, L.R. Ind. App. Sup. Vol. 65, 69; *Kumar Tarakeswar Roy v. Kumar Shoshi Shikhareswar*, 1883, L.R. 10, Ind. App. 60; *Sowdaminee Dossee v. Administrator-General of Bengal*, 1892, L.R. 20 Ind. App. 12; *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, 1897, L.R. 24 Ind. App. 90; *Bai Motivahoo v. Bai Mamoo bai*, 1897, L.R. 24 Ind. App. 103.]

GOBIND CHUNDER SEIN.—*Appellant*: VALENTINE RYAN, and on his decease, the Administrator-General of Bengal. — *Respondent* * [Dec. 4, 5, 1861]

On appeal from the Supreme Court at Calcutta.

The Factors Act, 5th and 6th Vict. c. 39, is extended to India, by the Act of the Indian Legislature, No. XX, of 1844.

A Banian, or agent, was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same, *malâ fide*, without the consent of his principals to a native Banker, for advances made to himself.

Held, that in order to invalidate a pledge so made, under the third section of the Act, 5th and 6th Vict., c. 39, it is necessary that the Court, or jury, should find that the lender had notice of the agent's *malâ fides*, or want of authority to pledge the goods [9 Moo. Ind. App. 165].

To establish such notice, it is sufficient to show that the circumstances attending the transaction were such as that a reasonable man of business applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *malâ fide* towards his principals [9 Moo. Ind. App. 170].

An appeal abated by the death of the Respondent. Administration with the Will annexed was granted to the Administrator-General of Bengal. On the application of the Appellant the appeal was revived against the Administrator-General, as the personal representative of the Respondent [9 Moo. Ind. App. 157].

Trover by the Appellant against one Ryan to recover the value of seventy-five bales of twist.

The case turned entirely upon the question, whether [141] a pledge made by one Denonauth Sein, as Banian, or agent, of the firm of Gouger, Jenkins, and Co., with the Appellant was protected by the operation of the Act of the Indian Legislature, No. XX, of 1844, which extended the Factors Act, 5th and 6th Vict. c. 39, to India.

The facts of the case were these:—

Ryan, in the month of August, 1857, was the master of the ship *Aurora*. The firm of Gouger and Co., of London, in that month shipped seventy-five bales of twist on board that ship, then bound from London to Calcutta, under a bill of lading, making the twist deliverable to Messrs. Gouger, Jenkins, and Co., merchants and agents of Calcutta, or their assigns, as consignees for sale. The twist was shipped on account of Messrs. A. Gouger and Co. and Mr. Stewart; and Messrs. A. Gouger and Co. forwarded the bill of lading and invoice to Messrs. A. Gouger, Jenkins, and Co., to be dealt with by them as agents for sale in the ordinary way on account of Gouger and Co. and Stewart, the owners of the goods. The *Aurora* arrived at Calcutta with the twist on board. The partners in the firm of Gouger, Jenkins, and Co. were then absent from Calcutta, and the business of the firm was transacted by their manager, Mr. Cockshott. Denonauth Sein had for some time previously been, and then was, acting as [142] Banian for the firm of Gouger, Jenkins, and Co., and so continued to act until the month of February, 1858, when he absconded.

On the 18th of February, 1858, while so acting as Banian of that firm, Mr. Cockshott handed to Denonauth Sein the bill of lading of the twist, for the purpose of enabling him to get from the ship's agents the usual delivery order to get signed, and delivery of the twist made to Messrs. Gouger, Jenkins, and Co. On the following day Denonauth Sein informed Cockshott that he had sold the twist to one Doorgapersaud, the price to be paid in cash on delivery of the goods from the godowns or warehouses of Messrs. Gouger, Jenkins, and Co., and the same to be cleared away and settled for within forty-one days, and Cockshott accordingly entered the sale in the contract-book of the firm. On the 23rd of the same month the ship's agents signed the delivery order. It appeared that on the 24th of that month, Denonauth

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessor.—The Right Hon. Sir Lawrence Peel.

Sein, borrowed from the Appellant, who was a money lender at Calcutta, the sum of Rs. 20,000, on a pledge of the bill of lading, without the knowledge of Messrs. Gouger, Jenkins, and Co., who had never authorised him to pledge or deal with the same. Denonauth Sein was at this time largely indebted to Gouger, Jenkins, and Co., and had frequently been pressed by Cockshott to reduce the amount of his debt; and it appeared that he had taken the first part of the bill of lading to the Appellant, and informed him of the sale to Doorgapersaud, and of the entry thereof in the book of the firm, and that the price had not been paid by Doorgapersaud, and that the latter had forty-one days to clear the twist from the godowns of Messrs. Gouger, Jenkins, and Co. The Appellant retained the first part of the bill of lading, [143] and advanced to Denonauth Sein, who was in want of money, the sum of Rs. 20,000, less Rs. 400, which he deducted and retained for interest, and he then received from Denonauth Sein his note of hand, and also a memorandum of deposit of the bill of lading in consideration of the advance so made. Before making the advance the Appellant enquired of Cockshott as to his authority to hand the bill of lading to Denonauth Sein, but the Appellant did not enquire of Cockshott whether Denonauth Sein had the authority of his principals, Messrs. Gouger, Jenkins, and Co., to pledge the bill of lading. Of the money so received, Denonauth Sein paid the sum of Rs. 10,000, into the Oriental Bank to his principals' account. On the 2nd of March, 1858, the Appellant applied to Ryan, by letter, for delivery of the twist, but the same having been claimed by Messrs. Gouger, Jenkins, and Co., who denied the Appellant's right to it, they desired Ryan not to give it up to him, to which he assented, on being indemnified by Messrs. Gouger, Jenkins, and Co., against the Appellant's claim. An action of trover was in consequence brought by the Appellant against Ryan in the Supreme Court at Calcutta, for the recovery of the value of the twist. The Defendant pleaded two pleas, first not guilty, and second not possessed. The Plaintiff joined issue on those pleas.

The action was tried before the Chief Justice, Sir James Colville and Sir Charles M. R. Jackson. Among other witnesses examined on behalf of the Plaintiff was the Plaintiff himself, Denonauth Sein, and Cockshott. The facts above set forth were proved at the trial, and evidence was given of the nature of the duties of a Banian. The Supreme Court found a verdict for the Plaintiff on the plea [144] of not guilty, and a verdict for the Defendant on the plea of not possessed, upon which judgment was entered up for the Defendant.

The Plaintiff obtained a rule *nisi* for a new trial, on the ground, first, that the verdict was against the evidence; and secondly, that there had been a misdirection.

After the argument upon the rule, Sir James W. Colville, on the 4th of March, 1859, delivered the judgment of the Court, as follows:—"The only pleas are not guilty, and not possessed. If the second issue is established, there can be no doubt about the conversation. Therefore, the only substantial question at the trial was, whether the Plaintiff had made out that right to the possession of the goods which entitled him to maintain the action. The goods were consigned by the ship *Aurora* to Messrs. Gouger, Jenkins, and Co., as factors, for sale, on the joint account of Messrs. Gouger and Stewart, the former only of whom is a partner in Gouger, Jenkins, and Company. The *Aurora* arrived in February, 1858, about the 18th of that month. Cockshott, who then managed the business of Gouger, Jenkins, and Co., as the constituted attorney of the two partners, both of whom were absent and in Europe, delivered to Denonauth Sein, the Banian of the firm, the bill of lading for the goods blank indorsed, but for the special purpose only of getting from the agents of the ship the usual delivery order, under which, in the ordinary course of business, the goods would have been landed and brought to the godowns of Gouger, Jenkins, and Co. Some delay took place in getting the delivery order, which was not written across the face of the bill of lading until the 22nd of February. The form of it, notwithstanding the blank indorse-[145]-ment, is, 'Deliver to Gouger, Jenkins, and Co.' And there was evidence that it is according to the usual course of business here, though neither the necessity nor the prudence of the custom is apparent, to send bills of lading, when delivery orders are required, with the blank indorsement of the holders. In the meantime, and on the 19th of February, Denonauth Sein represented to Cockshott that he had found purchasers for the seventy-five bales of twist: and thereupon the usual contract of sale with Doorgapersaud and others, was entered in the sale-book of Messrs. Gouger, Jenkins, and Co., but by

accident or design (a circumstance which seems to have occurred on other occasions) was not signed by Doorgapersaud, the declared purchaser. It however bears the initials of Cockshott in token of his approval of it. On that contract, Messrs. Gouger, Jenkins, and Co., appear to be the vendors of the goods, and the price is made payable on delivery from their godowns to the purchaser, who undertakes to clear away and settle for the goods within forty-one days after the date of the contract. It will now be convenient to state what, in our judgment, has been proved in the action touching the functions and powers of the Banian in relation to the firm of Gouger, Jenkins, and Co., particularly with reference to this transaction. It is necessary to consider the evidence in this particular case, because, as we have had occasion to remark in other cases, although there may be a general similarity, there is by no means that uniformity in the relations of Banians with their employers in this city, which would justify us in assuming any of the points in question as known usages of trade. In the present instance there seems to have been [146] no written agreement of Banianship; but upon the parol evidence, the Court at the trial, inclining where they differed, rather to Messrs. Jenkins and Cockshott than to Denonauth Sein, who was a witness open to great suspicion, came to a very clear conclusion that the relations of Gouger, Jenkins, and Co., and Denonauth Sein, might fairly be described as follows:—It was the duty of Denonauth Sein, as Banian, to find purchasers for goods imported by the house; when found they were brought by him to the partners, or other European manager, like Cockshott, of the house, and if the bargain was approved of, a formal and written contract, like that which has been put in evidence, was entered in the sale-book; Gouger, Jenkins, and Co., invariably appearing on the face of it as the sellers. This contract, in the proper and ordinary course of business, would be signed by the purchaser, though that ceremony seems, in this and in other instances, from carelessness or other cause, occasionally to have been omitted. The approval of the contract was intimated by affixing the initials of the partner or manager, in the present instance of Cockshott. The delivery would generally be from the godowns of Messrs. Gouger, Jenkins, and Co., though, for the convenience of both, or either party, it might sometimes be made from the ship's side; and after the execution of the contract and its approval by his employers, the Banian would have an implied authority, without further reference to them, to make delivery, pursuant to the terms of the contract, but not otherwise, to the purchaser. The Banian, however, was not merely an agent or servant with these duties and powers. [147] Upon all sales he received a *dustoorie*, or commission, payable by the purchaser; and for this, as for a *del credere* commission, he guaranteed the acceptance of the goods and the payment of the price by the purchaser. By reason of this guarantee he became liable, when the time fixed by the contract for taking delivery had expired, or at the end of the month within which that time fell, to be charged in account with the price of the goods sold; and if he were so charged, any rights which the vendors had against the defaulting purchaser would, if exercised at all, be exercised for his benefit. He had also a general authority to receive payment according to the terms of the contract; and if he received payment before he was so chargeable in account, it would seem that he got what benefit might arise from the intermediate use of the money. Hence arose a running account between him and the house, in which he was debited with all the proceeds of goods sold with which he had become chargeable as above-mentioned, and was credited with the value of goods purchased on this credit for the house in the bazaar, and with his other disbursements, if any, on account of the house. It is proved that, at the date of the transaction in question, Denonauth Sein was largely indebted on the balance of this account. It is not proved that he was ever in advance to the house. Inasmuch, however, as some of the arguments which have been most strongly urged against the verdict are founded on this course of dealing, it is necessary to state positively, as one of our conclusions of fact, that the house never looked or intended to look exclusively to the liability and credit of the Banian, or [148] to abandon, so far as they might be necessary for its own protection, any remedies which it might have under the contract against the purchasers, or any security which the law might give them by way of lien upon the goods. We come to this conclusion, not merely because we think that the positive testimony of Messrs. Jenkins and Cockshott is more worthy of credit than the loose evidence of Denonauth Sein and the Plaintiff on this

point, but also because the former seems to us to be consistent with and confirmed by the written contracts in the sale-book, and the whole course of dealing evidenced by them. If, then, our view of the evidence is correct, it follows that the powers and duties of Denonauth Sein, between him and his employers, with reference to these goods, after he received the Bill of lading, were, before the contract with Doorgapersaud, to get the goods landed and brought to the godown of Gouger, Jenkins, and Co., and after the approval of that contract, to deliver the goods on payment of the price, pursuant to the contract, but until such delivery to keep them in the godowns of Gouger, Jenkins, and Co., or otherwise in the actual or constructive possession. The pledge under which the Plaintiff claims title took place after the approval of the contract, and, therefore, whilst Denonauth's authority was of the latter description. He seems, some short time before, to have confided to the Plaintiff that he was in want of money, and to have come to some general understanding with him concerning advances upon the pledge of goods; but it does not, I think, very clearly appear that more than a transaction of this kind actually took place between them. The Plaintiff [149] and Denonauth Sein do not altogether agree in their evidence as to the preparation of the instrument of pledge, or the minor details of the negotiations which led to it. But it is clear that, on the 24th of February, Denonauth Sein handed the bill of lading to the Plaintiff, signed the instrument of pledge, and received, by cheque on the Bank of Bengal, Rs. 19,600, being the sum for which he pledged the goods, less Rs. 400 retained by way of discount. The letter of pledge is altogether silent about Doorgapersaud and the previous sale to him. It is, on the face of it, a pledge by the Banian, for his own purposes, of goods imported by his principals; but it is abundantly clear, on the evidence of the Plaintiff himself, that before he advanced his money he had been informed that Gouger, Jenkins, and Co. had sold these goods to Doorgapersaud, who had not paid the price of them, and was not entitled to the delivery of any for which he had not paid. The assent of Doorgapersaud to the transaction has been urged as an argument in the Plaintiff's favour; but it is obvious that the transaction has none of the essential elements of a subcontract by Doorgapersaud, in order to raise and pay the price of the goods. The advance is less than the whole price; the deposit is of the whole parcel of goods; the loan is to Denonauth Sein; he incurs a personal liability on his note of hand for it; the charges and risk of landing and the cost of storing the goods are to fall on him. The pledge imports no liability on the part of Doorgapersaud. He has nothing to do with it, except that he retains the right of clearing the goods as he can pay for them, and of converting the Plaintiff's lien on the goods into one on their [150] proceeds. Upon this state of facts, the Plaintiff at the trial rested his title (nor do we see how he could do otherwise) upon the last Factors Act, the 5th and 6th Viet. c. 39, extended to this country by Act. No. XX. of 1844. The evidence, however, involved a question which, if decided in favour of the Defendant, would, it was urged, deprive the Plaintiff of the protection of the Factors Act, even though he were otherwise entitled to it. It was insisted that there was evidence from which the Court might conclude that the alleged contract with Doorgapersaud was a mere fraudulent contrivance of the Banian, in order to gain dominion over the goods; and, therefore, that upon the authority of *Kingsford v. Merry* (26 L. J. Exch. 83), and *Higsons v. Burton*, (26 L. J. Exch. 342), the pledge of Denonauth Sein could not give a title even to a *bona fide* pledgee. This question we decided at the trial in favour of the Plaintiff, not because we had or have a very confident opinion that the sale to Doorgapersaud was a real *bona fide* transaction, but because we thought that it lay upon the Defendant to impeach it by calling Doorgapersaud, of whom both sides seemed to be afraid, and that we could not, in the absence of direct evidence, and on mere suspicion, presume that the alleged contract, which Cockshott and the Plaintiff had both at one time treated as valid, was a mere fraudulent pretence. The other questions considered at the trial were, first, whether Denonauth Sein was an agent, entrusted with the possession of the goods, or the document of title to them (the bill of lading), within the meaning of the Act; secondly, whether it did not sufficiently appear on the whole evidence, that the particular transaction was, by force of the [151] third section, excluded from the protection of the Act. On the first of these issues the burthen of proof lay on the Plaintiff; on the second, it lay on the Defendant. Upon the first of these questions, it appeared to us that Denonauth Sein was some-

thing more than a mere servant, or one of that class of agents which, in *Wood v. Rowcliffe* (6 Hare, 191), was held not to be within the scope of the last Factors Act : that he was a mercantile agent, though with powers far short of those of a general agent or factor for sale. We thought further, being such an agent, and entrusted, though for a special purpose, with the bill of lading, blank indorsed, he might, in certain circumstances, have made a pledge of the goods, which would have been protected by the Act : although it appeared, on the face of the document and other wise, that he held it only as agent for Gouger, Jenkins, and Co. ; whether we went too far in this it is unnecessary on this rule to inquire. But upon the other question we thought that the evidence brought the case within the proviso of the third section. We thought that the sale to Doorgapersaud (treating it as a real contract), and the communication of that sale to the Plaintiff before he advanced his money, put the Plaintiff into an entirely different position from that in which he might have stood had there been no such sale, or had he been ignorant of it. In the first place, it entirely negated the existence of that state of things which generally calls for the application of the Act, namely, a general agency involving a power to sell, and, therefore, under the provisions of the Act, a power to pledge, unless the non-existence of the latter power was made known to the party taking the goods. For the Plaintiff knew that if Denonauth Sein ever had a power to sell these [152] goods, that power had been expended by the sale ; and he knew more, he knew that the sale had been made, not by Denonauth Sein, but by and in the name of his principals, and that Denonauth Sein never had had the unqualified power of a factor for sale. He must be taken on his own evidence to have known further, that the goods had not been paid for ; that Doorgapersaud was not entitled to delivery or possession of them, except upon payment ; and that the agency of Denonauth Sein was limited to the retention of the goods on behalf of Gouger, Jenkins, and Co., until payment pursuant to the contract, whatever it might be, and to delivery upon such payment being made to him as agent of the seller. Yet, with the knowledge that the interest of Gouger, Jenkins, and Co. in the goods, was simply that of unpaid vendors, and that the possession of Denonauth Sein, actual or constructive, was attributed to that interest, and could not extend beyond it : he takes from Denonauth Sein a pledge which might, as in fact it did, injuriously affect the position and interest of his principals, and, in the event of his insolvency, which happened, deprive them of the price of their goods, contrary to the known course of dealing between Merchants and their Banians. The case might be stronger if the Plaintiff were fixed with knowledge of the terms of the written contract, and, in an ordinary case, we should have held that, by what he knew, he was so put upon an inquiry into those terms as to be fixed with constructive notice of them. But, inasmuch as the Factors Act proceeds very much upon the principle of 'no questions asked' (a principle which may have been wisely introduced so far into commercial transactions, but which is certainly not found to be conducive to [153] honesty and fair dealing in the general concerns of mankind), we will not push the knowledge of the Plaintiff, actual or constructive, to this extent. It seems to us, however, that upon his own admissions of what he knew, the Court at the trial, rightly came to the conclusion that the circumstances were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonauth Sein had not authority to make the pledge, if not also that he was acting *mala fide* in respect thereof, against his principals. Some exception was taken, on the argument of the rule to this application of Lord Tenterden's ruling, in *Evans v. Trueman* (1 Mood. and Rob. 10), which, it was said, was a case that arose under the earlier Statute, the 6th Geo. IV. c. 94. But it is to be observed that the ruling, modified as we have modified it, is adopted by Lord St. Leonards in his celebrated judgment in *Navulshaw v. Brownrigg* (2 De G. Mac. and Gor. 452), as a proper mode of leaving to the jury the question of notice, under the 5th and 6th Vict. c. 39. It remains to consider a few of the objections, which on the rule have been urged to the finding of the Court, and have not already been incidentally noticed. It has been urged strongly that, inasmuch as Rs. 19,600, were actually advanced and paid, there would not be *mala fides*. But an actual advance cannot be conclusive of the question of *bona fides* ; since, if so, there would be no necessity expressly to require *bona fides* on the part of the pledge, by the third section of an Act which professes only to protect transactions in which money has been actually

advanced. Again, *bona fides* in the pledgee is not alone sufficient. It is necessary that there should also be (see *Narulshaw* [154] v. *Brownrigg*, p. 450) "no notice that the agent is making the contract, either *mala fide* or beyond his authority." Again, it is said, there was no evidence of a lien on the goods. If this is meant of the existence of the vendor's lien under the contract, it is contradicted by the contract itself. But it is argued that the lien was waived by allowing Denonauth Sein to deliver without further consent from his principals. His authority, however, was only to deliver upon payment of the price. The lien would not the less subsist, even if he had been entrusted with the possession of the goods, since he can only have been entrusted with them in order to work out that lien for his principals, to whom it belonged. Had the goods been brought into their godowns, as in the ordinary course of business they ought to have been, he would not have had the possession of them; he would have had merely the power of taking them out of those godowns, and delivering them as paid for. Then, it is said, the Plaintiff had no notice of any such lien. But surely this is a fallacy. He knew that Denonauth Sein held the goods only as agent for Gouger, Jenkins, and Co., and that they had been sold to Doorgapersaud, who was not entitled to receive them until he had paid for them. This pledge, if a pledge of anything, was of the vendor's interest in the goods, that is, of the lien, until payment and delivery to Doorgapersaud, and of the proceeds afterwards. Again, it is argued that the lien was waived either by reason of the course of dealing between the house and the Banian, or by reason of the admission of Cockshott, touching the application of Rs. 10,000, part of the sum advanced by the Plaintiff. Now, one does not see how the lien could be waived except in [155] favour of the purchaser, and it is clear that, at the time of the pledge, Doorgapersaud neither was, nor represented himself to be, entitled to the possession of the goods. If it be meant that the lien was transferred to Denonauth Sein, the answer is that it was transferred to him only as agent, and for the benefit of his employers. The right to charge the Banian in account, under his guarantee, does not seem to us to affect this question, for that right could not accrue until the expiration of the forty days fixed for taking delivery, at which time either the contract must have been performed by delivery on the one hand and payment through the Banian and agent on the other, or the purchaser must have failed in the performance of the contract. And, in the particular case, the right was never exercised. Again, nothing in our judgment turn upon the expression of Cockshott, of which much more has been made on the rule than was made at the trial, in his examination *de bene esse*, to the effect that when the account put in was acknowledged, he knew that Rs. 10,000 of the money had been applied in purchase of the Bills of the Oriental Bank. The time when the account was acknowledged is not stated, but it was obviously later than that at which the account was made out; still later than that at which the bill became due. The case as to the Rs. 10,000, is simply this:—Denonauth Sein, when bound to lay out that sum for his principals out of other moneys due from him, obtains that and more by means of an unauthorized and fraudulent pledge of these goods. The result to his principals is the same. If the pledge avails against them, they, to the extent of it, have been defrauded of the price of their goods, whether any part of the [156] money went to reduce the balance due from the Banian on other transactions, or not. Lastly, on this question of lien, the Plaintiff's Counsel invoked the doctrine of *Beardman v. Sill* (1 Camp. 410 n.), and argued that the Defendant, not having set up a claim of lien originally, but having contended that the sale was a fiction, could not afterwards insist upon it. But there is no room here for the application of that doctrine. The Defendant does not now rest the defence as upon a subsisting lien. The lien was a circumstance which, if the contract was real, existed at the time of the pledge. When Doorgapersaud repudiated, or failed to complete his contract, the Defendant's property in the goods reverted. He is precluded from resisting the Plaintiff's title under the Factors Act, by insisting on any circumstance found by the Court to have existed at the time of the pledge. We have already incidentally dealt with the argument which treats the transaction as a pledge by or with the concurrence of the purchaser in order to raise the price of the goods. Upon the whole, then, no ground has been laid before us which induces us to disturb the verdict for the Defendant; and I need not say that it is a great satisfaction to Mr. Justice

Jackson and myself, who alone tried the cause at *Nisi Prius*, that the rule has been argued before a full Court, and that we are supported in our view of the case by Mr. Justice Wells, whose only doubt is, whether upon the evidence, Denonauth Sein was an agent entrusted with the bill of lading within the meaning of the Act. That question, however, we have treated as not open on this rule."

The appeal was from this judgment.

After the admittance of the appeal, Ryan died, [157] whereby the appeal became abated. Letters of administration with the Will annexed of Ryan were granted by the Ecclesiastical side of the Supreme Court at Calcutta to the Respondent, the Administrator-General of Bengal.

(June 14, 1861 *) The Appellant now moved to revive the appeal against the Administrator-General, as the legal personal representative of Ryan.

Mr. W. Field, appeared in support of the application. By an Order in Council it was directed that the appeal be revived against the Administrator-General of Bengal for the time being, and that the appeal be put in the same plight and condition as it was before the death of Ryan.

The appeal, being thus revived, came on for hearing.

Mr. Bovill, Q.C., and Mr. W. Field, for the Appellant.—Our contention is, that Denonauth Sein had authority from Gouger, Jenkins, and Co. to pledge the bill of lading and goods. He was the Banian, or agent of the firm, exercising powers similar to a factor in this country, and entrusted by his firm with the bill of lading in blank, and his act comes within the meaning of the first section of the Factors Act, 5th and 6th Viet. c. 39, which Statute was extended to India by the Act of the Indian Legislature, No. XX. of 1844, [158] and the pledge was valid within that section, and did not fall within the third section of the Statute. The evidence does not establish *mala fides* on the part of Denonauth Sein, the transfer of the bill of lading is not disputed, neither is any objection taken that full value was not given, nor that the Appellant had notice of any want of authority, or *mala fides* on his part which is necessary to bring the case within the third section. How, then, can it be treated as a fraud? The true rule is to be found in *Evans v. Trueman* (1 Mood. and Rob., 10). That case arose under the Statute, 4th Geo. IV. c. 83, and Lord Tenterden, referring to the Statute 6th Geo. IV. c. 94 says, "The expression in the Statute is, that a party is to be entitled to its protection if he shall not have notice by the documents, or otherwise, that the pledger was not the actual and *bona fide* owner of the goods pledged: a person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so; knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this Statute; slight suspicion, I think, will not." These principles are recognized by Lord St. Leonards in *Navulshaw v. Brownrigg* (2 De G. Mac. and Gor., 452), which case turned upon the Statute, 5th and 6th Viet. c. 39, the Statute in question: there his Lordship, referring to *Evans v. Trueman*, observes, "It is necessary, therefore, even according to this case, to fix a man with knowledge of the want of authority, in order to take from him the benefit of the Statute." The same rule prevails with respect to [159] Bills of Exchange, *Backhouse v. Harrison* (5 Barn. and Adol., 1098), *Goodman v. Harvey* (4 Adol. and Ell. 870). *The Bank of Bengal v. Radakisser Mitter* (3 Moore's Ind. App. Cases, 19), *Wilkins v. Jadis* (2 Barn. and Adol. 188). Gross negligence may, it is true, be evidence of *mala fides*. *Raphael v. The Bank of England* (17 C. Ben. Rep. 161).—[The Lord Justice Knight Bruce: Is there here anything but a question of fact? You accept the case of *Navulshaw v. Brownrigg* as law, and that case the Judges in the Court below relied upon in their judgment against you.] Denonauth Sein was a Banian and acted for other persons, as well as the firm of Gouger and Co., and was subject to a monthly account with his principals, therefore, independently of the Act, he had power to pledge the bill of lading, as it was within the general scope of his

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessor.—The Right Hon. Sir Lawrence Peel.

authority, *Prescott v. Flinn* (9 Bingh., 19), Story on Agency, sec. 26. It may be urged that the evidence of usage as respects this last position is not strong, but one or two instances of usage is enough, Holt's Nisi Prius Rep., p. 270. Moreover, it must be taken that the pledge of the bill of lading by Denonauth Sein with the Appellant was ratified by Gouger, Jenkins, and Co. That firm accepted the Rs. 10,000, part of the Rs. 19,600 received by Denonauth Sein with knowledge of the manner in which the money was procured.

The Solicitor-General (Sir R. Palmer), Mr. Leith, and Mr. Honyman, for the Respondent.—The Court below upon the evidence rightly held that the case came within the third section of the Factors Act for India, No. XX. of 1844, which prevents the [160] Appellant acquiring any title to the goods sued for. Denonauth Sein was not an agent entrusted with the bill of lading within the true meaning of that Act. The evidence establishes the fact, that he never was authorized by Messrs. Gouger, Jenkins, and Co. to pledge the bill of lading in question. The whole question depends upon evidence which has been sifted and rightly applied by the Court below. It cannot be urged with any success, that because Denonauth Sein was indebted to his principals and paid in the sum of Rs. 10,000, to their account, that it amounted to a ratification of his act of pledging, which we submit was *mala fides*.

Their Lordships' judgment was reserved, and now pronounced by

The Lord Justice Knight Bruce (Dec. 21, 1861).—This was an action of trover, brought in the Supreme Court at Calcutta, to recover the value of certain bales of twist. The pleas were, not guilty and not possessed. The original Defendant was one Ryan, Master of the ship *Aurora*—he is now deceased—and represented by the nominal Defendant; but as the action was defended on the indemnity by Messrs. Gouger, Jenkins, and Co., Merchants at Calcutta, it will be convenient to treat them as the Respondents. The case was tried before the then Chief Justice Sir James W. Colville, and Sir Charles M. Jackson; they found a verdict for the Defendants, and subsequently discharged a rule for a new trial which had been applied for on the grounds of misdirection, and of the verdict being against the evidence. Judgment was entered up, and against this verdict and judgment the present appeal has been brought.

[161] The undisputed facts of the case are substantially as follows:—The goods in question were shipped in London by Alfred Gouger on behalf of himself and a Mr. Stewart, and consigned to Messrs. Gouger, Jenkins, and Co.; the bill of lading was forwarded to them. At the time of the arrival neither Gouger nor Jenkins was at Calcutta, and the business of their firm was being carried on by James Tobin Cockshott, under a power of attorney. The firm had been in the habit of employing a Banian of the name of Denonauth Sein; to this man Cockshott gave the bill of lading indorsed in blank, for the purpose of procuring a delivery order, and the delivery of the goods to the firm; but it was also part of the ordinary employment of Denonauth Sein, which applied to the present transaction, to procure a purchaser, and when he had so done, he was to report the name of the buyer and the terms to his principals for their assent to the contract. If they agreed, their initials were written upon it, which being done the Banian had authority to deliver the goods to the purchaser and receive the price. Between the Banian and his principals there was an account current, which was balanced at the end of the month; he was then debited for the contract price of the goods sold, and credited for the sums which he paid to the house; he received his "dustoree," or commission, from the purchaser.

In the present case he contracted for the sale of the goods to one Doorgapersaud, and by the terms of the contract the goods were to be cleared away and settled for within forty-one days after landing days, from the date of the contract, the 19th of February, 1848. To this contract Cockshott assented, and affixed his initials, and thenceforward Denonauth [162] Sein became entrusted, as between himself and his employers, with the bill of lading for the purpose of delivering the goods on the terms of the contract; they were by these terms made deliverable on payment in cash.

In this state of things, Denonauth Sein and Doorgapersaud went to the Appellant, a Banker and money-lender. According to the evidence, they represented to him that the latter had made a contract for the twist, and Denonauth Sein produced the bill of lading; it was stated that Doorgapersaud could not pay the whole amount, between

Rs. 23,000 and Rs. 24,000, in one sum, and that they (the two) wanted an advance. It was finally arranged that the Appellant should advance to Denonauth Sein, Rs. 20,000, less Rs. 400, deducted for discount. Denonauth Sein gave him his own promissory note for the amount, and signed a letter prepared by him, which stated the fact of the delivery to him of the bill of lading, and gave him authority to sell for his own benefit the goods in case of non-payment within one month and a half, refunding any excess that might remain after deducting the principal and interest, and other charges and making Denonauth Sein liable to him for any deficiency on the sale. Upon the authority of this instrument the delivery of the goods was demanded by the Appellant, and refused upon the indemnity of the Respondents; and the present action brought.

It is stated that Rs. 23,600 were paid to Denonauth Sein, and of these he paid Rs. 10,000 to the Oriental Bank on account of the Respondents, in obedience to a previous order, and had credit from them for the amount in the account current between them, in [163] which he was at the time, and still remains, largely indebted to them in respect of previous sales and other transactions on their behalf.

Upon the trial some evidence was given as to the nature of Denonauth Sein's employment, and the character and extent of his agency. The Court found that he received the bill of lading for the especial purpose of getting delivery of the goods, and that before the delivery order given, but after the receipt of the bill of lading, he informed his employers of the sale, and that they approved of the purchaser; that he was not strictly a Factor, but more than a mere servant—an agent to find purchasers, and, under some circumstances, to guarantee the payment; that the bill of lading was allowed by Cockshott to remain in his hands to obtain delivery of the goods, and that he had full authority to give delivery to purchasers on payment of the price; that he was, in the transaction in question, an agent within the meaning of the last Factors Act; that it must be taken on the evidence that the contract of sale with Doorgapersaud was not fraudulent; and that the only question remaining was, whether the pledge to the Appellant was protected by that Act—as to which the Court thought that the facts raised the inference that there was *mala fides* on the part of Denonauth Sein in dealing as he had done with the goods, and that the Appellant had notice that the pledge was without authority from the Respondents, and not *bona fide*. They therefore, held that the transaction did not come within the protection of the Factors Act, and that the verdict must be for the Respondents.

On this finding the rule was obtained which we have stated above, and, after argument, discharged, [164] upon the grounds stated in a very able and learned judgment delivered by Sir James W. Colvile, the correctness of which their Lordships are now to consider. In doing so it may be convenient, in the first place, to dispose of the question of a misdirection; and this they will do very shortly; for it seems to them that there is not the slightest ground for this part of the rule.

The question which the learned Judges made the cardinal one in the case, was, whether the circumstances were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonauth Sein had not authority to make the pledge, if not, also, that he was acting *mala fide* in respect thereof against his principals.

This is precisely the way in which the question was put to the jury in a case under the first Factors Act, 6 Geo. IV., c. 94, *Evans v. Trueman* (1 Moo. and R. 10); and this was unquestioned at the time, though the case came before the Court on other point; this mode of leaving to the jury the question of notice was approved of by Lord St. Leonards, in *Navulshaw v. Brownrigg* (2 De G. Mac. and Gor., 452), as a proper mode under the last Factors Act, 5th and 6th Vict., c. 39; on which, in substance, the present case depends. And their Lordships entirely concur in the principle established by these authorities. The question so put gives full effect, on the one hand, to the large words of the first section of the Act, and effectuates the object of protecting pledges and exchanges of securities made *bona fide* by agents entrusted with them, in consideration of advances made in respect thereof; and [165] on the other hand, it gives proper, and no more than proper, effect to the third section, which limits such protection to loans, advances, and exchanges made *bona fide*, and without notice, either that the agent making them has not authority to make the same, or is acting *mala fide* in respect thereof against the owners of the

goods represented by the document pledged. It makes the decision dependent not at all on mere suspicion, on the want of inquiry or of reasonable caution in the party advancing on the pledge, nor yet on the mere want of good faith in the agent, of which the party advancing is ignorant: all these, and such matters as these, which are in themselves inconclusive, and tend to embarrass the dealing with negotiable instruments, may be evidence; but the Tribunal deciding the issue, whether the jury, or, as there, the Judges acting as a jury, must, in order to bring the case within the third, and take it out of the first section, categorically find the facts of want of good faith, and of notice to the lender of want of authority in the agent, or that he is acting *mala fide* in the transaction against his principal. The Statute is silent as to the grounds on which the conclusion is to be arrived at; that is left to the ordinary principles of evidence. But, where the fact is so found, it would be as much against mere honesty as against the interests of commerce, properly considered, to afford any protection to the transaction. This objection, therefore, to the judgment entirely fails.

It remains to consider whether the verdict was against the evidence, and in doing so it will be necessary to introduce some additional facts, which did not find their place in the previous summary.

[166] Upon a careful consideration of all the circumstances, and after attention given to the arguments of the Appellant's Counsel, their Lordships are of opinion, that the Judges below have drawn the only right conclusion, that to which their Lordships would have been themselves led, and that the Court has shown great caution in not pressing its inferences as far, perhaps, against the Appellant as in strict justice might have been warranted.

The Judges say, that where there was a conflict of testimony between the Appellant and Denonauth Sein on the one hand, and Jenkins and Cockshott on the other, they had been disposed to credit the latter rather than the former. Now, it being assumed that Denonauth Sein was an agent entrusted with the document of title to the goods, so as to bring the case within the first section of the Statute, the advance which the Appellant made will still not be protected unless made *bona fide*, and without notice that the agent making the contract had not authority to make the same, or was acting *mala fide* against the owner. The Appellant must in the first place have acted *bona fide* in making the advance; and, secondly, he must have been without notice of want of authority in the agent; or, thirdly, of the *mala fides* in him against the owner. It appears to their Lordships that the evidence establishes all these three propositions.

As to the first, they assume that the Appellant really advanced the large sum of Rs. 19,600, but this alone will not establish his *bona fides*: he did so on advantageous terms to himself (whose business it was to lend money), in respect of the rate of discount and interest, and of perfect security, if the transaction should remain unimpeached. But beyond [167] this it was essential to his *bona fides* that he should believe the representations of Denonauth Sein and Doorgapersaud; and if he believed these, he must have believed also that the goods were actually sold to the latter, and were to be cleared and settled for in forty-one days: yet the terms of his advance were that he might, when he pleased, remove the goods at the cost of Denonauth Sein to his own godowns, and at the end of a month and fifteen days sell them, if the advance were not then repaid with all charges. Now, he says, he did not come to this agreement without cautiously inquiring as to the power under which Cockshott, the apparent principal for the time being of Denonauth Sein, was said to be acting, and that he went to Cockshott for the purpose of seeing it, and did so. If he had been acting *bona fide*, towards Cockshott, it seems to us that, exercising this somewhat superabundant caution as to the power, it is incredible that when in Cockshott's presence he should have made no inquiry or communication respecting this particular transaction; yet their Lordships think it perfectly clear upon the evidence that he did not. When it is considered how conclusive that communication, one way or the other, would have been, they cannot doubt that it would have been made by any one about to enter into such a transaction *bona fide*, nor that it would have been stated, if it had been made; but neither does the Appellant affirm it in his evidence nor was Cockshott cross-examined to it; and he, having been examined on interrogatories before the trial, and not being at the trial, his silence on the subject

is entirely consistent with the same conclusion. If the transaction had been *bona fide* on the part of the Appellant, the communication, as we have said, [168] would naturally have been made, but if it were *mala fide*, it certainly would not; because it must have been known that it would put an end to the transaction at once, and that Denonauth Sein would not have been allowed to pledge goods which were already under contract of sale. This circumstance, however, strong as it is, does not stand alone. Denonauth Sein comes to the Appellant, not armed with all the documents which are stated to be usually in the hands of an agent authorised to pledge, and without excuse for their absence; and he comes, too, as an agent who has already confessedly exhausted his authority in respect of the goods, by the contract which he has made for the sale of them, and who seeks to pledge them on terms inconsistent with the terms of that contract. The presence and implied assent of the purchaser, so far from lessening these difficulties, was of a nature only to increase the suspicions attaching to the transaction.

The evidence enables their Lordships to deal with the two remaining questions at the same time. Had the Appellant notice that Denonauth Sein was without authority to make the contract of pledge, or that he was acting *mala fide* against his principals? They think that the evidence warrants an answer in the affirmative as to both. First, it is clear that in fact he had no authority express as to this transaction, or to be implied from any previous course of dealing; and if in truth he had been allowed to pledge more frequently, or with greater similarity of circumstances to those of the transaction in question than the evidence here discloses, there is nothing to show that the Appellant was aware of this, or acted on the credit of it. Secondly, it is clear that in fact [169] Denonauth Sein was acting *mala fide* towards his principals; the account current shows that he was largely indebted to them on the balance of prior transactions: he was bound, in order to maintain his post and credit with them, to make a payment for them at that time, and he sought to do this fraudulently by raising money on their own goods, which he would have to account for at a later period, and so forestalling the proceeds of them.

But of course these facts, though necessary as a basis, are not in themselves sufficient, without notice of them to the Appellant. Whether he had such notice must be judged as any other question of fact. To adopt the question on which the Judges made their decision turn, were the circumstances such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonauth Sein had not authority to make the pledge, or that he was acting *mala fide* in respect thereof against his principals? In answering this it must be remembered again that the Statute, though it insists on a conclusion, prescribes nothing as to the nature of the evidence on which it is to be founded, or the manner in which the inquiry is to be conducted. The question must be dealt with as any other question of fact, by a due consideration of all the circumstances. Then it may be taken here as if Denonauth Sein had said, "I am the Banian of the Respondents; I hold in my hand the bill of lading of goods consigned to them, but not delivered. I have contracted to sell them to Doorgapersaud, who stands now beside me. My principals have sanctioned the sale, and he is to pay for them and clear them away in forty-one days. Now, I desire you to [170] advance me money on these goods; I will give you my own promissory note for the amount, and I will deposit the bill of lading indorsed with you; you may take the goods at my expense at once to your own godowns, and if I do not repay you at a period exceeding the date at which he is to clear and pay for them, you may sell them and pay yourself with interest, and all charges; and meantime you may deduct a large discount from the sum advanced"; and this offer is accepted, after a visit to Cockshott to see his power of attorney, and not a word said upon it to him at the interview.

The Appellant was a man of business; he had been himself a Banian: he either knew much of Denonauth Sein and his dealings, or little—if much, it is clear upon the evidence, and very material, that he had never known him, as agent of the Respondents, deal with their goods in a similar way under similar circumstances—if little, the more caution was necessary. He did apply his mind to the matter, for he required personal satisfaction as to Cockshott's power. What then must reasonable men, in turn applying their minds to these same circumstances, believe to have been the clear conviction in the Appellant's mind as to Denonauth Sein's authority or

honesty? Their Lordships think that there is but one answer to this, that he must have felt perfectly certain that Denonauth Sein was acting without authority; if so, it is unnecessary to say whether with *mala fides*, though upon this they do not themselves entertain any doubt.

It remains only to notice a circumstance not very strongly relied on by the Appellant's Counsel, nor, perhaps, strictly relevant to the issues in the cause, [171] but yet which it will be better to dispose of. It appears that in the account current between the Respondents and Denonauth Sein for February, the month in which this transaction took place, the latter is credited with the sum of Rs. 10,000, paid to the Oriental Bank for the former. These Rs. 10,000 have been taken, in the argument, and are so now, to have been a portion of the Rs. 19,600, advanced by the Appellant. It was urged that the accepting the Rs. 10,000, with a knowledge how they were procured (a fact which stands not quite clear upon the evidence), was a ratification of the dealing between the Appellant and Denonauth Sein. Their Lordships do not assent to this argument. The sale of the goods to Doorgapersaud not being to be completed until the month of March, would not come into the account between the Respondents and Denonauth Sein until the end of that month; and in the account then to be made up if it had been regularly completed, he would have been debited with the price for which they had been sold and credited with the payment of that price to them. Meantime he being largely in their debt, and having been ordered to make a payment for them in respect of some prior dealings for them, had raised the money by this fraudulent pledge of their goods. Though he had so done, yet he was the principal debtor for this money to the Appellant on his own promissory note, and if everything had gone to its regular end, the Respondents would have received nothing more from him than they were entitled to. They have now received much less. As the payment was actually made to the Oriental Bank before it appeared in the account, and in pursuance of a previous order, the Respondents could neither refuse to give Denonauth [172] Sein credit for it, nor could they be called on to repay the money to the Appellant; any more than if, without the Collateral security of the pledge, it had been advanced on the personal security only of Denonauth Sein. Their conduct, therefore, does not amount to a ratification of the pledge.

On all grounds, therefore, their Lordships will humbly advise Her Majesty that the judgment below should be affirmed, and the appeal dismissed with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, b. *Abatement and Revivor*; tit. INDIA, 4. *APPLICABILITY OF ENGLISH LAWS*; tit. PRINCIPAL AND AGENT; I.E. 3 *EFFECTS OF FACTORS ACTS*, a. S.C. 15 Moo. P.C. 230; 8 Jur. (N.S.) 343; 5 L.T. 559; 10 W.R. 155. See *Factors Act*, 1889 (52 and 53 Vict. c. 45), s. 4. As to revivor of appeal, cf. *Stace v. Griffith*, 1869, 6 Moo. P.C. (N.S.), 18.]

THE QUEEN v. JOYKISSEN MOOKERJEE * [July, 4, 5, 16, 1862].

On an application for leave to appeal from the sentence of the Sudder Nizamut Adawlut (the chief native criminal Court of appeal in Bengal), the Judicial Committee, though of opinion that justice had not been done in the Court below, declined to determine the question of the prerogative of the Crown to admit in appeal in a criminal matter, and to advise such admission, on the ground that such course might be detrimental to the general administration of criminal justice in Her Majesty's Colonial and foreign possessions; but suggested an application by the Petitioner to the executive authorities

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

for relief, with an intimation of their Lordships' opinion of the hardship and injustice of the particular case.

This was a special petition for leave to appeal against the judgment of the Sudder Nizamut Adawlut (the native criminal Court of appeal in Bengal), affirming a conviction of the Petitioner, Joykissen Mookerjee, by the Sessions Court of the Zillah Hooghly, on the charge of knowingly and fraudulently uttering [173] a forged and fabricated deed, and the sentence pronounced upon him of imprisonment for five years, with hard labour, the latter commutable for a fine of Rs. 10,000.

The Petitioner, a prisoner in the jail at Alipore, in the Province of Bengal, was a Hindoo inhabitant of Bengal, and was committed with one Pitumber Bose, on the 23rd of February, 1861, by Mr. J. Grant, a Magistrate of Serampore, for trial before the Sessions Court of the Zillah of Hooghly, upon the two following counts of charges. First, for fraudulently and injuriously fabricating a written deed, an Izarah Pottah, dated 18th Assar, 1267, B.S., for one-third of Moklar, for ten years, at a yearly rent of Rs. 902, purporting to have been executed by Meghlal Dhur and Doololl Dhur for selves and co-shareholders of Pitumber Bose; and secondly, for knowingly and fraudulently uttering the above fabricated deed, by presenting it for registration at the Registrar's office, at Serampore, on the 2nd July, 1860.

The Sessions Court of Hooghly, before which the Petitioner and Pitumber Bose were committed for trial, was established by Ben. Reg. IX. of 1793, entitled, "A Regulation for re-enacting, with alterations and modifications, the Regulations passed by the Governor-General in Council on the 3rd December, 1790, and subsequent dates, for the apprehension and trial of persons charged with crimes or misdemeanors."

The trial of the Petitioner and Pitumber Bose upon the above charges, took place on the 30th of March, 1861, and subsequent days, before J. Lillie, Esq., [174] the Additional Sessions Judge of Hooghly, and Moulvee Fyezoollah, the then Mahomedan law officer of the Sessions Court of the Zillah Hooghly.

It appeared from the statements in the petition, that at the trial, the case for the prosecution upon the above charges having been opened, witnesses examined, and the whole evidence for the prosecution taken, when the Counsel for the prosecution applied to the presiding Judge to be allowed to amend the Record, technically called "the calendar," by adding to it a count charging the Petitioner with having caused, or procured, the forgery of the Pottah in question, that the Judge thereupon sent the calendar to the committing Magistrate with an order directing him to amend the same by adding such a count, and to recommit the Petitioner for trial upon such additional charge. That the Magistrate, in compliance with such order, amended the calendar by adding the following count, or charge, namely, "for causing or procuring the forgery of the Pottah" above described, and returned the calendar so amended to the Court of the Sessions Judge. That during the interval between the time of the calendar being sent to the Magistrate for amendment, and of its being returned to the Court of the Sessions Judge, the Petitioner remained in the Court of the Sessions Judge, the Petitioner never having been taken before the Magistrate on such additional charge; that neither the prosecutor nor any of his witnesses attended before the Magistrate to prefer such charge; nor was the Petitioner himself examined before the Magistrate on such charge or called upon to answer the same; nor was any opportunity given to him to produce [175] evidence before the Magistrate to rebut that charge; and that the Petitioner was not in fact committed for trial, or held to bail upon such charge, or in any manner charged or indicted thereon, save only by the addition thereof to the calendar during his absence, as before stated. That after the calendar with the additional count had been so returned to the Court of the Sessions Judge, the Petitioner was called upon to plead, and pleaded "not guilty" to all the counts of the amended calendar. And, that after the Petitioner had so pleaded no further witnesses were examined for the prosecution, but the Petitioner and Pitumber Bose were allowed to proceed to examine their witnesses and to put in their written defence, to which the Counsel for the prosecution replied; and that on the 4th of May, 1861, the Mahomedan law officer delivered his Futwa, whereby he stated his opinion that the first and second counts of the calendar had been established against the prisoner, Pitumber Bose, but not against the Petitioner, and that the third, or additional count, had been

established against the Petitioner, whereupon, on the 6th of May, 1861, the Session Judge convicted the prisoner, Pitumber Bose, on the first and second counts of the amended calendar, but disapproving of the finding of the Mahomedan law officer on the third or additional count, proceeded, in accordance with the provisions of section 53 of Reg. IX. of 1793 of the Bengal Code, to complete the trial, and transmitted to the Nizamut Adawlut a copy of all the proceedings, and the Futwa of the law officer, with a separate letter stating the grounds of his disapproval, and awaited the sentence of the Nizamut Adawlut: and that at the same time the prisoner, Pitumber Bose, appealed to [176] the Nizamut Adawlut from the sentence passed upon him by the Sessions Judge. That upon the case so transmitted coming on for trial before the Nizamut Adawlut, the Petitioner's Counsel took objection to the proceedings of the Sessions Judge in sending back the calendar to the Magistrate with orders to add another charge against the Petitioner and proceeding to try the charge upon the same Record with those originally preferred against the Petitioner and Pitumber Bose, and contended that as the trial had been held and completed on the third or additional charge without any evidence having been called for by the prosecutor upon that charge the Petitioner was entitled to be acquitted thereon, but the Nizamut Adawlut disallowed the objection, and on the 9th of July, 1861, passed the following order:—"We remit the Record to the Sessions Judge, with directions that he will retake the evidence of the witnesses as to the third count in proper legal form, and having conducted the whole trial on that count with the assistance of the law officer who sat with him, if he be still there, and if not with his successor, pass on the prisoner, No. 1, Joykissen Mookerjee, whatever sentence may eventually seem just and proper. As, however, the charge against the prisoner, No. 1, cannot be substantiated unless the sentence passed by the Sessions Judge against prisoner, No. 2, who has appealed, be confirmed, the Court proposes to hear and determine that appeal before the order relating to prisoner, No. 1, be allowed to issue." That the Petitioner applied to the Sudder Nizamut Adawlut to review this order, but that Court rejected such application, and resolved that the order of the 9th of July, 1861, should issue in due course: and the Sudder Nizamut Adawlut [177] after hearing the appeal of Pitumber Bose, convicted him of the crime of uttering a forged Pottah, knowing it to be forged, and sentenced him to be imprisoned with hard labour and irons for five years.

The Petitioner being thus compelled to undergo his trial upon the charge of having caused or procured the forgery of the Pottah, resolved to avail himself of the privilege conferred by Reg. VI. of 1832, of the Bengal Code upon all persons professing the Mahomedan faith, which by the 5th section declares, "that any person not professing the Mahomedan faith, when brought to trial on a commitment for an offence cognizable under the general Regulations, may claim to be exempted from trial under the provisions of the Mahomedan Criminal Code; and in such case the Commissioner of Circuit or Judge of Sessions presiding on the trial shall comply with such requisition, and shall proceed in one of the three modes referred to in section 4 of this Regulation, at the same time dispensing with the Futwa of the Mahomedan law officer;" and the Petitioner accordingly, on the 13th of November, 1861, filed his petition in the Court of the Sessions Judge of Hooghly, claiming to be exempted from trial under the provisions of the Mahomedan Criminal Code, on his then approaching trial upon the charge of having caused or procured the forgery of a Pottah, the same being an offence cognizable under cl. 3, sec. 4, Reg. II. of 1807, of the Bengal Code. The Petitioner then set forth the particulars of an unsuccessful application made by him to the Sudder Nizamut Adawlut to modify their order of the 9th of July, 1861, and to leave it open to the Sessions Judge to use his own discretion as to the mode of proceeding to be adopted at the trial of [178] the Petitioner; and further stated that, Moulvee Fyezoollah, the Mahomedan law officer belonging to the Nizamut Court, and who had assisted at the previous trial of the Petitioner, had been removed, and was no longer attached to that Court; and that thereupon the Sessions Judge had obtained an order from the Government, requiring that Mahomedan law officer to repair again to Hooghly, for the purpose of sitting with the Sessions Judge, at the re-trial of the Petitioner, and had moreover received a letter from the Registrar of the Nizamut Adawlut, informing him that the Petitioner's claim to exemption was too late, that it should have been made before the prisoner was arraigned on

the charge for which he was under trial, and directing that the Court's instructions (passed in accordance with their resolution of the 9th July, 1861), "should be obeyed to the letter." That accordingly, on the 11th of December, 1861, the Petitioner was brought to trial before the Sessions Judge of Hooghly and the same law officer Moulvee Fyezoollah; but before any step was taken in the trial the Petitioner filed a further petition renewing his claim under Reg. VI. of 1832 to be exempt from trial, under the provisions of the Mahomedan Criminal Code, on the charge of causing or procuring the forgery of the Pottah, and praying that his trial might be proceeded with in one of the three modes referred to in sec. 4 of the Regulation, upon which the Sessions Judge recorded the following order: "The prayer of the petition, being contrary to the express instructions of the Nizamut Adawlut, conveyed to me in the letter of their Register, dated the 24th of October last, is rejected." That the trial of the Petitioner upon the [179] charge of having caused or procured the forgery of the Pottah, thereupon proceeded before the Sessions Judge of Hooghly and Fyezoollah, the former law officer of the Court, under protest from the Petitioner, that the Court so constituted had no jurisdiction to try the Petitioner, but witnesses having been examined, both for the prosecution and defence, Fyezoollah delivered his Futwa on the 23rd of December, 1861, finding the Petitioner guilty of the charge preferred against him; but that the Sessions Judge of Hooghly, being of opinion that the Petitioner was not guilty of the offence with which he was charged, transmitted the proceedings to the Sudder Nizamut Adawlut, according to sect. 53, of Reg. IX. of 1793, of the Bengal Code, together with a letter, stating his reasons for disapproving of the finding of Fyezoollah. The case thus referred by the Sessions Judge came on for hearing before the Sudder Nizamut Adawlut, on the 7th of February, 1862, when the Petitioner's Counsel, before proceeding to argue the case upon the merits, raised several preliminary objections, and, amongst others, the following:—First, that the Sessions Judge exceeded his powers in ordering the committing Magistrate to alter the calendar, and to commit or re-commit the Petitioner on a new and substantive charge. Second, that the Judge, when he ordered the re-commitment of the Petitioner, did not properly follow the course of proceedings, directed by the Circular Order of the Sudder Court, No. 70, dated the 14th of November, 1851, under which he professed to be acting, the effect of which was to embarrass the Petitioner in his defence, inasmuch as two distinct trials were proceeding at one and the same time, [180] the first on the two original counts, and the second on the third or additional count, embracing a new and substantive charge, and that the Petitioner was deprived of the opportunity of claiming his right to exemption from trial, under the Mahomedan Criminal Code, on the third or additional count. Third, that the Petitioner was never properly charged before the Magistrate on the third or additional count, nor examined nor confronted with witnesses in the Magistrate's Court upon that charge, and that no such charge was ever, in fact, made against the Petitioner before the Magistrate, nor any witness examined, or evidence given, before the Magistrate in support of that charge. Fourth, that the Petitioner was never in fact committed, or held to bail in due form of law, to take his trial on the third or additional count or charge, and that, consequently, the Sessions Court was without jurisdiction to try the Petitioner upon the charge contained in that count. Fifth, that the Petitioner, being a Hindoo, was entitled to claim, and had duly and legally claimed, exemption from trial on the third or additional count, under the provisions of the Mahomedan Criminal Code, and that his trial before a Mahomedan law officer was consequently illegal and void. Sixth, that Fyezoollah had vacated his appointment as law officer of the Hooghly Court, before the Petitioner was brought to trial upon the third count, in December, 1861, and was never duly re-appointed, or appointed Mahomedan law officer to conduct the Petitioner's trial. Seventh, that Fyezoollah never accepted such appointment, or the responsibilities thereof, or delivered any Futwa as Mahomedan law officer, presiding at the trial of the Petitioner. [181] Eighth, that Fyezoollah was incompetent to act as law officer on the trial of the Petitioner, he never having taken the proper oath of office as law officer as prescribed by the Regulations; and ninth, that the Futwa, delivered by Fyezoollah, in December, 1861, was informal and void, not having been given under seal as is required by the Regulations. The petition then set forth that the Sudder

Nizamut Adawlut overruled all these objections, and, that the case so made against the Petitioner, on the third or additional count, upon the evidence taken in December, 1861, was heard on the 31st March, 1862, when the Court convicted the Petitioner on the third count, and sentenced him to five years' imprisonment, with hard labour commutable for a fine of Rs. 10,000. That the Petitioner on the 3rd of April, 1862, presented his petition to the Sudder Nizamut Adawlut, praying for leave to appeal to Her Majesty in Council from the above conviction, and the several orders above-mentioned, whereupon the Court passed the following order:

"This Court is not required, nor warranted by law, to take any steps in criminal matters, which the parties concerned require to have brought before Her Majesty's Privy Council. Any application with that object must be made to the Judicial Committee of the Privy Council direct." The petition then stated that the Petitioner, who was at large on bail at the time of his conviction, had since surrendered himself, and was then undergoing his sentence in the jail at Alipore, and had paid the fine of Rs. 10,000, in place of being put to hard labour. And after stating that no Charter, Statute, or Regulation existed, which in any manner regulates or limits the privilege or [182] right of appeal, or the mode of exercising such privilege or right from the sentences or orders of the Sudder Nizamut Adawlut, in criminal matters, to Her Majesty's Honourable Privy Council, the Petitioner set forth the grounds upon which he contended that the proceedings and conviction were erroneous, and among others, urged the following objections:—First, that a Sessions Judge had no power to order a committing Magistrate to add a new and substantive charge to the calendar, or to commit upon such a charge, the Magistrate not being a ministerial officer, but being bound to exercise a discretion, according to his own conscience, as to whether the evidence before him warranted him in committing a person accused before him upon a particular charge. That the Sudder Nizamut Adawlut had ruled, in the present case, under the Criminal Code in force in the Courts by which the Petitioner was tried, that the offence of causing or procuring the forgery of an instrument, was a substantive offence, distinct from that of forging or uttering a forged instrument, and that no conviction of the crime first mentioned could have been had under the first or second count, upon which the Petitioner was originally committed. That the committing Magistrate had, consequently, in compliance with the orders of the Sessions Judge, sent up a charge against the Petitioner, which was never preferred before the Magistrate. Second, that supposing a Sessions Judge had the power to direct the Magistrate to commit upon a particular charge, such power was not duly exercised in the present instance. That the Sudder Nizamut Adawlut had distinctly declared that it was the duty of the Sessions Judge, under the [183] Circular Order, No. 70, of the 14th of November, 1851, when, from the evidence given before him on the first two charges made against the Petitioner, he found that those charges were not established by that evidence, at once to have stopped the trial, and ordered the re-commitment of the Petitioner on the third count, in addition to the other two, or to have acquitted the Petitioner on the two counts on which he had been charged, and directed his commitment on the third. That the trial, however, was not stopped, the petitioner being required to plead to a new and substantive charge while his trial on the two former charges was proceeding, the result of which had been to give a pretext for depriving the Petitioner of his right to claim exemption from trial, according to the provisions of the Mahomedan Criminal Code, on the new charge. Third, that the Circular Order above referred to directs, that the Judge shall not exercise the power of remanding a prisoner before the Magistrate, with a view to a fresh commitment being made, except upon the "plainest and strongest grounds:" and that no such grounds existed in the present case was shown by the Judge having disapproved of the Futwa for the Petitioner's conviction, based upon the very evidence upon which he directed the fresh commitment. Fourth, that no proper proceedings were taken to procure the Petitioner's commitment upon the new charge; that when the Sessions Judge thought it expedient that the Petitioner should be committed on a new charge, he ought to have sent the Petitioner before the Magistrate, that the charge might be preferred against him, and the Petitioner examined thereon, and confronted with the prosecutor [184] and witnesses while giving their testimony on oath in support of that charge, with an opportunity to the Petitioner to cross-examine them and produce evidence to rebut the charge. Fifth, that the Petitioner was never in fact

committed or held to bail to take his trial on the third count, and that the Sessions Judge was, therefore, without jurisdiction to try him upon that count; that the mere addition of a count to a calendar made in the absence of either the Prosecutor or the person charged, and under the simple initials of the committing Magistrate, wanted all the essentials of a valid commitment, and sets at nought all the decent formalities of criminal procedure. Sixth, that supposing the Petitioner to have been legally brought to trial on the third count, he was entitled to be acquitted thereon when the case was first referred to the Nizamut Adawlut, the Petitioner having pleaded to that count, and the Futwa of the law officer having been taken thereon, which Futwa was in the nature of a verdict, though not supported by any evidence. That the order of the Nizamut Adawlut of the 9th of July, 1861, which the Judges who passed it admitted to be without precedent, was in consequence illegal and improper, and that the Petitioner ought not to have been put a second time on his trial for the same offence. Seventh, that supposing the order of the 9th of July to have been legal, the Petitioner when brought to trial on the third count was entitled to claim, and did duly and legally claim, exemption from trial under the provisions of the Mahomedan Criminal Code. That the opinion of the Registrar of the Nizamut Adawlut, that it was then too late for the Petitioner to make such claim, was erroneous, inasmuch as that Court by [185] remitting the Record for the purpose of having evidence taken on the third count virtually held, that all that had been done on the trial of that count after the Petitioner had pleaded thereto, had been null and void; and, therefore, the Petitioner when brought to trial on that count in December, 1861, was in the contemplation of the law in the same position as if he had only that moment pleaded not guilty. That the Petitioner was debarred the opportunity of making such claim on the occasion of the former trial by the error of the Sessions Judge, in continuing the trial upon the first two counts; that the Nizamut Adawlut erroneously held that the Petitioner waived his right to claim exemption from trial on the third count, under the provisions of the Mahomedan Criminal Code, by going into a defence on the third count before the Mahomedan law officer on the occasion of the first trial. That the Petitioner was obliged on that occasion to go into his defence on the first two counts, and did so filing a written defence that there was not a word in that defence which was not applicable to the first two counts, nor was any mention made of the third count in that defence. That the Petitioner was never in fact put to any defence on the third count, as no evidence had been given in support of that count, and the Petitioner denied that on that occasion he went into any defence on the third count beyond simply pleading "not guilty" thereto. That even if the Petitioner had done so, he submitted, that the trial on the third count after the Record had been remitted to the Sessions Court, was to all intents and purposes a new trial, and that the Petitioner when so brought to trial, was entitled to all [186] the rights conferred by the Legislature on Hindoos, of claiming exemption from trial under a foreign code; and the Petition prayed for special leave to appeal from the above orders, and from the conviction, judgment, and sentence of the Sudder Nizamut Adawlut, and that that Court might be ordered to transmit forthwith the transcript of the proceedings and evidence upon which the Petitioner had been tried and convicted, to the Privy Council Office, and that Her Majesty would be pleased to direct that until the hearing of the appeal therein prayed for, the Petitioner might be admitted to bail, or until such other time as to Her Majesty might seem fit.

Mr. Bovill, Q.C., and Mr. Hannen, for the Petitioner.—This is a special application to Her Majesty for leave to appeal from the proceedings and sentence of a Native Criminal Court, which have been confirmed by the Sudder Nizamut Adawlut on appeal, in a matter and under circumstances which would enable a party to obtain redress in a Court of Error in this country. The proceedings set out in the petition show that there was such irregularity as well as injustice, that a Court of Error would set them aside. Without entering upon the merits, we desire to show, in the first place, that there is an appeal from this Criminal Appellate Court to the Queen in Council. It cannot be questioned that appeals to the Queen in Council in criminal matters are allowed, being expressly provided for by each of the several Charters creating the Supreme Courts at Calcutta, Madras, and Bombay, the Judges of those Courts having reserved to them a discretionary power to

[187] grant such appeals, which power has been exercised, *Pooneakhoty Moodeliar v. The King* (3 Knapp's P.C. Cases, 348), *Aga Kurboolie Mahomed v. The Queen* (3 Moore's Ind. App. Cases, 161), *Aga Yoong v. The Queen* (7 Moore's Ind. App. Cases, 72). The cases of *The Queen v. Eduljee Byramjee* (3 Moore's Ind. App. Cases, 468), and *The Queen v. Alloo Paroo* (3 Moore's Ind. App. Cases, 488), though cases in which leave to appeal was refused by the Court in India, are yet authorities showing that such an appeal lies, and that the Crown in cases from the Supreme Courts in India has not parted with its prerogative to entertain an appeal in a criminal suit, merely restricting the discretion of allowing such in the first instance to the Judges. The true question here is, whether the Crown has parted with that right in cases tried by the Native Criminal Courts in India. In *re Ames* (3 Moore's P.C. Cases, 409), this Court entertained no doubt as to its jurisdiction to admit a criminal appeal from the Cour Royale, in the Island of Jersey, though it was afterwards discovered that such a power was restrained by an Ordinance of the Royal Commissioners of Queen Elizabeth, dated the 3rd of April, 1591. The history of the establishment of the Nizamut Adawlut, in India, whose proceedings we complain of, is to be found in the preamble to the Ben. Reg. IX. of 1793. It is there stated to have been originally established in 1772, at Moorshedabad, "for revising the proceedings of the Provincial Criminal Courts in capital cases, and the Committee of Revenue at Moorshedabad were vested with a control over this Court, similar to that which the Collectors of the revenue were empowered to exercise over the Provincial Courts. Upon the abolition of the Committee [188] of Revenue at Moorshedabad, the Nizamut Adawlut was removed to Calcutta, and placed under the charge of a Darogah, or superintendent, subject to the control of the President in Council, who revised the sentences of the Criminal Court in capital cases." It appears that the Court was afterwards re-established at Moorshedabad, but, by a subsequent Regulation, of the 3rd December, 1719, was again removed to Calcutta, and permanently established there by sec. 66, of Ben. Reg. IX. of 1793, the Regulation we are now considering. It appears as well from the preamble as the subsequent parts of this Regulation, that there always was a controlling power reserved to and exercised by the Provincial Government, or its Officers, and from the whole tenor of the administration of criminal justice, it is clear that there was an appeal from the decision of this Court to some superior Tribunal; if so, then, we submit, there must be an appeal to the Queen in Council, as the *dernier ressort*. The prerogative of the Crown in this respect has been carefully preserved. It is not affected by Ben. Reg. XVI. of 1797, respecting appeals from the Sudder Dewanny Adawlut in civil suits to the King in Council; the Statute, 21 Geo. III. c. 70, sec. 21, or in the order in Council of the 10th of April, 1838 (1 Moore's Ind. App. Cases, p. IX.), made pursuant to the 3rd and 4th Will. IV., c. 41, sec. 24, which do not touch the criminal jurisdiction. We admit that there is no specific enactment in the above Regulation or Statutes, or in any other of the Regulations, respecting the Native Criminal Courts in India. Reg. VI. of 1796, sec. 2, gives the Nizamut Adawlut power to recommend to the Governor-General a mitigation of [189] punishment after the opinion of the Futwa of the law officer, which is tantamount to a liberty of appeal to the supreme authority, and that being so, makes our case stronger, for the right of appeal is but the exercise of the prerogative of the Crown to revise all legal proceedings, a right inherent in the Crown, and which cannot be abrogated except by the express will of the Sovereign, or by Act of the Legislature, to which the Sovereign is a party. Bac. Abr. Tit. "Prerogative," B. 1; Clutton "On the Prerogative," p. 29. And this is especially the case as regards the Colonies and Foreign possessions of the Crown. *Christian v. Corren* (1 P. Will., 329. See also, Memorandum, 2 P. Will., 75), and *Calvin's case* (Coke Rep. Pt. VII., p. 17). In *Reg. v. Cowle* (2 Burr. 856), Lord Mansfield says, "Upon imprisonments in Guernsey and Jersey, in Minorca, and in the Plantations, I have known complaints to the King in Council, and orders to bail and discharge;" and Sir John Leach, in *Cuvillier v. Aylwin* (2 Knapp's P.C. Cases, 78), declared that "The King has no power to deprive the subject of any of his rights." Again, in *Macfarlane v. Leclair* (15 Moore's P.C. Cases, 181), and in *re Louis Marois* (15 Moore's P.C. Cases, 189), although the sum involved was in both cases under the appealable value restricted by the Canadian Act, 34th Geo. III., c. 6, sec. 30, yet leave to appeal was granted by this Court to prevent injustice. We submit, therefore, that no

general restriction exists in respect to the power of the Crown to admit appeals, either in Criminal or civil matters.

Secondly, the whole process in criminal prosecutions is directed and provided for by the Regulation IX. of [190] 1793. It is enough, however, for our present argument, to refer to the fifth and forty-seventh sections. The fifth section provides for the apprehension of offenders, and the manner in which the charge is to be preferred, as well as the form of the warrant. Now, none of the requisites there pointed out were complied with in the charge upon the third account against the Petitioner. The 47th section, which provides the manner in which the trial of prisoners is to be conducted, was equally disregarded. Upon these two grounds alone, which we are prepared to prove, we say that there is enough to entitle us to leave to appeal: there was sufficient irregularity to have invalidated a trial in any Criminal Court in this country, and by analogy there must be a remedy for such irregularity and injustice when committed in Her Majesty's dominions abroad. The irregularities complained of by the Petitioner as being contrary to the mode of conducting criminal procedure, prescribed by Ben. Reg. VI. of 1832, secs. 5 and 6, were presented in a form which would be equivalent to error on the Record in proceedings in the English Courts. He pleaded not guilty to all the charges, and never was heard as to his exemption from trial by the Mahomedan Criminal Code, as that Regulation provides. Again, the Mahomedan law officer was not qualified to try him on the third count of the indictment, and the whole proceedings, therefore, were *coram non iudice*. In this country, whether in civil or criminal jurisdiction, where there is error upon the Record, the Sovereign has a right, by virtue of the supreme prerogative of the Crown as the fountain head of justice, to inspect the Record, and set it right. The same rule applies in respect to Colonial [191] Courts as to English Courts. In *Crawford's case* (13 Q. Ben. Rep., 613), a writ of *Habeas Corpus ad subjiciendum* issued from the Queen's Bench to the Isle of Man: to the Island of Jersey in *Carus Wilson's case* (7 Q. Ben. Rep., 984), and also in *Anderson's case* (30 L.J. Q.B., 39), to Canada. These cases show that the power of the Crown in the Colonies is not limited and the right of appeal from the Criminal Courts abroad has not been taken away or curtailed by any local Regulation or Imperial Statute. In *Rajunder Narain Rao v. Bhoji Govind Singh* (2 Moore's Ind. App. Cases, 181), it was held that this Court had by the Common law the same power as Courts of Record to rectify its judgments when mistakes had crept in by misprision or otherwise. Lastly, we submit, that the irregularity in the proceedings, and the injustice complained of in this case, is such as to render it a fit case for the exercise of the undoubted prerogative of the Crown to admit the appeal.

The Attorney-General (Sir W. Atherton) and Mr. Welsby, for the Crown.—The right of admitting an appeal in criminal cases is not an inherent part of the prerogative of the Crown. The passage quoted from Chitty, "On the Prerogative," does not uphold the contention of the Petitioner's Counsel. It is founded upon Chalmers' Opinions, pp. 117, 202, and such a right has not been granted, so far as India is concerned, by any Charter or Regulation, having the force of law in India, to the subject, from a sentence of the Sudder Nizamut Adawlut; therefore, we submit, this Court has no power to grant this application. No analogy exists with respect to the jurisdiction exercised by the Court of Queen's [192] Bench in respect to writs of error, or Certiorari, 4 Coke's Inst., ch. 7, shows the origin of the jurisdiction of that Court. The Court of Queen's Bench is not a final jurisdiction, for a writ of error lies to the House of Lords. With respect to the Regulations in force in India relied upon by the Petitioner, they do not give the jurisdiction contended for. From the year 1790 to the year 1801, the Governor-General and Members of the Supreme Council, constituted the Nizamut Adawlut, as well as the Sudder Dewanny Adawlut, Ben. Reg. VI., 1793, sec. 2, and by Regs. IX. of 1793, sec. 67, and XLIX. of 1795, the Governor and Council are to be assisted by a Cazi and Muftees. This state of affairs was altered by Reg. II. of 1801, sec. 10, by which the Nizamut Adawlut was composed of a member of the Supreme Council, two Puisne Judges, and two native law officers. Section 16, provides for appeals to the King in Council in civil cases, and for reference to the Governor in Council, but no farther. The constitution of that Court was afterwards modified by Ben. Regs. XV. of 1807, sec. 3, and XII. of 1811, and by XXV. of 1814, power is given to a single Judge to sit in the Nizamut Adawlut. No mention is made of appeals in criminal matters to England, in any of these Regulations.

Statute 21st Geo. III., c. 70, sec. 21, provides for appeals in civil cases to the King in Council, where the subject-matter in dispute shall be of the value of £5000, and the provisions of that Statute, in respect to appeals in civil matters from the Sudder Dewanny Adawlut, are introduced by Ben. Reg. XVI. of 1797. If then, the Crown ever had the prerogative contended for by the Petitioner before the passing of the above Statute, we maintain that it has since been parted with by Statute. [193] *The Queen v. Eduljee Byramjee* (3 Moore's Ind. App. Cases, 468), *The Queen v. Alloo Parron* (ib. 494). In the latter case, Lord Brougham doubts the authority of *Christian v. Corren*, as it was the reasoning of the Reporter himself who was Counsel in that case, and not the judgment of the Court (1 P. Will., 329).

No judgment was then given, and the attention of their Lordships having been afterwards drawn to the Act of the Indian Legislature, No. XXV., of 1861, sec. 414, which enacts that, "unless otherwise provided by this Act, or any other law for the time being in force, no appeal shall lie from any order or sentence of a Criminal Court," their Lordships directed the petition to be argued upon the effect of the section of that Act.

Mr. Bovill, Q.C., and Mr. Hannen, were heard upon this point. First, we contend that the words of the Act of the Indian Legislature, No. XXV., of 1861, sec. 414, do not apply, or assuming that they do, we submit that the Act does not take away the right of appeal claimed by the Petitioner, for not having received the sanction of the Crown, as required by the Imperial Statute, 16th and 17th Vict., c. 95, sec. 26, that Act was *ultra vires* and void, so far as it affects the prerogative of the Crown. There is no power in the Indian Legislature to interfere with the prerogative of the Crown, without its consent. In this country no Bill can be brought in affecting the prerogative without the consent of the Crown. [The Respondent's Counsel interposed, and cited upon [194] this point the Imperial Statute, 24th and 25th Vict., c. 67, s. 24, which enacts that no Law or Regulation made by the Governor-General in Council should be deemed invalid by reason only that it affects the prerogative of the Crown, and contended that such Statute was retrospective.] By the 54th section of that Statute, it is enacted, that it is not to come into operation till its publication by the Governor-General in Council by proclamation, which event did not take place till the 16th of November, 1861, after the passing of the Act, No. 25, of 1861; therefore, though the clause in question prevented the whole of any Act which contained a clause interfering with the prerogative from being avoided, it did not legalize such interference itself. It cannot be denied that the prerogative of the Crown can only be taken away by express words, which are not to be found in the Act No. XXV., sec. 414, of 1861. It has been so held with respect to the right of Certiorari, *The King v. The inhabitants of Cumberland* (6 Term Rep., 194), *The King v. Eaton* (2 Term Rep., 89), *Groenvelt v. Burwell* (1 Lord Raym., 469), *The King v. Jukes* (8 Term Rep., 542), *Rex v. Moreley* (2 Burr., 1048), *The King v. Allen* (15 East., 333), *Smith v. The Commissioners of Sewers* (1 Mod., 44), *Rex v. Lewis* (4 Burr., 2459), *The King v. Hanson* (4 Barn. and Ald., 519).

The Attorney-General (Sir W. Atherton), Mr. Forsyth, Q.C., and Mr. Welsby, appeared for the Crown, but were not called upon to address their Lordships.

Judgment was delivered by

[195] Dr. Lushington.—It appears from the proceedings in the case that a person of the name of Joykissen Mookerjee, has been convicted of a criminal offence, namely, of having procured leases of certain property to be forged. The questions for the decision of their Lordships are, first, whether, as has been argued, there exists on behalf of the Crown, a prerogative right of appeal even in matters of criminal jurisdiction; and, secondly, whether this is a proper case in which the authority of the Crown should be interposed for the purpose of doing justice.

Now, with reference to the existence of the prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt on the existence of that prerogative, not only under the existing circumstances, but in others which might arise, with reference to the other dominions of the Queen which may have been acquired by conquest. They do not think it necessary that they should, on the present occasion, enter minutely into the considerations upon which the prerogative of the Crown is founded. They think it will suffice for the purpose of this case, to assume that it does exist, and con-

sequently, that it is in the power of the Judicial Committee of the Privy Council, exercising that prerogative right under the Crown, so to advise Her Majesty, if they should think an appeal ought to be allowed on the present occasion.

With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion that justice has not been very well administered in the present case; and, supposing it to [196] have been a civil, and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering these proceedings, and of doing justice to the party complaining.

But this is a criminal case, and subject to very different consideration. Admitting, therefore, two things—admitting the existence of the prerogative of the Crown, and admitting that this, *prima facie* and presumptively, is a case of great grievance—their Lordships have now to determine whether, looking at all the circumstances attending the granting of appeals in criminal cases, it would be their duty to advise Her Majesty to grant this appeal or to withhold it.

We must recollect, in the first place, that by granting an appeal is meant an examination of the whole of the proceedings which have taken place. It is not simply for the investigation of any legal question which might have arisen; it is for the purpose of examining the whole of the evidence, and the whole course of the proceedings upon the trial, to enable us to come to a conclusion upon the merits.

Now, it is of no small importance to bear in mind that, notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subject to Her Majesty, from all those parts of Her dominions that were acquired by conquest, and where Her Majesty has the entire sovereign power of legislating according as she may think fit, either by Orders in Council, or, as was determined on a former occasion, by virtue of Letters from the Secretary of State, it is, I say, to be borne [197] in mind that, in no instance whatever, of any grievance however great, at any time, has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case.

We can easily call to memory very many instances which have occurred in the Colonies in which it has been alleged that gross injustice has been done, and even lives sacrificed where they ought not to have been exposed to any danger; but no precedent of an appeal of this nature has existed; and we think it is obvious, upon the least consideration of the consequences, how it is that no such precedent has existed, and how it is that no such precedent would have been created, even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an appeal in cases of this description are so exceedingly strong, they are so entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment.

Now, if we were to advise Her Majesty to grant an appeal on this petition, how would the case stand? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases? What could be done in a capital case? Is there any distinction which can be drawn? If the prerogative of Her Majesty gives this individual the right of appeal, could any rules or regulations be imposed whereby that right of appeal could be governed or could be restricted? So you would go through the whole [198] catalogue of cases, and there is no doubt whatever that whenever punishment was likely to ensue there would follow an appeal to Her Majesty in Council, and consequently not only would the course of justice be maimed, but in very many instances it would be entirely prostrated.

These are the reasons which operate upon our minds in rejecting this application; not at all forgetting that injustice may have been done in this individual case, and not at all forgetting that the power of the Crown may be invoked in another shape, and that that injustice may be remedied. Their Lordships are of opinion that they cannot, under the existing circumstances, advise Her Majesty to admit this right of appeal, but they doubt not that justice will be done, because they would suggest that an application should be made to the constituted authorities who have

the power to afford a remedy, though in a different way. They doubt not that when it is represented to those authorities that this suggestion emanates from the Judicial Committee, they will not be loth to examine into the circumstances of the case, and to do that which justice may require.

We have only one word more to say on the present occasion. Their Lordships do not think it necessary to enter at all into the question which has been discussed at the bar this morning; it would require a very nice examination of the Statutes and the criminal law of India, which could only end in the same way. Whatever might be the result of that examination, we have no hesitation in saying the course we are now about to adopt would be the course we should then recommend Her Majesty to pursue.

We cannot grant this application.

[S.C. 1 Moo. P.C. (N.S.) 272. See *Reg. v. Bertrand*, 1867, 4 Moo. P.C. (N.S.) 460; L.R. 1 P.C. 530; and note to *In re Ames*, 1837, 3 Moo. P.C. 413.]

[199] CHARLOTTE ABRAHAM and DANIEL VINCENT ABRAHAM,—*Appellants*;
FRANCIS ABRAHAM,—*Respondent* * [Feb. 17, 18, 19, and 20, 1863].

On appeal from the Sudder Dewanny Adawlut at Madras.

The *status* of Native Christians, known as “East Indians,” and the law of inheritance and succession, as administered in the Mofussil Court in respect to their rights and property, considered. Mad. Reg. II. of 1802, sec. XVII. provides, that in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the Judges are to act according to justice, equity and good conscience; and Mad. Reg. III. of 1802, sec. XVI. cl. 1, prescribes, that in suits before the Native Courts regarding succession, inheritance, caste, etc., the Hindoo law with respect to Hindoos, and the Mahomedan law with regard to Mahomedans are to be considered the general rules by which the Judges are to form their decision. Held, that the latter Regulation applied to Hindoos and Mahomedans, not by birth only but by religion [9 Moo. Ind. App. 243].

Held, also, in a case of succession to the estate of a deceased of pure Hindoo blood, who had married a European wife, professing, with his family, the Christian religion, and whose ancestors for generations had embraced Christianity, that such case was within the provisions of Mad. Reg. II. of 1802, sec. XVII., and was to be decided by reference to the usages of the class to which the deceased attached himself and the family to which he belonged.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert [9 Moo. Ind. App. 241, 242].

The convert may renounce the old law by which he was bound, as he renounced his old religion, or if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion. For though the profession of Christianity releases the convert from the trammels of the Hindoo law, yet it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interest in, and his power over, property. The convert, though not bound as to such matters, either by the Hindoo law, or by any other positive law, may by his course of conduct after his conversion, have shown by what law he intended his rights to be governed. He may do so either by attaching himself to a class which in this respect has adopted and acted upon some

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

particular law, or by having himself observed some particular law, family usage, or custom [9 Moo. Ind. App. 243, 244].

The *lex loci* Act, No. XXI. of 1850, held not to apply where the parties have ceased to be Hindoos in religion.

The *status* of a member of an undivided Hindoo family who became a convert to Christianity, in reference to parcenership, considered. Such circumstance held to amount, by the Hindoo law, to a severance of parcenership.

Whenever an opinion of the Pundits is required by the Court, and there are many special circumstances which may bear upon the question to be submitted for their opinion, these special circumstances ought to be set forth by the Court in the case submitted to the Pundits.

The principal question involved in this appeal was as to the law which governed the succession to the property of the late Matthew Abraham, a Protestant native of India, resident in the Madras Presidency, and who died intestate in the year 1842. The ancestors of Matthew Abraham, for several generations [200] had been Christians, and Matthew Abraham, who had been baptized in infancy in the Roman Catholic faith, but afterwards became a convert to the Protestant religion, married a European wife in the year 1820, and with her and the children of the marriage conformed in all respects to the language, dress, manners, and habits of English persons up to the time of his death. The Sudder Court at Madras held that the property should be distributed in accordance with the Hindoo law.

The circumstances of the case, were as follows:—

In the year 1812, Matthew Abraham, then a youth, [201] was residing at Bellary with his father; and was at that time receiving religious instruction from a Protestant missionary, having become a convert from the Roman Catholic to the Protestant religion. The Respondent, another son of Matthew Abraham's father was born in the year 1813. About the year 1815, Matthew Abraham was appointed to a situation in the Arsenal at Bellary, upon a salary of Rs. 52½ a month. His father died some time prior to the year 1820, without leaving any property. In the last-mentioned year, Matthew Abraham married the Appellant, Charlotte Abraham, whose father was an Englishman and her mother a Portuguese. In the year 1823, he opened a shop on his own account at Bellary; and in the year 1827, the Respondent, Francis Abraham, who was then of the age of fourteen, was placed by Matthew Abraham as a writer and attendant in his shop, and on the 2nd of April, 1832, he and a Mr. Richardson were admitted as partners in the shop under a deed of partnership, whereby the then partners were to be entitled equally to the profits. No capital was contributed by the Respondent upon his admission to the partnership. Mr. Richardson retired from the partnership in or about the year 1836, but upon his retirement no new arrangement was made between Matthew Abraham and the Respondent, as to their shares in the shop. Matthew Abraham, besides being a shop-keeper, held a contract from Government for the supply of spirituous liquors to the troops in cantonment at Bellary, called "The Abkarry contract"; and in order to enable him properly to carry out that contract, he erected a large distillery in or near Bellary. The contract was first taken by Matthew Abraham in [202] the year 1827, and the contract was taken by him from year to year, with the exception of the official year 1829-30, until his death in the year 1842, at which time the contract was still subsisting. The distillery business so carried on by Matthew Abraham was separate from the shop, and was carried on by him alone on his own account, and, as it appeared and was insisted by the Appellants, without any partner; but for some time previously to and at the time of the death of Matthew Abraham, the Respondent was employed as a clerk or manager in the distillery business, and during the frequent periods of absence of Matthew Abraham from Bellary, transacted the chief part of that business. On the 10th of July, 1842, Matthew Abraham died intestate, leaving his widow, the Appellant, Charlotte Abraham, and two sons, Charles Henry Abraham, who is since deceased, and the Appellant, Daniel Vincent Abraham, him surviving. At the time of the death of Matthew Abraham, the other son, Charles Henry Abraham, was of the age of twenty years, and was in England for purpose of his education, and the Appellant, Daniel Vincent Abraham, was of the age of nineteen years, and was residing with his mother at Bellary. The pro-

perty of Matthew Abraham consisted of the benefit of the Abkarry contract, which was still subsisting, and the sum held in deposit for the due fulfilment thereof; and of the distillery business; of the capital employed in the shop at Bellary, and his share of the profits thereof; of a business and property at Kurnoul; of certain houses and property at Bellary; of a policy of assurance on his life for Rs. 6400, in the Madras Equitable Assurance Society; and of ready money and out-standing debts, and money due to him on securities.

[203] At the request of the Respondent, the Appellant, Charlotte Abraham, executed a power of attorney, appointing him her attorney to collect all the money, debts, goods, and effects due, owing, payable, or belonging to her as the widow of Matthew Abraham, and for all purposes therein mentioned; and she afterwards herself procured letters of administration of the effects of Matthew Abraham, which were granted to her by the Supreme Court at Madras, whereby she became the sole legal personal representative of Matthew Abraham in the Madras Presidency.

The Respondent, under the authority of the above power of attorney, took possession of the books, papers, money, and securities for money of Matthew Abraham, and collected and received the debts, money, stock, and all other property belonging and due to his estate. The Abkarry contract which was held by Matthew Abraham, and was subsisting at the time of his death, as before stated, expired in the month of April, 1843.

Immediately upon the death of Matthew Abraham, the Respondent obtained permission from the Commissary-General to carry on the business of the Abkarry contract, and accordingly he entered into written engagement, dated the 22nd of July, 1842, to discharge the obligation of the Abkarry contract bond executed by his brother, Matthew Abraham, in the year 1842. Upon the expiration of the contract in 1843, the Respondent obtained a renewal of the contract in his own name, and obtained further renewals thereof from year to year, up to the date of the suit hereinafter mentioned. The deposit which had been made by Matthew Abraham for the due fulfilment of his contract, and which remained lodged at the time of [204] his death, continued as the deposit upon the renewals of the contract to the Respondent up to the year 1848, when he withdrew that deposit and lodged a Bengal promissory note for Co.'s Rs. 5000. The distillery business for the purpose of the Abkarry contract had, ever since the death of Matthew Abraham, been carried on upon the premises built by Matthew Abraham.

The Respondent, after the death of Matthew Abraham, continued to carry on the business of the shop in which he had been a partner with Matthew Abraham, employing the capital which was invested therein at the time of the death of Matthew Abraham. The Appellant, Daniel Vincent Abraham, was admitted for some time in the position of a partner, and drew some small share of the profits, but the Respondent, in the year 1851, kept the Appellant, Daniel Vincent Abraham, from the shop, and prevented him from receiving any share of the profits thereof; and since that year the Respondent had carried on the business of the shop alone, and possessed himself of all the profits arising therefrom.

From the correspondence between the Respondent and Charles Henry Abraham, and between the Respondent and the Appellant Charlotte Abraham, which formed part of the evidence in the case, it appeared, that the Respondent had assured the Appellant, Charlotte Abraham, and Charles Henry Abraham, that his sole wish and object was to labour for his deceased brother's family, and to further their interest to the utmost of his ability; and though the accounts of the distillery, and of the shop, and generally of Matthew Abraham's estate, were constantly demanded from the Respondent by the Appellant, [205] Charlotte Abraham, the Respondent succeeded from time to time in evading her demands, and quieted the minds of the Appellants by supplying them with money as they required it, and by remitting to England the sums required by Charles Henry Abraham.

At length, in the year 1852, the Respondent denied that he had any accounts to furnish, and asserted that he was not liable to furnish any to the Appellant, Charlotte Abraham, or to her sons. He also persisted in refusing to allow the Appellant, Daniel Vincent Abraham, to have any share in the management of the distillery business and Abkarry contract, and claimed that he alone was absolutely entitled to that business and contract; and upon the return of Charles Henry Abraham from

England to Madras, in June, 1853, the Respondent refused to continue to make any further remittances to him.

In consequence, the Appellants, Charlotte Abraham and Daniel Vincent Abraham, together with Charles Henry Abraham, since deceased, in May, 1854, filed a plaint in the Civil Court of Bellary, against the Respondent, whereby, after stating the facts hereinbefore set forth, and that the property to which they were entitled exceeded the sum of Rs. 3,00,000, they prayed that an account might be taken of what at the time of the death of Matthew Abraham was due to him in respect of the capital of the shop, and of the profits thereof, and that the Respondent might be decreed to pay what should be so found due; and that it might be ascertained what part of the estate of Matthew Abraham had since his death been employed in the shop, and that an account might be taken of [206] the profits thereof since his death; and that the Respondent might be decreed to pay the amount so ascertained and appearing by the account. That an account might be taken of all the capital employed in the distillery business, and of the profits thereof down to the death of Matthew Abraham, received by the Respondent, or to his use, and also of the profits of the distillery since the death of Matthew Abraham; and that the Respondent might be decreed to pay the amounts found due upon the last-mentioned account. That an account might be taken of the estate of Matthew Abraham, generally received by the Respondent, or to his use, and that the Respondent might be decreed to deliver up, or account for the same; and that the Plaintiffs might be put into possession of the distillery business, and the premises, and the benefit of the Abkarry contract; and that the Respondent might be decreed to deliver up to them all deeds, books, and writings, relating to the same respectively, the Plaintiffs offering to make a just allowance to the Respondent for his services in managing the distillery and generally.

The Respondent by his answer, admitted the general statements as to the family contained in the plaint, and for defence, in substance, insisted, that the Appellant, Charlotte Abraham, was only entitled to maintenance, and could not claim as co-Plaintiff jointly with her sons. That the property claimed had not been specified in the plaint as required by sec. 3, Mad. Reg. III. of 1802. That Matthew Abraham and the Respondent were the children of natives of Hindoo origin, and members of an undivided family. That upon the death of their father, Matthew Abraham took possession of [207] his property. That in 1823, Matthew Abraham and the Respondent jointly started the shop in Bellary, and that the business of the shop was from time to time carried on by moneys jointly borrowed by them, for which joint bonds were executed. That as Matthew Abraham and the Respondent were undivided Hindoo brothers, labouring for their joint interest, they had each an equal right to all the capital. That the deposit for the Abkarry contract was chiefly made up from sums received from the petty Arrack vendors, and, so far as the deposit was supplied by Matthew Abraham, the same was made out of family property, and that the distillery buildings were built, or enlarged, out of joint funds. That the Respondent was not employed either as clerk or manager of the distillery, but that though the distillery was a wholly separate concern from the shop, he possessed equal rights therein with Matthew Abraham, and his joint interest had been invariably recognized and admitted by Matthew Abraham. That the Abkarry contract for the official year 1836-37, was entered into in the joint names of the Respondent and Matthew Abraham. That the property which existed at Matthew Abraham's death, was the undivided property of the family. That the realization and management of the estate of Matthew Abraham was not entrusted to the Respondent by the Appellant, Charlotte Abraham, but that he assumed the same, and was entitled so to do, as being the head of the family. That the letters of administration granted to the Appellant, Charlotte Abraham, were solely for the purpose of procuring payment of the money due upon a policy of assurance, and could not alter the law governing the case, which, he insisted, was the Hindoo law. That the Respondent did not [208] obtain successive renewals of the Abkarry contract held by Matthew Abraham, but that he purchased anew the Abkarry contract at public auction in 1843. That the Plaintiffs having no resources of their own had been supported by the Respondent from motives of charity. That no demands for accounts were made by the Appellant, Charlotte Abraham, of the Respondent as her agent. That the Respondent was solely entitled to the Abkarry contract, and that the Plaintiffs had no connection with or right to

any share from the profits of the contract. That a large portion of the property existing at the time of Matthew Abraham's death was in the possession of Plaintiffs; and finally submitted that, instead of the Plaintiffs being entitled to property exceeding Rs. 3,00,000, they were not entitled to anything from the Respondent.

The Plaintiffs in reply insisted, that the Plaintiffs were correctly joined together in the suit. That it was only in the power of the Respondent to set forth a description and particulars of the property claimed. That the Hindoo law could not apply to parties situated as the Plaintiffs and the Respondent were, and that the course of conduct pursued by the Respondent was inconsistent with the applicability of that law. That even if the case was to be governed by Hindoo law, Matthew Abraham inherited no property from his father, and the position in which the Respondent stood towards Matthew Abraham was such as to show that their interests were separate and distinct. That the Respondent did not become the head of the family on the death of Matthew Abraham, but that the Respondent had actually acknowledged in writing that the Appellant, Charlotte Abraham, was the head of the family. That the Respondent, since the death of [209] Matthew Abraham, acted as the agent of the Plaintiffs, and that the Abkarry contract in 1843 was taken by the Respondent after communication and with the consent and permission of the Appellant, Charlotte Abraham. That the Plaintiffs were not Hindoos or subject to Hindoo law, and they denied that they were regarded as Hindoos by law. That the Respondent had been in the habit of honouring drafts drawn by the Appellant, Charlotte Abraham, upon him as manager of the distillery, and had advanced moneys from the distillery to other persons at her request and against his own inclination, and that such conduct was inconsistent with the assertion that the Plaintiffs had been supported by him out of charity. That the Plaintiffs never opposed the Respondent with respect to the Abkarry contract, because for several years after Matthew Abraham's death they believed that the Respondent was acting and considered himself as acting as their agent in obtaining the contract, and that the Plaintiff, Charles Henry Abraham, was in total ignorance of the actual position of affairs until September, 1852, and he took proceedings in the suit immediately upon his return to India in June, 1853. That the Plaintiffs were not in possession of the property of Matthew Abraham, with the exception of a dwelling-house, bungalow, furniture, plate, etc., and that their possession of any of the property was inconsistent with the Respondent's claim to be the sole head and representative of the family.

The rejoinder of the Respondent admitted that parties in his position had no *status* which fell under any particular law, and adduced several reasons with a view to show that the law which should govern the case was the Hindoo and not the English law.

[210] On the 12th of March, 1855, the cause came on before Mr. Story, the then Civil Judge of Bellary, and he proceeded to adjudicate upon the two preliminary objections taken to the plaint by the Respondent in his answer: namely, that the Appellant, Charlotte Abraham, had been improperly made a co-Plaintiff, and that the property claimed had not been specified in the plaint in accordance with Mad. Reg. III. of 1802: and upon both of these objections the Civil Judge was in favour of the Respondent, and made a decree non-suiting the Plaintiffs, with costs.

From this decree the Plaintiffs appealed to the Sudder Adawlut, and that Court, by an Order, dated the 20th of August, 1855, after stating that the Civil Judge might have required the Plaintiffs to amend their plaint by stating the particulars of the property, directed the Civil Judge to proceed to dispose of the suit on its merits. The Sudder Court appended to the above order the following instructions to the Civil Judge:—"The Court have to notice that the Civil Judge has pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties are to be bound, without receiving any evidence whereby to govern his judgment on the subject. Such a question can only be rightly pronounced upon, on consideration of the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindoo stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community. It will be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine [211] whether it was the self-acquired estate of the

deceased, Matthew Abraham, or of ancestral origin, after which the rights of the parties thereto, whether under English or Hindoo law, should be declared."

The suit accordingly came again before the Civil Court, and by an Order of that Court dated the 30th of November, 1855, the Plaintiffs were required to amend their plaint by stating the particulars of the property. This order the Plaintiffs were unable to comply with, as they were ignorant of the particulars, and the Civil Court dismissed the suit with costs by an Order dated the 11th of January, 1856.

Upon appeal to the Sudder Adawlut this Order was set aside, upon the ground that in a suit like the present, wherein the particulars of the property sued for were to be known only by information to be furnished by the Defendant, the proper course for the officiating Civil Judge to have taken would have been to seek this information at the Defendant's hands.

The suit was accordingly replaced on the file of the Civil Court, and the following points were recorded for proof by Mr. Irvine, the Civil Judge:—General point. First, each party should prove the practice of families similarly situated to theirs, whether to adhere to the Hindoo law of inheritance, or to be governed by the law of England in that respect. Secondly, each party should also prove what has been the practice of their own family in this respect as shown by their acts.

The Plaintiffs to prove, first, that Defendant's father died insolvent, and that Matthew Abraham took charge of the Defendant then a child, as stated in the [212] plaint. Second, that a considerable sum of money was expended by Matthew Abraham on the Abkarry buildings. Third, the nature and extent of the property left by Matthew Abraham. Fourth, that the Defendant on Matthew Abraham's death was continued in the management of all his estate on the terms mentioned in the plaint, and that he took the renewal of the Abkarry contract for the remaining months of the year in which Matthew Abraham died and in subsequent years, as stated by them. Fifth, that the first Plaintiff lent money from the distillery funds against Defendant's inclination; and by a supplemental point, directed him to prove that Matthew Abraham kept regular accounts of the distillery business.

The Defendant to prove, first, that his father died possessed of property and that Matthew Abraham took possession of it. Second, that the shop was established as stated, and that he and Matthew Abraham raised capital for it by borrowing money jointly for it. Third, that the money deposited with the Government as security for the Abkarry rent was made up from the sums received from the petty renters, and that that money was used as stated in the answer. Fourth, that the first Plaintiff requested that the third Plaintiff should be admitted as a partner in the Abkarry contract. Fifth, that on Matthew Abraham's death the Defendant became the legal head of the family, and as such continued in possession of the estate. Sixth, that he obtained after Matthew Abraham's death the Abkarry contract for his own exclusive benefit, and that he was legally entitled so to do. Each party were to be at liberty to disprove the points given to the other.

Both parts entered into voluminous evidence, [213] and a great many witnesses were examined on behalf both of the Plaintiff and the Defendant.

The documents adduced by the Plaintiffs consisted chiefly of correspondence between the Respondent and Matthew Abraham, generally during the life of Matthew Abraham; and the correspondence between the Respondent and others after the death of Matthew Abraham. From the correspondence during the life of Matthew Abraham, it appeared that he and the Respondent acted in all respects like English persons, being wholly inconsistent with the allegations of the Respondent, that there was a general unity of interest between him and Matthew Abraham, and that they were undivided Hindoo brothers. The correspondence after the death of Matthew Abraham included a long letter addressed by the Respondent to the late Charles Henry Abraham, dated the 19th of August, 1842, shortly after the death of Matthew Abraham, lamenting the great loss he had sustained, and the consequent alteration in his situation, and in which he set forth a statement of the affairs and general assets of the deceased, without making any claim, or allusion to a claim, on his own behalf to any interest therein, except as the general manager of the property, and soliciting the aid and interest of Charles Henry Abraham to procure from his mother (the Appellant) a continuance of his agency or some provision for his future sup-

port; the remainder regarded the power of attorney and letters of administration before stated, and the accounts between the Plaintiff and Respondent.

In addition to the correspondence, documentary evidence was adduced by the Plaintiffs, showing the admission of the Respondent as a partner with [214] Matthew Abraham in the shop, on the 2nd of April, 1832, with entries from the distillery cash book, showing drafts from the distillery funds according to the orders of the first Plaintiff, both before and after the death of Matthew Abraham. They put in evidence, also, translation of a bond executed by two persons to Matthew Abraham, therein described as "Contractor of the entire Talook of Bellary," and an abstract of the distillery accounts, rendered to the first Plaintiff by the Respondent, together with the letters of administration before mentioned, and a receipt by the Appellant, the widow, as "Administratrix to the estate of the late Mr. M. Abraham," and by the Respondent, as her attorney, in respect of debts due to Matthew Abraham's estate. The Plaintiffs filed also a return of particulars respecting the Abkarry contract, showing the continuance of the same deposit after Matthew Abraham's death, and other matters as to the renewals by the Respondent; accounts of the distillery brought in by Respondent upon being called upon to do so—such Accounts showing the payments made to the Appellant, the widow, up to the institution of the suit. Two witnesses, Englishmen, and two native Christians who had been well acquainted with Matthew Abraham's father, and with Matthew Abraham, when a youth, were examined by the Plaintiffs, who proved that Matthew Abraham's father was in a state of poverty up to the time of his death, and that Matthew Abraham had been appointed to a post in the Arsenal at Bellary, independently of any exertions of his father on his behalf, and had not come into possession of any property upon his father's death. Many other witnesses, who had been intimately acquainted with Matthew Abraham and the Respondent, [215] proved that the Respondent was a dependent upon Matthew Abraham; that he had never been treated by him or other members of the family as if he were in the position of an undivided brother, and ultimately to become the head of the family; that his partnership with Matthew Abraham was limited to the shop; that Matthew Abraham and the Respondent never adhered to a single Hindoo custom or usage; that the usage and habits of Matthew Abraham and his family, and of the Respondent, were entirely opposed to Hindoo law or customs; and that there was no difference whatsoever between their mode of life and that of any English, or East Indian family, but that, on the contrary, they were always looked upon as members, and even leading members, of the East Indian community, and that they were associated with Englishmen and East Indians in all matters of religious, public, social, and private interest. It was further shown by the evidence of other witnesses, well acquainted with the religion and customs of the different classes, that the only class of persons whose *status* and position presented a clear analogy to that of Matthew Abraham, were the East Indians, who, strictly so called, were the descendants of a European and a native, or half-caste, and who, when adhering to English habits and customs, were governed by English law, and that that class had not hesitated to admit and recognize both Matthew Abraham and the Respondent as members thereof. It was also proved that, after the death of Matthew Abraham up to Christmas, 1853, the Arrack vendors came to the house of the first Appellant, Charlotte Abraham, every Christmas to pay their respects or do homage to her as the representative of Matthew Abraham, and as such at the [216] head of the distillery, and that the Respondent was present on many such occasions. Four persons, who had been connected with the distillery during the lifetime of Matthew Abraham, deposed to the fact of Matthew Abraham having been solely entitled to the distillery; that accounts were regularly made up for and kept by him, and that the Respondent had no power at the distillery or over the persons employed therein, save such as was delegated to him as manager by Matthew Abraham.

The Respondent was called as a witness for the Plaintiffs, and examined at great length. He stated, amongst other things, that he was admitted a partner in the shop in 1832, under a deed of partnership, which he could not produce; that he was never admitted by Matthew Abraham as partner in the distillery business by any deed, but he alleged that Matthew Abraham had acknowledged that he and the Respondent were joint proprietors of the distillery business; he admitted that he did not, upon Matthew Abraham's death, close accounts or pay over to the

Plaintiffs Matthew Abraham's interest in the distillery: that he made no valuation for the transfer to him of the distillery business; that he continued to work the distillery business with the stock and funds that were invested in it at the time of Matthew Abraham's death; that he did not on Matthew Abraham's death give the Plaintiffs intimation that he would carry on the Abkarry contract business for his own exclusive benefit; that Matthew Abraham and the Respondent had not an equal interest in the distillery business as to shares; that Matthew Abraham was the sole contractor, and the Respondent contributed his labour; that he kept no regular account of the property [217] which was in his possession at the death of Matthew Abraham; that he considered that, during the life of Matthew Abraham, he had a proprietary interest in all his property; that he laboured jointly with Matthew Abraham in the contracts for several years previous to his death, and did nearly all the business for several years, and, therefore, claimed a share in it; that the Appellant, the widow, had made several demands for accounts from the Respondent in different years; that he did not furnish any capital for the Abkarry business after Matthew Abraham's death; that he had removed the records of the distillery and had destroyed some since June, 1853; that he had destroyed all the records of the distillery up to May, 1854; and that he claimed the distillery as his own since Matthew Abraham's death, but did not produce any account of the business from the period. The Appellant, Charlotte Abraham, and the Appellant, Daniel Vincent Abraham, were examined as witnesses, and their evidence was in the main corroborative of the facts and circumstances above stated.

The documentary evidence adduced by the Respondent consisted of correspondence and other documents. The correspondence during the life of Matthew Abraham was relied on by the Respondent as showing that there was a general unity of interest between him and Matthew Abraham, and that such general unity was recognized by the family. Some of the letters contained among other matters the following expressions in allusion to the Abkarry contract:—"We have nothing else to depend upon," and "We shall have the benefit of it;" and again "We asked for the renewal of it;" and "We have a legal right to it."

The correspondence after the death of Matthew [218] Abraham, consisted of letters from the deceased, Charles Henry Abraham, respecting his father's death and other matters, and from the Appellant the widow to the Respondent, with respect to the funds to meet the expenses of her son in England being supplied out of his father's estate. The Respondents also put in evidence a decree of the Auxiliary Court at Guntoor in a suit for maintenance; the translation of four awards of arbitrators upon divisions of ancestral property; a translation of a power of attorney in Persian signed by the Respondent and the Plaintiff, Daniel Vincent Abraham, authorizing a Vakeel to act for them in certain suits, in which was contained a recital that the Respondent and the third Plaintiff "are the heirs" of Matthew Abraham. Daniel Vincent Abraham, however, in reply to this stated in his examination, that he was about nineteen years of age when the above document was signed, and that he had but slight, if any, knowledge of the Persian language, and did not make himself acquainted with the contents of the document, but having full confidence in the Respondent, signed it. Various instruments dealing with the Abkarry and other property of the late Matthew Abraham, executed both before and after his death by the Respondent, together with the pleadings and decree in a suit instituted jointly by the late Daniel Vincent Abraham, the son, and the Respondent, respecting the affairs of his father, Matthew Abraham, and testimonials, contract bonds, etc., in relation to the Abkarry contract, showing the Respondent as holder of the Abkarry contract since the death of Matthew Abraham, were also put in evidence.

The Respondent's witnesses were examined, chiefly [219] with reference to the law by which native Christians were governed. Several of the witnesses who were East Indians, and considered themselves competent to give an opinion, gave it as their opinion that native Christians, were such Christians as were born in the country, and who have not changed their customs and habits, and that persons who like Matthew Abraham, did not in any way differ from Englishmen, save in native origin, were to be classed with East Indians, and ought, like that class, to be subject to English law. Mr. Ross, one of the Respondent's witnesses, who had been well acquainted with the family, confirmed the fact of Matthew Abraham and the Re-

spondent having been leading members of the East Indian community, and stated that none of the East Indians ever made any distinction between themselves and Matthew Abraham on account of his birth, and of the native dress he had once worn.

Mr. Irvine, the Civil Judge of Bellary, gave judgment in the suit on the 1st of June, 1858, and, as to the law of inheritance in respect of native Christians, rejected all the evidence of East Indians, as not being similarly situated with the Abrahams; but he considered that the documentary evidence of awards and deeds of division between native Christians and the evidence of the native Christians proved that the general state of native Christians was to remain divided, and that the undivided state was the exception. He held that the Respondent and his brother were not undivided in fact; that they were partners in the shop in equal shares; that the Respondent was the agent of his brother, and of the Plaintiffs after his death as to the Abkarry contract, and also agent under the administration and power of attorney; and he decreed accounts to [220] be taken in a certain manner (see Order set out in the judgment, *post* [9 Moo. Ind. App.], 233), with an allowance to the Respondent, and directing him to pay the costs.

From this decree the Respondent appealed to the Sudder Dewanny Adawlut at Madras.

When the appeal came before the Sudder Court, questions (see these questions stated in the judgment, *post* [9 Moo. Ind. App.], p. 235) were put to the Pundits that Court, and answers to the following effect given: that property not ancestral, but acquired by all brothers jointly, by means of agriculture, trade, etc., was equally divisible among all of them; that the fact of the elder brother acquiring some property before the younger attained the age of discretion made no difference, especially where, during the latter years of the elder brother's life, the labour fell chiefly upon the younger; that under these circumstances the property should be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one; that the ignorance of the brothers of their respective rights in law would not affect such rights; and that the absence of intention on the part of the elder brother did not affect the rights of the younger.

The Sudder Court (consisting of Messrs. H. Frere and L. T. Strange), made their decree in the cause on the 5th of November, 1859, reversing the judgment of the Civil Court. This decree, in its main features, was to the following effect:—As to the law of inheritance, the Sudder Court considered that the Civil Judge, whilst deciding on the fact of division or undivision, had failed to pronounce any opinion upon the rule of law; the Court came to the conclusion that there was in India no *lex loci*, but that the rule of law must be according to the customs and usages of the class to [221] which the parties belonged, and the usage in each particular family, to be ascertained by evidence. The Court founded its judgment on the report of the Indian law Commissioners, and the opinion of the Judges of the Supreme Court at Calcutta, that the English law was not in force in India, except so far as it was introduced by the Charters. The Court said that in seeking a law to apply to parties circumstanced as those in the suit, they were cast upon the rule laid down in section XVII. Reg. II. of 1802, that “in cases for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience.” That the Sudder Court, in a case similar to the present in regard to East Indians, who had no Code of law of their own, pointed out, under date the 14th of July, 1828, that the rule of law must be according to the customs and usages of the class to which the parties belonged, which was to be ascertained by evidence; and that on the 25th January, 1836, and the 3rd September, 1844, they gave effect to the same instructions. The Court agreed with the Civil Judge in rejecting the evidence of East Indians, but considered that the change of dress and manners could not alter the law of inheritance, or any local law or usage. The Court considered, that the evidence as to the usages in law of Christian converts from Hindooism was universal; that the Hindoo law as to rights in property, was the rule observed by the class in question, from generation to generation. The Court held that the acts of the family were in accordance with Hindoo law, referring to the suits in regard to the Kurnoul debts by Respondent and his nephew, as joint heirs of Matthew Abraham. In applying the Hindoo law, the Court adopted the opinion of the Pundits, con-

sidering that the dealings of the brothers [222] brought them within that law, and held that, according to it, the Respondent was entitled to an equal share in the estate. The Court came also to the conclusion that the Respondent was not a salaried agent, or an agent at all, and that the evidence of the first Plaintiff and her relatives, the first two witnesses in this respect, was unworthy of credit, and that as the Plaintiffs were not justified in bringing the suit, the Court condemned them in all the costs that had been incurred.

The present appeal was from this decree.

The Solicitor-General (Sir R. Palmer), and Mr. W. H. Melvill, for the Appellants.—This decree cannot be sustained. It is wrong in law in declaring that the rights of the parties in this appeal are to be governed by the rules and principles of the Hindoo law. It is of the utmost importance to ascertain the *status* of persons in the position of Matthew Abraham, and the law by which the succession to their property is to be governed. In India the *status* of religion as regards natives is the *status* of law; the law is the religion both of Hindoos and Mahomedans. The Hindoo law, therefore, being a law of religion, cannot be applicable to persons who are not Hindoos, that are Christians, and as in this case, as well by descent, as profession, and whose ancestors for several generations have in every respect repudiated the tenets and principles of the Hindoo religion. Our contention is, that the law applicable in this case must be the law appertaining to that class of which the parties become members, or so much of it as is applicable to their peculiar situation. The English law of descent and succession, therefore, in the case of native East Indians, professing the Christian religion, must be the governing law in regard to the rights and possession of their property. This is apparent [223] as well from all sound and legal principles as from the laws enacted in India.

First, by Mad. Reg. II. of 1802, sec. XV. it is provided, that the Court shall proceed to try suits under the same rules and regulations as were prescribed for the trial of suits between individuals; and by section XVII. of the same Regulation it is enacted, that "in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience." Section XVI. cl. 1, of Mad. Reg. III. of 1802, further provides that, in suits regarding succession, inheritance, marriage, and caste, etc., the Mahomedan laws with respect to Mahomedans, and the Hindoo law with regard to Hindoos, are to be considered as the general rules by which the Judges are to form their decisions. Mad. Reg. V. of 1829, which was passed to modify the provisions of Reg. III. of 1802, as regarding the testamentary dispositions of Hindoos, recognizes the validity of Wills made by Hindoos, if made in conformity with the Hindoo law. Previous to the passing of the Act, No. XXI. of 1850, the *lex loci* Act, in the case of apostasy, the change of religion on the part of a Hindoo deprived him of his right of inheritance, W. H. Macnaghten's "Hindu Law," Vol. II. p. 131; but by that Act it is declared, that notwithstanding a Hindoo becomes a Christian, his rights of inheritance to property as a Hindoo shall not be thereby affected. But the Act, No. XXI. of 1850, never had or can have any application to this case. The Abrahams never were Hindoos in religion; they never professed or acknowledged the religious tenets upon which alone the Hindoo law is founded and by which it is governed. They were, therefore, not as Hindoos [224] within the pale of that law. The Sudder Court has held that there is no *lex loci* in India, and that the law to govern the case is to be sought in the usage of the class to which the deceased, Matthew Abraham, belonged. As to there being a *lex loci* or not in India, out of the jurisdiction of the Supreme Court Charters, the Report of the Indian Law Commissioners of October 31st, 1840, shows clearly, first, that the Commissioners considered that Hindoo law cannot apply to Christian converts; and, secondly, they thought that the English law must in such cases apply, but they seem to have given up that opinion in deference to the opinions of the Judges of the Supreme Court, who laid it down, that the English law was only introduced by Supreme Court Charters, and was co-extensive only with their jurisdiction. The doctrine that there is no *lex loci* in India is capable of a *reductio ad absurdum*. Persons who have ceased to be Hindoos have a law, or they have not. If they have not, no Court of Justice can adjudicate. If they have a law, it must be either the *lex loci*, or the law of usage. But a law of usage implies a continuance, and must have had a beginning; therefore, if there is

no class similar to themselves, there can be no law of usage; and if there be a class, that class must for some time have been without a law. The Sudder Court has dealt with the case as one to be determined by usage of persons similarly situated with the deceased Matthew Abraham. The persons similarly situated are Christian converts from Hindooism, and the Judges of the Sudder Court have by their decree held that such native Christians are to be governed, as to their property, by the usage of Hindoo law, and that from the evidence in this case such usage is not inconsistent with the practice of the family. Now, both [225] Courts rejected the evidence of East Indians, persons of mixed European and native blood, whose evidence we insist was strictly pertinent and ought to have been admitted. The class called "East Indians" are generally illegitimate children of a native woman, the father being European. But in such a case the application of Hindoo law depends upon the co-existence with the Hindoo *status*, and that is the Hindoo religion, *Myra Boyce v. Ootaram* (8 Moore's Ind. App. Cases, 400). The real question here is, what was the usage of this family? The evidence rejected shows that their usages were in every respect those of English East Indians. They conducted themselves as Englishmen in dress, habits, manners, and customs, and, moreover, held and conformed to the tenets of the Christian religion. Surely, this was evidence of their not being Hindoos; and if they were not Hindoos, then the Hindoo law of inheritance could not apply to them, for such law is part and parcel of the Hindoo religion, and cannot be separated from it. The whole evidence, which is very voluminous, proves most completely that there are four classes of persons belonging to the Christian community in India, namely, first, European Protestants; second, European Roman Catholics; third, East Indian Protestants, or Catholics, being either partially or wholly of native blood, and, as the family of the Abrahams are in this case, Christians by birth and parentage; and, lastly, there are native converts, either Protestants or Roman Catholics. Now, all these parties must have some *status* and some law to govern their rights, and if the Hindoo law is to apply to them, then they can have no rights of property whatever. This appears from an opinion of the Pundits, in a former suit, which was called for by the Appellants, and in which they stated that in [226] the case of East Indians, the law to be applied depended upon the religion which they professed.

But, secondly, there was no ancestral property in this case, and, therefore, even if the Hindoo law could be shown to be applicable as between the parties, the consequences which the Sudder Court has deduced therefrom would not follow, and the decree on that ground cannot be sustained. The facts are wholly opposed to the conclusion that Matthew Abraham and the Respondent were just and undivided in estate, or that the Respondent had any interest in any part of the property in question, except that which belonged to him by contract, as the partner of Matthew Abraham under the deed of April, 1832; and the fact of Matthew Abraham having admitted the Respondent into partnership in the shop in 1832, under a deed of partnership, is conclusive against the claim which the Respondent now sets up to a general joint interest with Matthew Abraham, which, if it existed at all, must have existed prior to the partnership in 1832. Now, in all cases, within the application of the Hindoo law, where there has been property to start with, which property formed the nucleus of subsequently acquired property, though such is self-acquired property, yet the presumption in law is, that the whole property is in coparcenary, *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 240). The very theory of an undivided family is founded upon the existence of paternal property. But our contention is, that Matthew Abraham and the Respondent did not constitute what the Hindoo law regards as an undivided family, and that the Respondent is not entitled to that special and peculiar right which the Hindoo law regards as attaching to the accretion [227] of property held in coparcenary. One way of testing the Respondent's claim is, to consider whether a claim by him for a general partition during Matthew Abraham's life could have been maintained, which the authorities clearly show could not, Strange's "Hindu Law," Vol. I., pp. 195, 198-9, 203, 208, 213, 219, 221, 226-7; *Id.* Vol. II., pp. 346, 357, 365, 370, 371, 375; Inst. of Menu (by Haughten), Ch. IX., sec. 204, p. 319; W. H. Macnaghten's "Hindu Law," pp. 43, 51. The Mitacshara, ch. I. sec. 3. From the evidence in the cause it is apparent that this claim of the Respondent was an after-

thought. At the time of Matthew Abraham's death, as well as for some time after, he led the Appellants to believe that the Abkarry contract was held after Matthew Abraham's death precisely as it was before.

Then, lastly, we submit, that the Sudder Court was not justified in refusing an account, and that the decree proceeded on an erroneous basis in calculating the sums to be paid to the Respondent, and, under no circumstances, could the case warrant the imposition of the whole costs of the suit upon the Appellants.

Sir Hugh Cairns, Q.C., and Mr. W. W. Mackeson, for the Respondent.—There is no *lex loci* in India. Among Christian native Hindoo families, the rule of property and inheritance is regulated by usage among the class. According to the usage as proved in this case, the Hindoo law is followed by all classes of native Christians. As to the rule of law by which native Christians are regulated, that question is elaborately investigated in the Report of the Indian law Commissioners of the [228] 31st of October, 1810, and after a critical examination of all the decided cases, whether they related to Armenian, Portuguese, French, or native Christians in India, the conclusion arrived at by the Commissioners is, that the English law is confined within the limits of the Charters of Justice, and that there is no *lex loci* there, but that each class must be regulated by the customs and usage of the class, and each family thereof, and that this result must be arrived at in each case by evidence. In *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 321), the Master reported, that the Supreme Court at Calcutta, created by the Statute, 21st Geo. III., c. 70, decided cases according to Hindoo or Mahomedan law, which could not be applied to the government of Christian people, and that there was no uniform *lex loci* to regulate inheritance, succession, etc. Mad. Reg. II. of 1802, secs. 3 and 4, applies to natives and other persons not British subjects; so Mad. Reg. VII. of 1827. It is true that Ben. Reg. IV. of 1793, section 15, applies only to Hindoos, or Mahomedans, but as the Mofussil Courts are Courts of conscience, they determine questions respecting the law of Foreigners, that is, not Hindoo or Mahomedans, but British subjects. Thus in *Durand v. Boillard* (5 Ben. Sud. Dew. Rep. 176), the succession was governed by French law. *Joanna Fernandez v. Domingo de Silva* (2 Ben. Sud. Dew. Rep. 227), was a case of Portuguese law, and the cases of *Arichuk Tea Statanoos v. Khaya Michael Aratoon* (3 Ben. Sud. Dew. Rep. 9), *Humrus v. Humrus* (2 Borr. Bom. Rep. 496), *Aratoon v. Aratoon* (7 Ben. Sud. Dew. Rep. 52), *Gregory v. Cockran* (8 Moore's Ind. App. Cases, 275), related to Armenian Christians. So with [229] *Parees, Miherwanjee Noushirwanjee v. Awan Bacc* (2 Borr. Bom. Rep. 209), *Moder Karkhooscrow Hormusjee v. Cooverbhacc* (6 Moore's Ind. App. Cases, 448); likewise Sheik law, *Doe d. Kissenchauder Shaw v. Baidam Beebee* (2 Morley Dig., 22); also among members of the Sheeah sect of Mahomedans, *Raja Deedar Hosssein v. Ramer Zuhoor oon-Vissa* (2 Moore's Ind. App. Cases, 441), and by the English law, *Hoo v. Peter Marquis* (4 Ben. Sud. Dew. Rep. 213). This view of the law, that the Mofussil Courts adjudicate according to the law of parties not being Hindoos or Mahomedans, is strengthened by the Act of the Indian Legislature, No. XXI. of 1850, by which it is declared that, notwithstanding a Hindoo becomes a Christian, his rights of inheritance or property as a Hindoo shall not be thereby affected. We insist that with respect to the customs and usages applicable to native Christians, the evidence here clearly establishes that the law of their ancestors, namely, the Hindoo law, was the only guide; that birth and blood must decide, and the adoption of English dress and manners does not and cannot alter the rule of law or change the *status* of the parties as to the acquisition and transmission of property.

Secondly, according to Hindoo law, the Respondent was entitled to an equal share with his brother, and, after his death, with his family, in all the property, which was joint property. The Hindoo law applicable to the joint acquisition of property by two brothers, although not undivided, is clear, *Kashul Chokkurcutty v. Radhanath Chokkurcutty* (1 Ben. Sud. Dew. Rep. 335), F. Macnaghten's "Hindoo Law," pp. 45, 66; Strange's "Hindu Law," Vol. I., p. 213, and cases collected in [230] Morley's Dig. tit. "Partition," Vol. I., p. 180. The legal result is, that the brothers had an equal interest in the joint acquisitions, even although ignorant of the law, and admitting no intention of creating a joint interest existed. As to the joint acquisition of property by the Respondent and his brother, Matthew, by their joint labour, we submit that the evidence is sufficient, independently of Hindoo law,

to create a joint and equal interest between the brothers. This is shown by the confidential and unreserved mode of dealing between them, their living together, their joint purchases and mortgages, and the constant and invariable course of joint and common interest for twelve years succeeding the death of Matthew, without account or claim.

Then with respect to the accounts. If the interest of the brothers is held to be joint, which we insist it was, then Rs. 3,00,000 is to be taken as a basis of calculation, and the amount received by the Appellants added to it, and then the total of the two amounts should form the valuation of the joint property, and this is the mode of taking the account which was finally agreed to by the several parties before the Sudder Court. This proposal was made to avoid the expense and delay of taking accounts generally, and the Court acted upon it, and we contend that, assuming the interest is held to be joint, both parties are bound to have the account settled on that footing, and have thereby waived general accounts.

Lastly, in case of there being no joint interest, the Respondent is entitled to the whole of the Abkarry contract, and the profits thereof, from the 20th of April, 1843, as his exclusive property, he being ready [231] in such case to allow a fair sum for the distillery, plant, and premises.

Their Lordships' judgment was postponed, and was now delivered by

The Right Hon. Lord Kingsdown (June 13, 1863).—The Appellants in this case are Charlotte Abraham, the widow, and Daniel Vincent Abraham, the only surviving child of Matthew Abraham. The Respondent, Francis Abraham, was the only brother of the late Matthew Abraham. Matthew Abraham and the Respondent were by birth Hindoos of pure native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally it appears Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in India as "native Christians." Matthew Abraham was by far the elder of the two brothers; for in early life, when the Respondent was only about two or three years old, he was employed as a clerk in the arsenal at Bellary. In the year 1820, he married the Appellant, Charlotte Abraham. This lady and her father and mother were also Christians: the father an Englishman and the mother a Portuguese. They were of the class known in India as East Indians. There was issue of this marriage the Appellant, Daniel Vincent Abraham, and another son, Charles Henry Abraham, who survived his father, Matthew Abraham, but died pending the proceedings brought before us by this appeal. In the year 1823, Matthew Abraham established a shop at Bellary, the business of which was continued to be carried on up to the [232] time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, Matthew Abraham entered into a contract with Government for the supply of liquors to the troops at Bellary, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to Matthew Abraham up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the Abkarry contract. In the year 1832, Matthew Abraham took Mr. Richardson and the Respondent, his brother, into partnership with him in the shop-business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of Matthew Abraham, continued by him and the Respondent, his brother, without any new arrangement having been come to between them. The Respondent, some time before the death of Matthew Abraham, also married a Christian lady of the class known as "East Indians." In the year 1842, Matthew Abraham died, leaving the Appellants and Charles Henry Abraham, his widow and children. After his death the Respondent continued to carry on the shop-business, and he also procured the Abkarry contract to be annually renewed in his name, and carried on the business of that contract, and the distillery connected with it. In the year 1854, the Appellants and Charles Henry Abraham instituted against the Respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at Rs. 3,00,000.

By their plaint in the suit they alleged, that the whole of the capital in the shop-business was supplied [233] by the late Matthew Abraham; that the distillery

business was carried on by him alone and with his own capital, and that the Respondent was his clerk, agent, or manager, in this business at a salary; that on the death of Matthew Abraham, the duty of collecting his estate devolved on the Appellant, Charlotte Abraham, and she intrusted the collection, realization, and management of it to the Respondent, and gave him a power of attorney for that purpose, and that the Respondent had carried on both the shop business and the distillery business by means of the late Matthew Abraham's capital; that he had made payments to and on account of the Plaintiffs, and for the debts of Matthew Abraham, but not nearly to the amount which he had received; and the Plaintiffs accordingly by their plaint, prayed for an account of the late Matthew Abraham's estate received by the Respondent, including the profits of the shop business and of the distillery, subsequently to his decease, offering to make the Respondent a just and sufficient allowance for his services in managing the distillery business since the death of Matthew Abraham.

The Respondent, by his answer to the plaint, insisted, that the Appellant, Charlotte Abraham, being the widow of the late Matthew Abraham, could not claim jointly with her sons, the other Plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that Matthew Abraham's situation in the arsenal was procured for him by his father; that the father demised when he, the Defendant, was about two or three years of age, and that the late Matthew Abraham took charge of him, the Defendant, as his guardian, and took charge also of all the property left by their father; that the shop-[234]-business had been conducted by him both in the lifetime and since the decease of Matthew Abraham, but that as the deceased Matthew Abraham and he (the Defendant) were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late Matthew Abraham and he (the Defendant) were brothers of an undivided native Hindoo family, jointly labouring together for their common welfare, borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for the same; and consequently that the late Matthew Abraham and he, (the Defendant) had an equal right to all the capital, and not the elder brother, Matthew Abraham, alone. He said that the Plaintiffs, Charles Henry Abraham and Daniel Vincent Abraham, were merely junior members of an undivided Hindoo family, and that he (the Defendant) by the death of Matthew Abraham had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact they were Hindoos and undivided and must of necessity, and according to all practice and precedent, be subject to the Hindoo law and no other. He denied that the Akkary contract was the property of Matthew Abraham alone, and alleged that he (the Defendant) had purchased the contract after the death of the late Matthew Abraham on his own responsibility.

The Plaintiffs by their replication submitted, that [235] by whatever law the case was to be decided, they had all a common interest against the Defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the Defendant's assertion that the case ought to be decided according to the Hindoo law; and after referring to the class of East Indians having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that in suits between parties who were neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted, that even if the case was to be governed by the Hindoo law, the Defendant had no right to any portion of the late Matthew Abraham's estate. They denied that Matthew

Abraham inherited any property whatever from his father, and said that the father died an insolvent and ruined man, and that Matthew Abraham had taken charge of the Defendant and reared him from generosity, and had begun the affairs under litigation when the Defendant was a boy at school, and unable to assist him in them. They insisted that Matthew Abraham and the Defendant were not members of an undivided family in the [236] light alleged by the Defendant, and that even if Matthew Abraham obtained his original appointment under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition.

The Defendant, by his rejoinder, adopted the view insisted upon by the replication as to the principles which ought to determine the law by which the case should be decided, submitting that the Plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to, in order to ascertain what law was to govern their relations to each other.

It appears from the record of proceedings before us that in this stage of the suit the Plaintiffs were non-suited by a decree of the Civil Court of Bellary upon the grounds, first, that the Plaintiff, Charlotte Abraham, the widow, could not take part in the suit, she having no right of inheritance as the family stood; and secondly, that no sufficient description or specification of the value of the property sued for had been given in the plaint: but upon an appeal to the Sudder Adawlut, this non-suit was set aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing, that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the [237] subject, and that such a judgment could only be rightly pronounced upon a consideration of the usages of persons situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, Matthew Abraham, acquired by himself, or of ancestral origin, after which the rights of the parties thereto, whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of Bellary, and the points stated in the pleadings (*ante* [9 Moo. Ind. App.], p. 207) were recorded for proof. A vast mass of evidence upon the points recorded was adduced, both on the part of the Plaintiffs and on the part of the Defendant. Their Lordships do not find it necessary to enter into the details of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state the conclusions at which they have arrived as to the result of the evidence bearing on these points.

By the decree made upon the hearing of the cause by the Civil Court of Bellary, the Court ordered as follows:—That an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to Matthew Abraham's death, and that the [238] Defendant do pay to the Plaintiffs one-half of the capital and profits found due. That an account be taken of all the capital employed in the distillery business and of the profits, down to the time of the death of Matthew Abraham, and also of the profits of the distillery business arisen since his death, and that the Defendant do pay to the Plaintiffs the amount of the capital and profits found due. That an account be taken of all other the moneys, goods, debts and property of Matthew Abraham which have been collected or received by, or come into the possession of, the Defendant, or any person by his order or for his use, and that the Defendant do deliver up to the Plaintiffs all such portions thereof as consist in kind or specie, and do pay to the Plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of Matthew Abraham. That so long as the present contract endures, and so long as the Defendant carries on the business in the Plaintiffs' distillery buildings,

etc., and with their capital, stock, etc., he must and shall be considered as their agent, and as such accountable to them for all the profits arising from the said business, and that he shall deliver up to the Plaintiffs all deeds, books, securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of Matthew Abraham, deceased; the Plaintiffs being bound, in taking the aforesaid several accounts, to make to the Defendant a just and sufficient allowance for his services in managing the said distillery business, and also for his services in collecting and managing all other the property, estate, [239] and effects of Matthew Abraham, and that the Defendant do pay to the Plaintiffs the costs of the suit.

From this decree the Defendant appealed to the Sudder Court.

The Sudder Court, upon the case being brought before it, submitted a question to their Pundits in these terms:—"Two brothers, governed by Hindoo law, inherit no ancestral property. They live together. The elder acquires some property. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labour thereto. The elder of those brothers has demised. During the latter years of the deceased brother the labor fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder brother has left two sons. Are the said uncle and nephews to be considered co-sharers; and, if so, in what proportions?"

And the Court afterwards submitted this further question to the same Pundits:—"Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respective rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them?"

The opinion given by the Pundits upon these questions having been, that the property ought to be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons [240] could not be affected by their ignorance of those rights, the Court as to the legal rights of the parties held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares; and having arrived at this conclusion, the Court adopted the estimate of the value of the property made by the Plaintiffs for the purposes of their suit—that it was of the value of Rs. 3,00,000, added to that amount the sums which had been paid to the Plaintiffs and to creditors, and the value of some part of the property in the Plaintiffs' possession, thus bringing up the entire value of the property to Rs. 4,71,414. 10s. 5p., and taking one-half of that amount as the Plaintiffs' share, and deducting from it the sums which had been paid to them, and one-half of the debts, found the balance due to the Plaintiffs to be the sum of Rs. 71,492. 10s. 9½p., which the Court ordered the Defendant to pay to the Plaintiffs in discharge of all obligations due by him up to the date of the suit. The Court was also of opinion that the Plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

It is from this decree of the Sudder Court that the present appeal has been brought.

The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of considerations the objection raised by the answer, that the Plaintiff, Charlotte Abraham, as widow, could not sue jointly with the other Plaintiffs, her sons, an [241] objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the Sudder Court when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late Matthew Abraham, but whether he and the Respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations

growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any [242] continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.

It appears, indeed, both from the pleadings and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point, appears also to be supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at Bellary seems to coincide entirely with the opinions of Pundits reported in W. H. Macnaghten's "Hindu Law," Vol. II. pp. 131-2. It is there stated, that on the death of an apostate from the Hindoo faith, his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion; and the marginal note states, that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulated the devolution of property. The Pundits, therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law, as to his subsequent acquisitions.

[243] Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoo in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by [244] attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom: and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point,

as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the Sudder Dewanny Adawlut in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the *forum*, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of movables was applied by the Courts in the Mofussil to the succession of the property of this class.

Such, then, being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

Their Lordships collect from the evidence that the class known in India as "native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate [245] divisions forming against distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the "East Indians," a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the Respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late Matthew Abraham and the Respondent had no ancestral property, and that the property which the late Matthew Abraham had was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in India upon this point. They are also quite satisfied upon the evidence that [246] from the time of the late Matthew Abraham's marriage he and the Appellant, Charlotte, his wife, and their children adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the Appellant, Charlotte Abraham, belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive Matthew Abraham into their society and treat him as one of themselves. The evidence on this point of the Appellant, Charlotte Abraham, the first Plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. Matthew Abraham had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of Bellary would recognize her husband as one of their body, and the marriage took place. On one important public occasion when a jury was summoned of East Indians, Matthew sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed, then, to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in

other respects, of the class to which they [247] belong. In this particular case the question is, whether the property was bound by the Hindoo law of parcenership.

Now, Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *a fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. Melvill, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fiction juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or [248] interest? Surely, in things indifferent in themselves the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a "Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before-mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as [249] father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs, which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the Defendant relies in his answer did not exist in any sense which is material to or assists the decision of the case.

There being then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late Matthew Abraham's acquisitions ought, or ought not, according to that law, to have been deemed to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say, that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lord-

ships, however, think it right to add, for the guidance of the Courts in India in future cases, that whenever the opinion of Pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those [250] special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which, in this instance, was laid before the Pundits: "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the Defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late Matthew Abraham; a point which, though not distinctly pleaded on the part of the Respondent, must, as their Lordships think, upon a fair view of all the pleadings in the case, be considered to be open.

In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burthen of proof rest? Their Lordships are of opinion, that it lies on the Defendant. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor [251] of every observation made and argument urged upon it by either side: that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on, on either side, as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. Mackeson to be, not a one-sided one; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. For the Appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters: first, the habits of life of the families both of Matthew Abraham and the Respondent, as inconsistent with the nature of the existence of an undivided Hindoo family, Hindoos by origin, but not Hindoos by religion. Secondly, the establishment by Matthew Abraham of a business under his sole name; his introduction into it of his brother and Richardson as partners with himself; his formal public notification of that fact to the world by a notice stating that he had introduced them into his firm; the payment of rent for the shop, both during the continuance of that firm and by the succeeding firm, which then consisted of himself and his brother only; and the consistency of that payment with the joint property in the building and premises. Thirdly, the signatures on several occasions of Francis Abraham as agent; his dissatisfaction with the business at Kurnoul; and his language regarding it as inconsistent with a joint ownership and corresponding voice. Fourthly, after the death of Matthew Abraham, the inconsistency of the Defendant's whole con-[252]-duct for a time, with any notion in his mind that he had a joint legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statements in the Respondent's letter to Charles Henry Abraham, of the 19th of August, 1842, in which, giving an account of all the property of Matthew Abraham, he states that, it was in the bracketed item or items alone he had a half share, the item or items so bracketed not including the distillery, which is afterwards mentioned as a part of the property of Matthew Abraham; on the Respondent's fears expressed in the same letter of being left to seek his fortune; on his expression that he had hoped that his brother would have provided for him; and on the request to Charles Henry Abraham, to intercede with his mother to carry out the presumed intentions of his father. Fifthly, the treatment by the Defendant of Mrs. Charlotte Abraham, as the head of the family; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice; the administration taken out in her name; and his taking a power of attorney from her.

These were treated as inconsistent with the Respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the Defendant and his brother belonged; the customs of the Christian class within which that family was included; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property as an undivided one.

The dealings of the Defendant in the management [253] of his brother's affairs; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family; the presumed continuance of a state proved to have existed, and not in terms proved to have been interrupted; the execution of the bonds and conveyances referred to in the Respondent's case; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent,—were pressed with much force on the attention of their Lordships. The statement of ownership in Francis Abraham contained in his mortgage deed, and the admissions derived from the acts of the third Plaintiff, Daniel Vincent Abraham, in the suits and proceedings relating to the Kurnoul affairs, also referred to in the case of the Respondents, were urged as additional grounds in support of the case of the Defendant, which it was argued the language of a large portion of the correspondence strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view much, if not the whole, of what is urged on the part of the Respondent as to the nature of the original family to which he and Matthew Abraham belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of Matthew Abraham to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the Respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot [254] but weigh heavily against the Respondent, it is to be observed that there is an equal absence of proof that the Respondent ever received any share of profits as parcener.

The arguments from the dealings of the brothers, so forcibly urged by Sir Hugh Cairns, are certainly as forcible to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when Richardson was associated with them. On what ground, then, should a Court conclude, if it thought that a conjoint interest existed in the Abkarry contracts, that it was founded on Hindoo family union, rather than on the model of the shop business? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed, that these instruments are wholly unexplained by the evidence, and that the fact of the Appellant, Charlotte Abraham, having been made a party to some or one of them, renders it very difficult to deduce from any of them the inference for which the Respondent has contended; but, what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the Respondent by his answer refers to these moneys having been raised for the purposes of the shop business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After care-[255]-fully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th of August, 1842, to which they have above referred. They find much, both in the correspondence and in the other documents, in proof in the cause which tends to confirm what is stated in that letter.

The Respondent, by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight

to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the Counsel for the Respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the Appellant, Daniel Vincent Abraham. Neither the Appellant, Charlotte Abraham, nor the late Plaintiff, Charles Henry Abraham, is in any way proved to have been privy to, or cognizant of, this admission: the late Plaintiff, Charles Henry Abraham, was absent in England at the time, and he never in any way adopted it. It is, no doubt, evidence against all the Plaintiffs, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the Sudder Court. Whence had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a status concerning which the Respondent himself seems to have been [256] long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th of August, 1812; had he then considered that he was a half sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of a youth, ignorant alike of law and business, a binding effect is given against all the Plaintiffs on the record.

Their Lordships are not prepared to follow the Sudder Court in the weight which they have given to this admission. Looking at the whole case, with reference to the Hindoo law, they are of opinion, that the claim of the Respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the English law—a point of view, however, which, so far as the Respondent is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the Respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion, that the decree of the Sudder Court cannot be maintained; but, on the other hand, they are not prepared to go to the full length to which the Judge of the Civil Court of Bellary has gone by his decree. The Respondent no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the Appellant, Charlotte Abraham, by accepting a power of attorney from her. That character, and the acquisitions under it, should have been renounced before the Respondent asserted an interest adverse to that of his constituent; such [257] an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of administration were, indeed, taken out for a special object only; they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to, or subsequently ratified, the authority delegated by the letters of administration. The administration related back to the death of Matthew Abraham; the possession of the whole property, therefore, from the time of his death must be ascribed to the first Plaintiff, as the Defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they entirely agree with the Sudder Dewanny Adawlut in their estimate of the value of the Respondent's services. The property in the Abkarry contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the Plaintiffs were competent to the management of the concern. In all probability, but for the Respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the Respondent to be named as the successor to his brother in the contract. The relationship of the [258] Respondent to the family, the devotion of his time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the Abkarry business, establish a great difference between this and the case of any ordinary agency.

In ordinary cases and under ordinary circumstances these services on the part of the Respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case their Lordships find it proved by the Plaintiff's first witness, that the Respondent on Matthew Abraham's death declared to him that he had worked like a slave in the Abkarry business, and was merely paid for his labour; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the Respondent, but she never did so. After her having so long availed herself of the Respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the Respondent to be remunerated to that extent. Their Lordships, therefore, think, that it ought to have been declared by the decree that the Respondent was entitled to an equal share of the profits of the Abkarry contract accrued after the death of Matthew Abraham as a remuneration for his services in the execution of that contract. Their Lordships [259] think also that, having regard to the evidence to which they have last alluded, and to the Respondent having been permitted for so many years to carry on the Abkarry contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs, up to the hearing, ought not to have been given against the Respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the Respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the Sudder Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Sudder Court, and to restore the decree of the Civil Court of Bellary, modified as above pointed out (see *Varden Seth Sam v. Luckpathy Royjee Lallah*, post [9 Moo. Ind. App.], 303).

[See *Jowala Buksh v. Dharum Singh*, 1866, 10 Moo. Ind. App. 511; *Barlow v. Orde*, 1870, 13 Moo. Ind. App. 308; *Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Nilamani Patta Maha Devi Garu*, 1870, 13 Moo. Ind. App. 513; *Juttendromohun Tagore v. Ganendromohun Tagore*, 1872, L.R. Ind. App. Sup. vol. 56.]

[260] JUGGOMOHUN GHOSE,—Appellant; KAISREECHUND.—Respondent *
[June 30, July 1, 1862].

On Appeal from the Supreme Court at Calcutta.

Neither by the English nor the Hindoo law, unless there be mercantile usage, can interest be imported into a contract, which contains no stipulation to that effect.

In an action on contract, known as Tajee mundee Chitties, opium wager contracts (before the passing of the Act, No. XXI., of 1848, which prohibited

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

such gambling contracts), the Plaintiff claimed interest on the sum recovered. Held, that as there was no stipulation as to interest in the contract, or satisfactory evidence of mercantile usage at Calcutta to import interest into the contract, the interest claimed could not be allowed.

This was an appeal from a judgment of the Supreme Court at Calcutta, founded on a verdict of that Court, sitting as a jury, on a new trial had in pursuance of a remit by the Judicial Committee, in an action on promises brought by the Appellant against the Respondent and one Manickchund, since deceased.

The only question on the new trial and urged in this appeal, was whether upon the evidence the Appellant had established any usage of trade at Calcutta so as to entitle him to interest on the principal sum of Rs. 7150. 6a. 3p., awarded to him on the new trial. The nature and circumstances of the case are fully set forth in the report of the former appeal (7 Moore's Ind. App. Cases, 263).

In pursuance of the Order in Council made by Her [261] Majesty on the hearing of the previous appeal, the Appellant set the cause down for a new trial on the former pleadings, and the action was tried on the 1st and 4th of June, 1860, before the Chief Justice, Sir Barnes Peacock, and Sir Mordaunt Wells, in the Supreme Court at Calcutta.

The Appellant, upon the question of mercantile or trade usage, examined eight witnesses, and put in two depositions of witnesses, taken in another action. The effect of their evidence was to show that no such general usage as that insisted on by the Appellant existed; that in cases in which interest was paid between the parties to such opium chitties, it was not by force of the original contract, or the usage of the trade, but under a distinct and substantive agreement, made sometimes in writing and sometimes verbally, between the original parties after the chitties became due and a failure to pay accordingly on the part of the then debtors; and that such new agreement gave further time for the payment of the principal, varying from four or five to twenty days, and providing for the payment of interest at rates varying according to the arrangement of the parties in each separate transaction. The Respondent examined three witnesses, and put in also the deposition of another witness taken in the other action. These witnesses deposed, that there was no known usage of trade, such as that which had been contended for by the Appellant, and agreed with the witnesses of the Appellant, so far as they declared that wherever interest was paid, it was not under the Tazee Munde Chittees, but under a subsequent fresh arrangement made by the parties in respect to the payment of such interest.

Upon this evidence a verdict was given by the [262] Supreme Court for the Appellant, for the principal sum of Rs. 7150. 6a. 3p. only, as on the former trial, without interest.

The Chief Justice, on delivering the verdict, said,—“It appears to the Court that the Plaintiff is not entitled to interest on the principal sum admitted in this case to be due in respect of differences on the opium sales in question; and if the case had not come down to us from the Privy Council for a new trial on this point, we should have been disposed to stop the case, concurring with the Counsel for the Defendant, that the Plaintiff has given no sufficient evidence in support of his claim to interest; but in consequence of Sir John Coleridge's remark in the judgment of the Privy Council (7 Moore's Ind. App. Cases, 282), to the effect that the evidence on the former trial required explanation, we thought it better that the case should proceed, and that the evidence which was forthcoming on the Defendant's part should be gone into, in order that if our decision should again go to the Privy Council, the case might be free from the former objections. Several questions have been raised in argument. The learned Advocate-General in his reply contended that, as this was a case between Hindoos, we were bound to decide this question of interest according to the rules of Hindoo law, without reference to local usage, and that by that law interest was given in many cases, such as on money or goods lent, in which it was not generally recoverable by the law of England. It was not shown that according to Hindoo law interest would be payable under such a contract as this, in which there was no stipulation for interest, and I am not sure that in cases where interest is payable, [263] according to the Hindoo law, it can be recovered

merely as damages. If it is recoverable as due by contract, the declaration should be framed accordingly, and the interest should not be claimed merely as damages. I understand that by the Hindoo law, when interest is payable, it is so expressed in the contract, and is due as a right, and that there is no such distinction as in our law of interest being given as damages for breach of contract. Something was said by the Advocate General as a reason for not claiming interest in terms, with reference to this contract being considered as an immoral one; but in that case not only interest but the principal also would be irrecoverable, and we cannot say that this contract is so far illegal as to avoid the claim to interest without avoiding also the right to the principal. The cases, however, already decided in the Privy Council between Hindoos, affirm that these contracts are not void either by English or Hindoo law (see *Doolubdass Pettamberdass v. Ramlohl Thakoorseydass*, 5 Moore's Ind. App. Cases, 109, and cases there cited); and, therefore, if the principal sum would be legally recoverable, it would follow that the interest, if due, might also be recovered. There is, however, no authority cited to satisfy the Court that such a contract bears interest, and there is nothing on the face of the plaint in this action claiming interest or charging the Defendant with a liability to pay it. The plaint, in substance, only states that the contract was not performed and thereby the Plaintiff sustained damage. Is the Court then bound to allow interest, or has it the option here, as in other cases, of giving or withholding it? [264] According to the English law, unless there is some usage of trade, such a demand would not bear interest, and there is no case which shows that according to Hindoo law a different rule applies. We are, therefore, driven to ascertain whether such a usage of trade exists, as that it must be supposed that the parties contracted with reference to it. We are not at all sure that, if such usage was made out, the Court would not be bound to give interest, not as damages, but as a substantial part of what was due by the contract itself. In *Calton v. Bragg* (15 East, 223), the action was for a balance consisting solely of interest, the principal having been paid. It was there decided, that interest was not allowable by law upon money lent generally without a contract expressed, or to be implied from the usage of trade, or other special circumstances. But there, if the action could have been supported, it would have been for interest as part of the debt, and not as damages. In an action on a Bill of Exchange, where interest is not expressed on the face of the Bill, interest is recoverable merely as damages, but if the Bill contains a stipulation for interest it becomes a part of the debt. It has been laid down that an invariable custom of trade affecting a contract is to be presumed as incorporated into the contract as in view of the contracting parties at the time. If, therefore, this contract had stated that the Defendants would pay the opium differences within three days after the sales, and in case of default would pay interest, the stipulation for interest would be such an integral part of the contract as that the Court would be bound to give it as part of the debt. But it is not so sought to be recovered, but as damages [265] merely. Suppose, instead of an express, there were an implied contract to pay interest from the course of dealing between certain parties, as in the case of tradesmen's bills in this city, which often specify in the heading that interest will be charged at a certain rate if the bill is not paid within a given time; if parties go on dealing with notice of these terms, a jury might infer that the customer agreed to the stipulation to pay interest if he delayed to pay the debt. In such case the interest would be recoverable as due by contract, and not merely as damages for the nonpayment of the demand. Now, the general usage of trade, where established, operates in the same manner as a particular course of dealing between individuals. If, then, there be a well-known usage of trade in reference to particular contracts, a person dealing in the trade, contracts on the terms of the usage; if interest is here recoverable on the difference of the opium sales by virtue of general usage, it is due by contract and not simply as damages. But, whether this is so or not, is comparatively immaterial, for the Court is of opinion, that no such usage of trade has been proved by the evidence. In only one instance, the case of one Neem Mullick, it was said that on a contract similar to the present, interest was paid. In all other instances we find that the payment was made by the Shroffs on behalf of the parties at the time when it became due. There was one witness, Manickjee Rustomjee, who said that he paid interest on such contracts. But the way in which he paid interest was this,

it was not on particular Chittees, but he had got a Shroff to issue these Chittees for him; the Shroff paid the losses at [266] due date, and he advised Manickjee of the payments, and debited him with the payments and interest in a general account current between the parties. This, therefore, was a payment of interest not under the opium Chittees, but upon money advanced by the Shroff to pay the opium Chittees, and interest was charged in the usual course of dealing between the parties. In all the other cases of Chittees not being paid when falling due, all the witnesses agree, that the holder would call on the party liable, and if he were unable to pay, there would be a fresh arrangement (sometimes in writing, at other times verbal) giving a certain number of days, varying from four or five to twenty, for payment with interest at various rates. In such cases interest became chargeable by virtue of the new and special arrangement; and this is a strong argument against its being considered by the parties to be due as part of the original contract; for if interest were due according to the term of the original contract, there would be no necessity for a new agreement stipulating for interest. In all these instances, the arrangement was for a short period, of some twenty days at the utmost; and there is no case like the present when the claimant has lain by for ten years, and then claimed interest. It was said by some of the witnesses that the original contracts did not provide for interest in case of default in payment, because the contractors would be considered dishonourable if they contemplated such a contingency as failure to pay; and in fact, as suggested by Mr. Justice Wells, these new contracts for enlarging the time of payment appear to have been made for the purpose of preventing the exposure of the defaulters [267] in the market, and the consequent injury to their credit. It appears to the Court, therefore, that there has been no usage of trade established by the evidence from which they can infer that, when the parties dealt it was an implied term of their contract, that in case of default in payment, interest would be chargeable without any further agreement; and there will, therefore, be a verdict for the Plaintiff for the principal sum which is admitted to be due, viz., Rs. 7150. 6a. 3p., but without interest."

The present appeal was brought from this verdict.

Sir Fitz-Roy Kelly, Q.C., and Mr. W. Paterson, for the Appellant.—This action was brought by the Appellant upon certain contracts, known in India as "Tajee Mundee Chittees," respecting the average price of opium at the first public sale by the East India Company for the year 1846, and the Appellant sought to recover the difference between such average price and the prices mentioned in the Chittees. Upon the former appeal here, *Juggomohun Ghose v. Manickchand* (7 Moore's Ind. App. Cases, 263-82) a new trial was ordered on the ground that the evidence of mercantile usage, given by the Appellant at the trial, as to allowance of interest upon these Chittees, required to be answered. On the new trial there was ample evidence of usage to pay interest when default was made in paying the principal on Tajee Mundee Chittees, and the Respondent failed to answer it by any satisfactory evidence to the contrary. The verdict of the Supreme Court, setting as a jury, in not giving interest, as damages, we insist was against the weight of the evidence, and cannot be sustained. Again, it is most [268] important to bear in mind that the finding of the Supreme Court at Calcutta is in direct conflict with the decisions of the Supreme Court at Bombay and of this Tribunal. In the case of *Ramlal Thakur-sidas v. Dulabdas Pitamber* (Perry's Oriental Cases, p. 198) it was held, that such wagers by the mercantile usage at Bombay carried interest, and Lord Wensleydale, in pronouncing the opinion of their Lordships in the same case upon appeal, *Doolubdass Pitamberdass v. Ramlall Thakoorseydass* (5 Moore's Ind. App. Cases, 136), says, "As to interest, we think the Court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions." In the cases of *Rughoonanth Sahoo Chotayloll v. Manickchand* (6 Moore's Ind. App. Cases, 251) and *Rughoonauth Sahoo Chotayloll v. Uggerechund* (*ib.* 262) from Calcutta, interest was not claimed, and the question, therefore, did not arise. Here the Supreme Court at Calcutta, when applied to, refused to allow interest as damages. Now, we submit, that would not be creditable to the administration of justice in India to have conflicting judgments upon the same transaction, although they arose in different parts of the same country, and we contend, that the judgments in the Bombay cases in allowing interest were right. The Chief Justice too was wrong in

stating that interest should be claimed by the declaration. It is not necessary expressly to plead such a demand. In the case of Bills of Exchange and Promissory notes, interest is recovered as damages.

Mr. Forsyth, Q.C., and Mr. Leith, for the Respondent.—This Court, when the case was formerly before it, did not decide that interest could be claimed by the [269] law of India as now insisted by the Appellant, or determine that the mercantile usage upon this point at Calcutta was the same as that at Bombay. All this Court did on that occasion, was to remit the case to the Court below, to enable the Appellant to establish his claim to interest by showing that in Calcutta mercantile usage to allow interest in transactions of this nature existed. Interest is now claimed first, as part of the *lex fori*, and, secondly, as a custom of trade so well understood as to be within the intention of the parties and impliedly, therefore, incorporated into the contract. But the requisites to support such a claim are, that it be invariable, clearly defined, and the terms fixed. Now, was such a custom established by evidence in this case? Because it must be borne in mind that the *onus* of proving the usage of trade, relied on by the Appellant as entitling him to interest, lay on him, and we submit, that he failed to prove such usage. The idea of the claim for interest upon these Chittees never occurred to the Appellant until the decision in *Doolubdass Pettamberdass v. Ramlooll Thackoorseydass* [6 Moo. Ind. App. 251] was pronounced by this Tribunal. The declaration did not contain any count for interest. The argument of the Appellant, that if the judgment of the Court below stands, there will be a conflict of decisions between the Courts at Bombay and Calcutta, and that it is desirable to have uniformity of decisions, is fallacious. In the first place, these wager contracts have been declared illegal by the Act of the Indian Legislature, No. XXI. of 1848, and, secondly, the case really does not involve a point of law to be decided as the rule in future cases. It is simply a question of fact of mercantile usage and trade, and amounts to no more [270] than this: Has the Appellant, by his evidence given in this action proved to the satisfaction of the Court that the custom contended for by the Appellant exists? Our contention is, that he has failed to do so. There is nothing extraordinary that the course of trade and usage as to allowance of interest at Bombay should differ from that at Calcutta. It occurs in this country. Take for example, the custom of Bankers in Scotland and of Bankers in England.

Their Lordships stopped the Respondent's Counsel, and called upon Sir Fitz-Roy Kelly, who was heard in reply.

At the conclusion of which their Lordships' judgment was pronounced by

The Right Hon. Lord Kingsdown.—Their Lordships are of opinion, that the judgment of the Court below was perfectly correct and ought to be affirmed.

When this case was before their Lordships on the former appeal, they thought the right to interest must depend on this point, whether there was, or was not, a mercantile usage sufficiently clear to enable the Court to import that condition into a contract which had been made between the parties. Their Lordships were of opinion, that on the former trial that fact had not been sufficiently investigated. There was evidence which required an answer, and that answer had not been given. Their Lordships, therefore, thought it necessary to send it back to India to a second trial.

Evidence upon the point of mercantile usage at Calcutta to allow interest on these Chittees has now been obtained, and their Lordships are clearly of [271] opinion, that the Court below was quite right in holding that it does not sufficiently establish the usage, upon which alone the right to interest must depend.

In the Bombay case [*Doolubdass Pettamberdass v. Ramlooll Thackoorseydass*, 5 Moo. Ind. App. 109], what their Lordships decided was this; that as there was evidence there given which the Court below thought was sufficient to establish the custom, and as their Lordships were not prepared to dissent from that conclusion, they held that the Court below was warranted in giving interest; and it might well be that such a custom prevails in Bombay and does not prevail in Calcutta.

This case was sent back for the express purpose of trying whether in Calcutta such a custom or usage did prevail there. If it did prevail, there should have been evidence of an overwhelming character to establish it. Such evidence has not been

given; and their Lordships are clearly of opinion, that the Court below could come to no other conclusion than that it did not prevail.

The judgment, therefore, was perfectly right, and the appeal must be dismissed, with costs.

[See note to *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass*, 1850, 5 Moo Ind. App. 136.]

[272] MAHARAJAH MAHASHUR SINGH BAHADOOR,—Appellant; BABOO HURRUCK NARAIN SINGH and Others.—Respondents * [July 1, 1862].

On appeal from the Sudder Dewanny Adaulut at Calcutta.

Sale for arrears of Government revenue set aside.

The sale advertisement being irregular, first, in not being published in conformity with sec. 6, of Act No. I. of 1845; and secondly, the Mohals not being sold in their consecutive numbers, in the Towjee, or Register of the Collector of the District, as provided by section 14, of that Act.

Such an irregularity is not cured by Act No. IX. of 1854, which relates only to technical errors of procedure in the Lower Court, which are not productive of injury to either parties.

In this appeal the suit was instituted to set aside a sale of an ancestral estate sold under the provisions of Act, No. I. of 1845, for arrears of Government revenue, and to obtain possession, with mesne profits and interest.

The estate, called Talooka Sarungpore, was put up to public auction, and sold by the Government Collector under Act, No. I. of 1845, by reason of the default of the Respondents in not paying the arrears of Government revenue due thereon. At such sale the late Maharajah Roodur Singh, the father of the Appellant, became the purchaser for the price of Rs. 1,02,100; and he was put into possession by the Government officers. [273] He remained in possession up to the time of his decease, when the Appellant, as heir-at-law, succeeded to the same. The chief ground upon which the sale was sought to be set aside was certain alleged informalities and irregularities in the conduct of the sale charged against the Government Collector with reference to the provisions of the above Act.

The facts of the case were as follows:—

The Talooka Sarungpore, a permanently settled estate, was the ancestral property of the Respondents; and the kists or instalments of Government revenue payable by them thereon, for the months of Cheyt and Bysack 1255, Fuslee era, corresponding with the year 1848 A.D., were allowed to fall into arrear, and amounted to the sum of Rs. 1,573. 11a. 6p. The instalment payable for the month of Cheyt became due on the first of the next following month, and the instalment payable for Bysack became due on the first of the next month, viz., Jeyt, and not having been then paid, were at these respective dates treated as being in arrear, according to the provisions of section 2, Act, No. I. of 1845. In pursuance of the requirements of section 3 of that Act, a general notification, fixing the latest date for the liquidation of arrears, was published in the Courts of the District and every Sudder and Mofussil office, and under the same notification the latest date for the liquidation of the arrears was the 7th of June, 1848, but at that date the arrears were not paid.

It is provided by section 3 of the Act, No. I. of 1845, that on such default the estate in arrears shall be sold at public auction to the highest bidder. On the 9th June, 1848, a proceeding was held by the Government Collector, in which it was declared and [274] recorded that the estate was liable to be sold. In accordance with

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

that proceeding, and in pursuance of the provisions of section 6 of the above Act, a notification in the native language was issued by the Collector on the same date, intimating that the 5th of July following was the day fixed for the sale of the estate. Also, in pursuance of section 7 of the same Act, a proclamation was issued by the Collector on the same day, directed to the Ryots and under-tenants upon the estate, forbidding them to pay rent to the defaulting proprietors from the day after that fixed as the last day for liquidating the said arrears as aforesaid. Two advertisements in the English language were also published, one in the Agra Government Gazette, and another in the Bengal Government Gazette, notifying that the Talook, with others also mentioned, would be sold on the 5th of July, 1848, for the recovery of balances of Government revenue not paid up on the 7th of June, 1848.

Petitions were presented by the defaulters praying that the Collector would exempt, in his discretion, under section 11 of that Act, the estate from sale by receiving the balance due, but the Collector held that he had no power to accede to the application.

On the 5th of July, the day notified, the estate was put up to public auction, and sold by the Collector to the late Maharajah Roodur Singh, as the highest bidder, for the sum of Rs. 1,02,100.

The defaulters presented a petition to the revenue Commissioner against the sale, under section 17 of the Act, No. I. of 1845, containing their grounds of appeal in which they set forth certain alleged irregularities or informalities in the notification of the sale, and in the conduct of the sale on the part of the Collector [275] and prayed an annulment of the sale. These alleged irregularities were stated to be, first, that as by section 14 of the Act, No. I. of 1845, it was clearly laid down that a day was to be fixed for the sale (agreeably to the provisions of section 6 of that Act), it was necessary to hold the sale on that day; and secondly, that the sale was to be consecutive, according to the order of the number; namely, that the Mehal which bore the smallest number on the Towjee, or register of the Collector, was to be first brought to sale; that in like manner, it was necessary to hold the sale of the remaining Mehals in the same succession and order; and that it was not in the power of the Collector, or any other of the officers, to bring any Mehal to sale by a breach of number. That from a perusal of the advertisement contained in the Gazette, it was apparent that Mouzah Bishenpoor Bulabludder, the number of which on the register Towjee is No. 696, was inserted in the first number; Mouzah Luchmeepoor, the register Towjee number of which is No. 652, was inserted in the second number; Talooka Sarungpoor, the number of which is No. 3047, was inserted as the third number; and Mouzah Mutrapoor, the register number of which is 3482, was inserted as the fourth number in the proclamation, and that the sale was so accordingly held; whereas, if the first number had been entered as the second number, and the second number as the first number in the sale proclamation, there would have been no breach of numbers. That by this means, the conclusion of the sale, contrary to section 14 of that Act, was clearly established. That a great informality in the sale existed—the advertise-[276]-ment prescribed by section 6, of the same Act, fixing the 5th of July, 1848, as the day of sale, and forwarded to the printing-office for the information of the auction-purchasers, agreeably to the authority of the Circular letter of the Sudder Board, No. 11, dated 20th June, 1845, and according to which, being printed, it was transmitted, by means of the Government Gazette, to all the civil and revenue authorities in every Zillah, being manifestly erroneous, as it appeared from the heading of the advertisement to be inserted in this form:—"First, that in accordance with section 6, Act I. of 1845, the Mouzahs, mentioned below, would assuredly be sold in the office of the Collector of the District of Tirhoot, dated 5th July, 1848, corresponding with the 19th Assar, 1255 Fuslee (on Wednesday), for the recovery of the balances due to Government from the Mehals mentioned below, at the request of the Collector of the District of Bhagulpore"; whereas in the Talooka in dispute there was no Government arrear demanded by the Collector of the District of Bhagulpore. Second, in the detail of the advertisement, as in the place of Pergunah Suressa, both in English and Persian, Talooka Sarungpoor, Pergunnah Suressa, was inserted. That Pergunnah Suressa was not in the District of Tirhoot. That this error was contrary to section 6, Act No. I. of 1845, and the Circular letter of the Sudder Board, No. 11, dated 20th June of that year, therefore, in consequence

of the occurrence of such irregularities, the sale could not be affirmed, as in the event of the affirmation of the sale, according to the notification, the purchasers would be entitled to the possession of the Mehal, the arrears of which might be demanded by the Collector of the District of [277] Bhagulpore, and that Mehal be attached to Pergunnah Sarum, and not, according to law, of Talooka Surungpoor. Pergunnah Suressa.

The Commissioner, after referring the matter to the Collector, refused the prayer of the petition, and on the 10th of August, 1848, affirmed the sale. The Sudder Board of Revenue, when applied to, refused to interfere in the matter.

In consequence thereof, several of the defaulters commenced the suit out of which the present appeal arose, by filing their plaint in the Court of the Principal Sudder Ameen of Tirhoot, against the Government, the Collector of the District, and the late Maharajah Roodur Singh, the auction purchaser, as principal Defendants, and also against certain other parties, described as precautionary Defendants, in conformity, as alleged, with the provisions of sec. 19, of Act, No. I. of 1845, within the term of one year from the date when the sale became final and conclusive. The plaint, among other things, stated, that the suit was brought to recover possession of, and for the insertion of the Plaintiffs' names in respect to, Talooka Sarungpoor, the annulment of the proceeding of the Commissioner of Revenue, dated 10th of Pergunnah Suressa, by the annulment of the sale held on the 5th of July, 1848, and August of the same year, affirming the sale; as well as to obtain the sum of Rs. 13,735 3a., the principal and interest and the mesne profits from the date of the sale. The plaint then stated the principal facts contained in the Plaintiffs' petitions filed in the Revenue Courts aforesaid, both before and after the sale, and that, as those Authorities would not annul the sale, the Plaintiffs had brought their suit for that purpose, on the [278] grounds of certain irregularities, the principal of which were, that the notifications or advertisements were informal and erroneous according to section 6 of the Act; that the sale was made in opposition to the provisions of sec. 14 of the Act, inasmuch as the Mehal was alleged to have been out of the order prescribed by that section, and not with reference to its number on the Towjee, or Register of the Collector, with reference to the numbers of the other Mehals; and that it was put up for sale, and sold earlier in the sale than another Mehal bearing a lower number on the Towjee of the Collector, and sold at the same sale. The plaint then stated the reason why the parties called precautionary Defendants were made Defendants, namely, that they were the proprietors of certain Mouzahs included in the Talooka, and would not join the Plaintiffs in bringing the suit, alleging them to be colluding with the other Defendants, and prayed that they might be put in possession of their estates, and have their names recorded in the column of proprietors, by the removal of the name of the auction-purchaser, with mesne profits and interest to the day of the recovery of possession.

The answer of the Government, amongst other things, submitted to the Court the irregularity of making both the Government and Collector parties to the suit, and insisted on the validity of the sale, with reference both to the notifications and proclamations in regard to the provisions of the Act, No. I. of 1845, and the Circular Order of the Sudder Board, dated 18th of April, 1843, and the form appended thereto.

The answer of the Appellant, as the son and heir of the late Maharajah Roodur Singh, who had died [279] pending the suit, after stating several irregularities in the suit, apparent on the face of the plaint, and submitting that the suit should be dismissed, met the several statements in the plaint by denying the alleged collusion, and upholding the sale to Maharajah Roodur Singh, as purchaser at the public sale by auction, as regular and valid. The other Defendants also put in answers.

The hearing of the suit took place before the Principal Sudder Ameen (Mr. E. Dacostas), on the 7th of April, 1853, when he gave judgment and decreed in favour of the Defendants, dismissing the suit with costs. After deciding that there was no ground for a non-suit, he proceeded in these terms:—"I now proceed to the merits of the case. It appears that this sale was held under Act, No. I. of 1845, on the 5th of the month of July, 1848, for a balance of Rs. 1573. 11a. 6p., and was confirmed by the Revenue Commissioner on the 10th of the month of August, 1848, by the dismissal of the Plaintiffs' appeal against the sale. The claimants now come into

Court, not denying the fact of being in arrear, but seeking to obtain a reversal of the sale, on pleas of which the following is the substance :—First, that under section 11 of the aforesaid Act, the Collector did not exempt their estate from sale, though he did those of several other defaulters, by receiving their rents subsequently to the last date of payment. Second, that their ancestors' good services to the State have not been taken into consideration. Third, that the payment of the arrears was withheld by the Bankers, in collusion with the Maharajah, the Defendant. Fourth, that the price realized at the sale was inadequate. Fifth, that the Commissioner's order confirming the sale is [280] opposed to sections 11 and 18 of the aforesaid Act. Sixth, that the sale was held contrary to the provisions of sections 6 and 14 of that Act, out of its turn—or, in other words, out of the regular order of the number of the Towjee—and without publication of the notice in the 'Gazette.' Now, it is obvious, that all the foregoing pleas, except the last, or sixth one, are absurd and irrelevant, noways affecting the legality of the sale. By section 24, a revenue sale can only be set aside by the Civil Court, upon the ground of its having been made contrary to the provisions of the Act above mentioned. The fact of the Collector not exempting the Plaintiffs' estate from sale under section 11, and of the Commissioner of Revenue not suspending his final orders on their appeal against the sale, and not representing the case to the Sudder Board of Revenue under section 18, are no infractions of the law. Both these sections vest the Revenue authorities with a discretionary power to grant the favour, but it is clear that, in the present instance, they did not feel justified or warranted in granting the indulgence. Indeed, the Collector, in his letter to the Revenue Commissioner under date the 22nd June, 1848, plainly states, that 'no sufficient reason that I can discover exists to enable me, under section 11, Act, No. I. of 1845, to exempt this estate from sale. On the score of indulgence alone can the boon be granted.' And, notwithstanding that the Plaintiffs did prefer an appeal to the Commissioner against the sale, yet that Authority, seeing no reason to annul the sale, rejected their petition. As regards the sixth or last plea urged by the Plaintiffs, I do not find that the provisions of sections 6 and 14 have been in any way infringed. The records of the [281] case clearly show that the notice of sale prescribed by the first-mentioned section has not been duly and regularly issued, but published both in the English and vernacular Government Gazettes, and that the sale has been conducted in strict conformity to the last-mentioned section. Mouzah Luchmepoor, bearing No. 652 of the rent-toll or Register; Talooka Sarungpoor, the validity of which is contested by this suit, No. 3047; and Mouzah Mutrapoor, No. 3482; forming class first Mehals, have been very properly and correctly classed in regular order, and sold accordingly in the rotation of their numbers in the manner advertised in the *Calcutta Gazette* of the 21st June, 1848, viz., the lower numbers on the Register preceding the higher ones. Consequently, Mouzah Bishenpoor Bullabhudder; Chuckla Gurjoul, Pergunnah Bisarah; bearing No. 696 of the rent-toll on Register, being of a different species, appertaining to class four of the form annexed to the Circular Order of the Sudder Board, dated the 18th of April, 1845. No. 9 of the *Agra Gazette*, could not, of course, be intermixed with class first, estates, and classed or sold second. To do so would only be to reverse the regular series of the number of each class of Mehals, prescribed, not only by the said form, but by the rules of section 14. The entries made in the advertisements issued under section 6 correspond with those published in the *Calcutta Gazette*. The discrepancy in the *Agra Gazette* is satisfactorily explained by the Collector. It is evidently an error of the printer, and arises from the circumstance of his having (to save the space of the separate notice) placed under an erroneous heading, estates, class one below class four Mehal. This, however, affords no [282] ground for invalidating the sale. In the advertisements printed in the *Calcutta Gazette*, and those sent to the Courts and other places, under section 6, no error exists. In short, there are no grounds to set aside the sale, which has been conducted in strict conformity with the provisions of Act, No. I. of 1845, and is in every respect good and valid"; and it was accordingly ordered, that the plaint be dismissed.

Two appeals were brought from this decree, which were afterwards consolidated. The hearing of the same took place on the 29th of August, 1856, before Messrs. Trevor, Samuels, and Money, the Judges of the Sudder Dewanny Adawlut at Calcutta, when the Court recorded their opinion, that the only pleas to be considered were—

"First, that the sale advertisements in the *Agra* and *Calcutta Gazettes* disagreed with each other, and were not published in strict conformity with section 6, Act, No. I. of 1845; and, secondly, that the Mehals were not sold in their order in the Towjee, in consecutive numbers, agreeably to the provisions of section 14 of the Act above cited. The Appellants state that the Mehals were published in the following order in the *Agra Gazette*:—First, Bishenpoor Bullabhudder, No. 696. Second, Luchmeepeer, Pergunnah Dhurour, No. 652. Third, Sarungpoor, Pergunnah Sarani, No. 3047.' Whereas No. 652, should have been first, and No. 696, second. That the Collector admits the incorrectness of this advertisement, but explains that the Mehals were sold according to the *Calcutta Gazette*, which was correctly printed and published. That in the *Calcutta Gazette* they stand thus:—First, Lu hmeepoor, No. 652; second, Sarungpoor, No. 3047; third, Mutrapoor, No. 3482; fourth, Bishenpoor Bullabhudder, No. 696.' Whereas No. 696, which is fourth, should [283] have been advertised and sold before No. 3047, which is second in the notification. The Defendants contend, that the Plaintiffs have misconstrued the intent of section 3, Act, No. I. of 1845, which relates to Mehals permanently settled; and of section 5, which has reference to various Mehals settled for fixed periods; and also of the Board's Circular Order of the 18th of April, 1845, and the form appended to it. The Mehals of various kinds were advertised in the Government Gazette, in conformity with the above form. That the sale of the estate in question was conducted regularly, with due regard to its consecutive number, according to the provisions of the Act; the three first estates being of the same description—that is, Mehals permanently settled and sold for the realisation of arrears of revenue due from themselves, and the fourth estate being sold for arrears on account of other Mehals; and, lastly, that the estate No. 696, was placed fourth in the *Agra Gazette* through the mistake of the printer, which would not invalidate the sale, inasmuch as section 6 of the Act does not provide that the notifications enjoined by the Act shall be printed with reference to the consecutive numbers of the Mehals in the Gazette; and section 14, which enjoins that sales shall be made with reference to the consecutive numbers of the estates to be sold, duly provides that they shall be sold with reference to their consecutive numbers in the Towjee; and the sale was duly conducted under the provisions of this section." The Court then finally pronounced their decree as follows:—"Upon the first plea we find no difficulty. The alleged disagreement between the *Agra* and *Calcutta Gazettes* appears upon the record, and is admitted by [284] the Collector. It is evident, from a comparison of the notification published in the two Gazettes, that the variance complained of existed; but we are of opinion, that this disagreement between them does not in any way vitiate the subsequent sale, and is no ground for us, under the provisions of section 6, or any other section, of the sale Act, to pronounce the sale of the estate to be invalid. It is necessary, under the law, that there should be a sufficient publication of the estates that are to be sold; but the Act nowhere enjoins that the estates shall be sold in the order specified in those notifications. We proceed, then, to consider the second plea, regarding the sale of the estates in their regular order or sequence, according to the consecutive numbers on the Towjee. The order in which sales are to take place, is distinctly laid down in section 14 of the Act—'It is hereby enacted that, on the day of the sale fixed, sales shall proceed in regular order, the estate to be sold bearing the lowest number on the Towjee or registers in use in the Collector's Office of the District being put up first, and so on in regular sequence; and it shall not be lawful for the Collector to put up any estate out of its regular order by number.' We find that the estates notified in the *Calcutta Gazette* were sold in the order in which they are placed in that notification—Talooka Sarungpoor, the estate in dispute, bearing the number 3047 in the Towjee, was sold before the 2-anna share of Mouzah Bishenpoor, the number of which was 696 on the Towjee. The Pleaders for the Defendants contend, that these estates were sold in their order, according to their respective classes or descriptions, as laid down at the end of section 5 of the Act, and that, therefore, they were sold according to their [285] consecutive number in the Towjee, and in accordance with the provisions of section 14. The defence set up by the Collector in the Lower Court is to the same effect. In interpreting the meaning of the provisions of this section, we must look at the precise words, and construe them in their literal and ordinary sense. It is only where the meaning of the law is doubtful

or ambiguous, that we should be justified in putting any qualification whatsoever upon it. But there is no such necessity here. The words are precise, and the meaning is perfectly clear. We cannot admit the reasoning upon this point of the Counsel for the Defendants, nor the interpretation which the Collector, in his defence, appears to have placed upon his own act with reference to the law. We do not find that he anywhere asserts, that the estate placed fourth in the *Calcutta Gazette*, which bears a lower number on the Towjee, and was sold after the disputed estate, which bears a higher number, is not a settled estate, or is borne on any other Towjee than that of the general rent-roll of the district. We presume that there is but one Towjee or rent-roll in a District for all settled estates in that District; and as we cannot allow that a classification of estates according to the nature of their arrears and a District Towjee are one and the same thing, we must hold that there has been a clear violation in this case of the provisions of section 14 of the sale law, and consequently, that under the plain terms of that section the sale was illegal. It is possible that the form attached to the Board's Circular of the 18th of April, 1845, may have misled the Collector regarding the order in which the sales of these estates were conducted. But with this we have nothing to do; and indeed, the Board's Circular [286] refers solely to the orders of notification, and has no reference to the sale. As to the argument which has been addressed to us by the Respondent's Pleader, to the effect that an error or irregularity which may have taken place in the conduct of the sale cannot now in appeal be noticed, inasmuch as it was an error or defect of a technical nature, and consequently one which was corrected by Act, No. IX. of 1854, we would observe that that law only refers to errors, defects, or irregularities of procedure in Courts of Civil Judicature, not to rules of law or conditions which affect the substantive rights of the parties. In the transfer of property from a defaulter to a purchaser under Act, No. I. of 1845, the intervention of the Collector is by law necessary, and certain rules are therein laid down, all of which are conditions essential to the validity of the sale. The rules laid down in section 14 of the sale law, are prescribed with a view to prevent the officer holding the sale from capriciously putting up an estate out of its order on the rent-roll, and thereby surprising intending purchasers, and inflicting an injury, it may be, on the defaulting proprietor. They are in their nature, no doubt, purely arbitrary; but, notwithstanding their nature, the observance of them is necessary, under the law, to give a purchaser an indefeasible title, and to prevent the defaulter from setting aside the sale on the score of irregularity. Whether these rules have or have not been strictly observed out of Court is the main point of inquiry. When a suit like the present comes before a Court of Justice, any overlooking, or misconception, or disregard of these necessary, and, therefore, material, though arbitrary rules, is a violation of the conditions of the sale, materially affecting the sub-[287]-stantive rights of the parties before the Court, and necessarily vitiates the sale. Act, No. IX. of 1854, only regards technical errors of procedure in the Lower Courts, which are not productive of injury to either party. If the case has been decided below on the merits, without a proceeding being drawn up under section 10 of Ben. Reg. XXIV. of 1814, or with a disregard of an objection to the over-valuation or under-valuation of suit, or non-sufficiency of stamp, such irregularities of procedure in Court, which cannot interfere with the substantive rights of any party, fall within the purview of Act, No. IX. of 1854, and cannot be noticed in appeal. But, with the substantive rights of parties, or with rules of law which affect those rights, Act, No. IX. of 1854, has nothing to do. These remarks are of general application, and we have thought it necessary to record them from a conviction that a very considerable misapprehension prevails as to the scope of Act, No. IX. of 1854. The effect of the irregularity in the conduct of the sale which has been established in this case, is simply to invalidate the sale, and bring back the parties to their *status quo* before the sale, and subsequent to the default. It does not remedy the Plaintiff's default, and consequently, does not enable us to restore him to the actual beneficial possession, of which he was deprived on the date of the default, by the operation of the sale law. This being so, we have considered whether it may not be argued, with some show of reason, that inasmuch as the Plaintiffs have sued for a reversal of the sale as a means of recovering possession of their estate, and as we are unable to pass any order regarding beneficial possession, the reversal of the sale only can be of no [288] benefit to them, and is not a remedy to which they are of right entitled. Their

interests in the property, it may be argued, ceased from the day on which their default occurred; and subsequent to that date they retained no rights, except to the sale proceeds. The regularity or otherwise of the sale, it may be said, is a matter between the Government, as vendor, and the auction purchaser, as vendee, with which the defaulter can have no concern. This argument, however, assumes, that the defaulter is placed in a very different position from that which, in our opinion, he occupies under the sale law. It is true that if a balance exists against an estate after sunset on the latest fixed day of payment, the owner of the estate cannot, by the payment of the balance, of right retain it. It is open, however, to the Revenue authorities, under section 11 of the Act, to receive his balance at any period previous to the sale, and restore to him his full rights. It is unquestionable, therefore, that the defaulter retains a valid subsisting interest: in fact, the right of ownership—in the property, until its actual alienation by a legal sale; and that if an illegal sale has taken place, it is of the greatest importance to him to obtain its reversal, in order that this right or interest may be revived, and he may be replaced in a position to enable him, through the influence of the Revenue authorities, to recover the actual possession of his estate. We observe, however, that in this case the Plaintiffs do not sue for the reversal of the sale solely as a means of recovering possession. On the contrary, in their plaint, they press their prayer for the reversal of the sale, and that for possession of the estate, distinct from each other; and it is obvious, from their pleading, that possession was not the sole [289] object they had in view; for their contention partly is, that, owing to the estate having been sold out of its order, they have obtained a very much smaller price for it than they otherwise would, and as they cannot calculate the amount of damage which they have sustained by this irregularity, their only remedy clearly lies in a re-sale, and to this we consider that they are, under the law, fully entitled, irrespective of their claim to possession. Under the foregoing considerations, it is ordered, that the decree of the Principal Sudder Ameen be reversed; that the sale, in consequence of its having been held in opposition to the provisions of Act, No. I. of 1845, be cancelled; that agreeably to section 25 of that Act, the purchase-money be refunded, with interest, to the auction purchaser by Government; that both parties be restored to the position they severally occupied subsequent to the default and previous to the sale, and that the costs of both parties be charged to Government; that the Appellants recover the costs of this Court, agreeably to the account prepared by the accountant, with interest from this day to the day of final realization from Government; and that, in order to obtain the costs of the Zillah Court, they must petition the Zillah Court, whence, in accordance with a Circular Order passed on the 4th of July, 1836, an order will be passed for the same to be paid."

The present appeal was from this decree.

As the Respondents did not appear, the appeal was heard *ex parte*.

The Solicitor General (Sir R. Palmer) and Mr. Leith, for the Appellants. The requirements of the law as to public sale by [290] the Government Collector for arrears of revenue have been substantially complied with, due regard being had to sections 5 and 14 of Act, No. I. of 1845. Admitting that there was an informality or irregularity in the sale, it was immaterial, and is cured by Reg. IX. of 1854, as no special injury or damage to the Respondents has been shown to have resulted therefrom. The sale ought not, therefore, to have been set aside by the Court. The Act, No. I. of 1845, nowhere declares in express terms that a sale shall be void, or shall be set aside, if not made in exact accordance with the provisions of section 14 of that Act; which provisions, we submit, are merely directory as regards the Collector and the executive officers of the Government, and do not affect the title of the auction purchaser. The late Maharajah Roodur Singh was a *bona fide* purchaser at the sale, which became final and conclusive under the express provisions of section 19 of Act, No. I. of 1845; and, therefore, the sale ought not to have been set aside by the Court on the ground of irregularity on the part of the Collector in its conduct. The remedy, if any, of the Plaintiffs, was a personal action for damages against the Collector, by whose act they considered themselves aggrieved.

The Right Hon. Dr. Lushington:—Their Lordships are of opinion, that the judgment of the Sudder Court, now appealed from, is right. They think it im-

portant that the regularity of Government sales, under the Act, No. I. of 1845, for arrears of revenue, should be strictly observed.

[291] MUSSUMAUTH ANUNDMOYEE CHOWDHOORAYAN.—*Appellant*: SHEEB CHUNDER ROY and Others,—*Respondents* * [July 2, 1862].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

This Court will not apply to pleadings in the Native Courts, the strict rule, that averments in a plaint not traversed in the answer, are to be taken as admitted.

In a suit to establish a deed of Unoomotee Puttur (permission to adopt), which was never registered, and which power to adopt had not been exercised by the deceased's widow for nearly twenty years, the plaint set out the deed and relied upon the adoption. The answer did not traverse the alleged deed and the adoption made in pursuance thereof, but denied generally the title of the Plaintiff. Held, in absence of proof of the execution of the deed of Unoomotee Puttur, that the omission to traverse the allegation of its execution was immaterial, as the Plaintiff was bound to prove his case by evidence, which he had failed to do [9 Moo. Ind. App. 305].

Quære.—If under section 33 of Ben. Reg. X. of 1793, an adoption by a minor and ward of Court of a son, without the consent of the Court of Wards, is wholly void.

This appeal arose out of a suit instituted by Neelkunth Gooptoo, as the next friend of a minor, named Bhairub Chundro. The object of the suit was to establish the minor's rights, as adopted son, to succeed as heir of Kirtee Chundro Chowdhuree; and also to set aside the adoption of one Gerish Chundro, under an Unoomotee Putter (a deed giving power to adopt), alleged to have been made by Bhoban Chundro [292] Chowdhuree, the surviving son of Kirtee Chundro Chowdhuree.

The Appellant's case was, that Kirtee Chundro Chowdhuree, on the 30th of May, 1828, shortly before his death, executed an Unoomotee Puttur and delivered the same to the Appellant, his wife, which deed authorized her in the event of the death of his two natural sons, who were sickly, to adopt a son: that she had exercised the power so given her, by adopting Bhairub Chundro. The genuineness of the deed of Unoomotee Puttur was denied by the Respondent, and the adoption of one Gerish Chundro, by Hurromonee, the widow of Bhoban Chowdhuree, the surviving son of Kirtee Chundro Chowdhuree, relied upon by him.

The principal facts of the case were as follows:—

Kirtee Chundro Chowdhuree died on the 23rd Joistee, 1235, leaving only two sons, Juggut Chundro Chowdhuree, and Bhoban Chowdhuree, his joint heirs, in equal undivided moieties, according to Hindoo law, and the Appellant, his sole widow him surviving.

The two sons were both minors at the time of the death of their father. The elder son did not long survive his father. He died on the 3rd of December, 1828, a minor, intestate, and without having been married, leaving the Appellant, his mother, and, as such, his heir according to Hindoo law, entitled to succeed to his one-half undivided share in the whole of the property left by his father. The other brother died on the 19th of December, 1844, a minor, and intestate, without leaving any issue; but leaving Hurromonee, his sole widow, an infant of tender years, and his heir according to Hindoo law, entitled to his one undivided moiety of the share in the Zemindary, to be held by her for life.

[293] In the year 1846, Hurromonee put forward Gerish Chundro as a son adopted by her under the authority of an Unoomotee Puttur, which deed she alleged

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

had been made by Bhoban Chundro Chowdhuree, her husband. At the time this deed was executed, he was a minor and ward of Court, but there was no authority granted by the Court of Wards, as required by Ben. Reg. X. of 1793, sec. 33, to enable him to adopt a son.

A suit, No. 34, of 1846, was afterwards instituted by Hurromonee in the Civil Court of Zillah Mymensingh, against a third party, for the purpose of indirectly setting up and establishing this adoption. The Appellant intervened in the suit as a party objector, and in a petition denied the validity of Hurromonee's alleged Unoomotee Puttur, and her power to adopt a son. On the 2nd of July, 1847, the Principal Sudder Ameen, after hearing evidence on the point, dismissed the suit.

The Appellant afterwards, on the 30th of November, 1847, under the alleged Unoomotee Puttur from Kirtee Chundro Chowdhuree, adopted Bhairub Chundro.

In consequence, Hurromonee instituted a suit in the same Zillah Court, against the Appellant, her mother-in-law, and one Bhugobuttu Gooptah, who claimed the right to hold a hereditary Talook, granted by the late Kirtee Chundro Chowdhuree, as Defendants. In her plaint in that suit, she stated (amongst other things) that Bhoban Chundro Chowdhuree, her late husband, being ill of fever, and being childless, executed in her favour an Unoomotee Puttur, for the purpose of taking five adoptions consecutively, and subsequently died that very night; that she had accordingly adopted a son, under the name of Gerish [294] Chundro, according to the Shasters; that, after that the Appellant by violence dispossessed her of a moiety of the Zemindary, and she alleged, that the Defendant, the Appellant, bought Bhairub Chundro, the son of Neelkunth Gooptoo, in Augroon, 1251, and had adopted him; though, as she charged, she was not competent to make any adoption in the life of the son adopted by herself, and that as it was contrary to the Shasters, she, Hurromonee, claimed the whole of the property of Kirtee Chundro Chowdhuree, with mesne profits. The Appellant, by her answer to the plaint, traversed and denied the making of an Unoomotee Puttur, by the late husband of the Plaintiff, Hurromonee, and alleged that it had been fabricated, and also denied that her husband had ever given Hurromonee any permission to adopt a son. The answer further stated that Appellant had been empowered by the Unoomotee Puttur of her husband, Kirtee Chundro Chowdhuree, to take, in the event of their two sons' deaths, three other sons, consecutively, into adoption: and that she had accordingly made the adoption of Bairub Chundro.

Neelkunth Gooptoo, the natural father of Bhairub Chundro, then instituted the suit in which the present appeal arose, as the guardian or well-wisher of his infant son. The plaint was filed in the same Zillah Court against Hurromonee, and the Appellant, as widow of Kirtee Chundro Chowdhuree, with some others, as Defendants. The Plaintiff stated, that he sought to recover possession of a one-third of 2 annas 15 gundas of the Zemindary and other property therein described, together with wasilat, by cancelment of an illegal adoption made by the Defendant Hurromonee. The plaint averred, that the late Kirtee [295] Chundro Chowdhuree, the adoptive father of the minor, in order that the funeral cake and water should be perpetuated, and the property protected, had, on the 18th Joistee of the year 1235, executed, in the presence of witnesses, an Unoomotee Puttur, authorizing the Appellant to adopt consecutively three sons, and died on the 23rd of the aforesaid month; and that after this, the Appellant according to the conditions of the Unoomotee Puttur of her husband, being desirous of adopting a son, he and his wife, Kripamoojee Gooptoo, gave their second son, Bhairub Chundro, a minor, on the 15th Augroon of the year 1254; and that the Appellant, in conformity with the Shasters, took and adopted him, naming him Bhairub Chundro Chowdhuree, after performing the putristo jag, etc., and gave information of it to the Judges. The plaint also averred, as to the Unoomotee Puttur set up by the Defendant, Hurromonee, that it was never executed by her husband.

The answer of the Defendant, Hurromonee, did not contain any traverse or denial of the averments respecting the execution by the late Kirtee Chundro Chowdhuree of the deed of Unoomotee Puttur, averred in the plaint; nor did the answer contain any denial of the fact also averred in the plaint that his widow, the Appellant, had received authority from him to adopt sons, in the event of their own two natural-born sons dying, but pleaded that, as a period of twenty years had

elapsed, under such circumstances the suit was barred under sec. 14, Ben. Reg. III. of 1793, and denying generally the Plaintiff's title, relied upon the validity of her own adoption of Gerish Chundro, under the Unoomotee Puttur of her deceased husband.

[296] The replication of the Plaintiff met the plea of the Regulation of Limitations by the Defendant, Hurromonee, by first referring to the Unoomotee Puttur executed by Kirtee Chundro Chowdhuree, and to the adoption by the Appellant thereunder, on the 30th of November, 1847, of the Plaintiff's son, by which, as it was submitted, he became the rightful successor to his adoptive father's real and personal property, and by then pleading that the suit had been instituted at the expiration of one year from the date of the adoption, which, it was insisted, took the case out of operation of the Regulation of Limitations.

Pending the suit the Defendant, Hurromonee, died, when the Respondent, Sheeb Chundro Roy, as the natural father of her adopted son, the minor, Gerish Chundro, was admitted in place of Hurromonee as a Defendant.

The hearing of both suits took place together, before Norshuree Seeromonee, the Principal Sudder Ameen of the Zillah of Mymensingh, on the 26th of May, 1852, when he pronounced judgment. The material portion of which was as follows:—"Hurromonee has instituted a suit, No. 2, in order to have the alleged adoption by Anundmoyee Chowdhoorayan disallowed, and thereby to recover possession of the property claimed in this suit; and, as the Plaintiff, also being appointed the well-wisher of Bhairub Chundro, the adopted son of Anundmoyee aforesaid, has instituted this suit against Hurromonee and Anundmoyee and others, Defendants, in order to have the adoption of Gerish Chundro by Hurromonee disallowed, and to recover possession of the disputed property; and as the grounds of both the suits are one and the same, it was, therefore, ordered that both suits should be tried and decided [297] together. Accordingly, this suit has been tried and determined along with the above mentioned suit of Hurromonee; and, in my opinion, recorded this day, the adoption of Bhairub Chundro by Anundmoyee has not been satisfactorily proved, the same is set aside, and the suit of Hurromonee aforesaid decreed in her favour, the reasons thereof apply also to this case," and it was ordered, that that suit be dismissed; and the Principal Sudder Ameen further held, that the Unoomotee Puttur executed by Hurromonee's husband was proved, as well as the adoption made under it, and finally ordered, that the claim of Hurromonee was good and tenable, and that the objections of both the female Defendants were false and fraudulent, further ordering that Anundmoyee was to have during her lifetime, food and raiment; and the case was accordingly so decreed.

Neelkunt Gooptoo appealed against this decree to the Sudder Dewanny Adawlut at Calcutta.

The minor, Bhairub Chundro, subsequently died, leaving the Appellant, his adoptive mother, his heir, according to Hindoo law, him surviving; and under an order of the Court, the Appellant was made a party, as his heir, to carry on the appeal.

The decree in Hurromonee's suit (No. 2) was also appealed to the Sudder Dewanny Adawlut by the Appellant, and that appeal was marked No. 317, while the appeal in the other suit was marked No. 316.

The hearing of the last-mentioned appeal, No. 316, came on before the Sudder Dewanny Adawlut on the 30th of April, 1855, when it was determined by the Judges of that Court, consisting of Messrs. Abercrombie Dick, Raikes, and Patton, that the other appeal, No. 317, should be heard and disposed of by [298] them first; and that, afterwards, the hearing and decision of the appeal No. 316 should take place. The Court accordingly took up the appeal No. 317, in the suit No. 2 of the late Hurromonee, and entered upon the hearing thereof separately, and thereupon directed the Pleader of the Appellant to confine his argument to one issue, namely, whether the Unoomotee Puttur, under which the late Hurromonee had adopted Gerish Chundro was a valid deed, as that was the ground on which her suit, No. 2, was founded.

The Sudder Dewanny Court delivered judgment on that point, reversing the decree of the Principal Sudder Ameen made in that suit, as follows:—"The law declares, that no adoption by disqualified landholders is to be deemed valid without

the consent of the Court of Wards, on application made to them through the Collector, sec. 33, Ben. Reg. X. of 1793. It follows, necessarily, that no power to adopt can be granted by such a person without the consent of the Court of Wards. Bhoban Chundro Chowdhuree, the person who granted the power, to adopt, on which the suit is founded, was at the time a ward of that Court, and the consent of the Court of Wards was neither asked for nor obtained. It is, therefore, invalid, and the suit of the Plaintiff must be dismissed. The decision of the Principal Sudder Ameen is reversed, and the appeal decreed, with full costs, against the Plaintiff.

No appeal was brought from this decree.

The Court immediately afterwards took up the appeal No. 316, and on the same day decreed as follows:—"The deed was written several days before the decease of Kirtee Chundro Chowdhuree, the giver of it, and, therefore, might easily have been registered. It was, however, never made [299] public until nearly twenty years after its date. There is no proof that it was ever made known to any of the members of the family. It was not mentioned when the elder of the two legitimate sons of Kirtee Chundro Chowdhuree died, and, what is more extraordinary, was not produced and acted upon at the time of the decease of the younger son, Bhoban Chundro Chowdhuree. It was at length produced, and a son adopted in virtue of it, after Hurromonee, the widow of Bhoban Chundro Chowdhuree, had adopted a son under an alleged power from her husband. It is, too, in so mutilated and dirty a state as to defy all examination into the nature of the stamp and the date of its sale by the stamp vendor. Under these circumstances, it is utterly unworthy of credit. The appeal is, therefore, dismissed with costs, and the decision of the principal Sudder Ameen, rejecting the Unoomotee Puttur Mussumauth Anundmoyee, confirmed."

The present appeal was from this last decree.

The Respondents did not appear, and the appeal was therefore heard *ex parte*.

Mr. Leith, for the Appellant.—As the fact of the execution of the Unoomotee Puttur by Kirtee Chundro Chowdhuree was averred in the plaint, and not traversed or denied by the answer of the Defendant, Hurromonee, it ought to have been considered by the Courts below as admitted on the pleadings, and as not requiring to be established by evidence. Now, the fact of the Unoomotee Puttur having been thus admitted, the adoption under it of the late minor, Bhairub Chundro, must also be taken as having been proved: and such adoption was valid by Hindoo law and custom. As respects the decree of the Principal Sudder Ameen, that decree was [300] made on the hearing and consideration by the Judge of the pleadings filed and evidence given in another and distinct suit, to which neither the Plaintiff, nor the minor, Bhairub Chundro, was a party: and that suit was improperly heard by the Principal Sudder Ameen with the suit out of which the present appeal had arisen. It is, therefore, submitted, that any alleged act of the Appellant, as the widow of Kirtee Chundro Chowdhuree, to whom the authority to adopt was given by the deed, or any omission or delay on her part, ought not to have been used by the Sudder Court so as to prejudice, much less to destroy, the rights of the minor, Bhairub Chundro, as the adopted son and heir of Kirtee Chundro Chowdhuree. If the evidence was weak of the execution of the power to adopt, as it was not impugned, it was sufficient. The substitution by the Court of the Appellant in the place of her deceased adopted son was most irregular: it made her both Plaintiff and Defendant.

The case stood over for consideration.

Judgment was now pronounced by

The Right Hon. Lord Kingsdown (July 19, 1862).—The Appellant is the widow of one Kirtee Chundro Chowdhuree, who died in 1828, leaving two sons. The elder, Juggut Chundro, died a few months after his father, unmarried and intestate. The younger, Bhoban Chundro, died in December, 1844, a minor and childless, but leaving a widow, Hurromonee. Shortly after his death Hurromonee, under an Unoomotee Puttur, or authority to adopt, which she alleged her husband had executed in her favour on the night of his death, adopted one Gerish Chundro, as the son and representative of Bhoban Chundro. And, in the year 1847, the Appellant, who disputed Hurromonee's [301] right to adopt, set up an Unoomotee Puttur which she alleged had been executed in her favour by Kirtee Chundro Chowdhuree, on the 20th of May, 1828, and under that instrument adopted the son of one Neelkunt

Gooptoo as the son and representative of her husband, Kirtee Chundro Chowdhuree, and gave him the name of Bhairub Chundro Chowdhuree.

These rival adoptions gave rise to two suits, which it will be convenient to distinguish by the numbers 316 and 317, by which they were known in the Sudder Dewanny Adawlut.

Suit, No. 316, in which the present appeal is presented, was instituted in 1849, on behalf of Bhairub Chundro, a minor, by his natural father, Neelkunth Gooptoo, as his well-wisher, or next friend, against the present Appellant, Hurromonee, and several other persons as Defendants. The plaint stated the execution of the Unoomotee Puttur by Kirtee Chundro Chowdhuree; the adoption of the infant Plaintiff under it; his title by virtue of that adoption, to one-third of the estate of Kirtee Chundro Chowdhuree in immediate possession, and to the other two-thirds, subject, as to one of them, to the interest of the present Appellant, as heiresses-at-law of her eldest son; and subject, as to the other, to the life interest of Hurromonee, as heiress of her husband; and it claimed the possession of one-third of the Zemindary, and some personal property as against the two female Defendants with wassilat; and as against Hurromonee, the cancelment of the adoption made by her as legal. The other Defendants had no interest in the property, and seem to have been made Defendants only because they had taken part in the adoption by Hurromonee. To this suit, therefore, the [302] Appellant, though no doubt a friendly, was a substantial, Defendant.

Shortly before the institution of suit, No. 316, Hurromonee had commenced the suit, No. 317. The only Defendants to this were the Appellant and another woman. It set up the adoption made by Hurromonee, and claimed by virtue of that and other acts of the Appellant, the whole of the property as against her, disputing the adoption made by her. In this suit the Appellant pleaded the Unoomotee Puttur alleged to have been executed by her husband, and insisted on the validity of the adoption made by her under it.

Hurromonee died before either suit came to a hearing, and certain proceedings were had by which Geris Chundro, the infant adopted by her, became, through his well-wisher or next friend, a defendant in suit, No. 316, and the Plaintiff in suit, No. 317.

The two suits were heard together by the Principal Sudder Ameen, in whose Court they were pending. In the suit, No. 317 he decided in favour of the Plaintiff, Gerish Chundro, affirming the validity of his adoption by Hurromonee; treating the Unoomotee Puttur set up by the Appellant as not established by proof, and the adoption thereunder as invalid. Upon the same grounds he decided against the title of Bhairub Chundro in suit, No. 316, and dismissed that suit with costs.

Appeals were preferred to the Sudder Dewanny Adawlut against both decisions. That in suit, No. 316, was, in the first instance, an appeal on behalf of the infant Plaintiff, Bhairub Chundro, by his father and well-wisher. The appeal in suit, No. 317 was that of the present Appellant.

Before the appeals were heard, Bhairub Chundro [303] died; and the present Appellant (being, on the assumption of his adoption being valid, his heiress-at-law) seems, on her own application, to have been substituted for him as Appellant in suit, No. 316, notwithstanding her character as Defendant in that suit. She thus became, regularly or irregularly *domina litis* in both appeals.

These appeals were heard by the Sudder Dewanny Adawlut in 1855. In suit, No. 317, the Court reversed the decision of the Principal Sudder Ameen, mainly on the ground that Bhoban Chundro being an infant at the time of his death, had no power to make the instrument under which Hurromonee claimed the right to adopt, without the consent of the Court of Wards; and, therefore, that the adoption of Hurromonee under it was wholly void. Against that decision there has been no appeal.

In suit No. 316, the Court dismissed the appeal, and confirmed the decision of the Zillah Court, holding that the Unoomotee Puttur under which the Appellant adopted Bhairub Chundro had not been proved, and was wholly unworthy of credit. Against this decision the present appeal is preferred.

The decision in suit, No. 317, has determined the interest of the party claiming under the adoption by Hurromonee; and the various deaths that have occurred have vested the whole interest in the estate, at least during her life, in the Appellant.

It is not, therefore, surprising that the present appeal has come on *ex parte*. Then Lordships, however, do not the less feel the difficulty in which every *ex parte* appeal places them, of having to decide the questions raised after hearing one side only.

The first and most important question is, whether the decision of the Principal Sudder Ameen was, when [304] pronounced, a correct decision of the issues then pending before him between the then parties to the suit. No subsequent event, or devolution of interest, can affect this question; because to give effect to these, should justice require it, would be the office not of an appeal, but of some supplemental proceeding.

The question in the suit was the title of Bhairub Chundro, as the adopted son of Kirtee Chundro Chowdhuree, to recover certain property, and to have another adoption cancelled. The foundation of this title was the Unoomotee Puttur under which he was adopted. If the proof of that failed, he had no title, and his suit was properly dismissed.

It is not now contended, that there is before their Lordships, or was before the Principal Sudder Ameen, testimony strong enough to establish the validity of the instrument, if impugned. But it is argued that the evidence which the Principal Sudder Ameen treated as too weak for that purpose, was irregularly taken, because it was taken in suit, No. 317, to which Bhairub Chundro was not a party. It is further argued that proof of the instrument by witnesses was unnecessary, because the answer of Hurromonee did not impeach, and must, therefore, be taken to have admitted its validity. These two objections shall be considered separately.

Their Lordships are not satisfied that the depositions of the witnesses examined in support of the Unoomotee Puttur (which are not before them) were not substantially taken in both the suits, which were clearly tried together. It appears from a passage in the record before us, that the father and next friend of Bhairub Chundro, in his reasons of appeal, comments on this evidence; and at the hearing in the Sudder Dewanny Adawlut the Appellant's Pleader [305] argued upon it. But suppose it to be out of the case, what is the result? Why, that the Plaintiff has given no evidence whatever in support of an averment material to his title. The only question that can remain is, where there has been an admission of that averment sufficient to relieve him from the necessity of giving any such evidence.

Their Lordships cannot answer this question in the affirmative. The answer of Hurromonee denies generally the truth of the Plaintiff's case. If it does not directly impugn the instrument, it does not in terms admit it. The defence is no doubt mainly directed to the avoidance of the adoption by the Appellant by setting up the adoption made by the Defendant, Hurromonee; but it does not admit that if the latter adoption fails, the other is necessarily valid.

Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the Plaintiff and Hurromonee, would have dispensed with the necessity of proving the instrument. But when the case was heard, the issue was no longer one between the Plaintiff and Hurromonee. She was dead, and Gerish Chundro had been admitted as a Defendant on the record. He did not come in as the heir of Hurromonee, for, if he were duly adopted, his title was paramount to hers. He would not then have been bound by her admissions of an instrument (even had they been more unequivocal than they are), the execution of which had been formally made one of the issues in the suit. Their Lordships, therefore, can see no ground for disturbing the decree of the Principal Sudder Ameen.

[306] The next question is, whether any case has been made for reversing or varying the decree of the Sudder Dewanny Adawlut. It has been argued that the substitution of the Appellant for Bhairub Chundro which made her both Plaintiff and Defendant in the suit, was grossly irregular. It may have been so; but it was an irregularity of her own seeking. If she had not taken up the appeal, it must either have been prosecuted by the well-wisher and next friend of the deceased infant (if the forms of the Court permitted this), or abandoned by him. Their Lordships must assume that the decree of the Zillah Court, which they think to be correct, would in either case have stood. The Appellant on her own application have been allowed, perhaps irregularly, to contest the correctness of that decree. She has done so unsuccessfully, and it is but fair that she should be left to pay the costs of the proceedings.

The Appellant is now entitled, as a Hindoo female heiress, to the whole estate; if she makes any further adoption, the validity of that adoption will be probably tried between the party adopted and those who will be the heirs of her husband on her death. In any such suit it is difficult to see how these decrees can be admitted as evidence for the purpose of showing the invalidity of the instrument of adoption.

At any rate their Lordships think it would be objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit, and the only order which they can recommend Her Majesty to make on this appeal is, that it be dismissed.

[307] VARDEN SETH SAM,—*Appellant*: LUCKPATHY ROYJEE LALLAH, BUNHAH LALL, SADASEVA TANKER, and JAMES OUCHTERLONY.—*Respondents* * [July 3, 1862].

On appeal from the Sudder Dewanny Adawlut at Madras.

Mad. Reg. II., of 1802, sec. XVII., enacts, that in the absence of any positive law to the contrary, in force in the Presidency of Madras, that the decision of the Court is to be according to justice, equity, and good faith.

The Plaintiff was an Armenian and the Defendants, Hindoos, Mahomedans, and Christians. The Plaintiff sought by the plaint to establish a lien on land, created by an equitable mortgage by deposit of title deeds. Held (in the absence of any agreement that the transaction was to be governed by any particular local law), that, under Mad. Reg. II., of 1802, sec. XVII., the principles of English law respecting equitable mortgages applied [9 Moo. Ind. App. 324-326].

S. purchased the Muttah of E., and paid part of the consideration money. When the parties came to complete, the vendors had not the title deeds, but they promised to deliver them in a few days, and arranged that the remaining part of the purchase-money should be retained by the purchaser, and they handed over to him the title deeds of another Muttah, called T., to be held as security for their delivering to the purchaser the title deeds of Muttah E., in order to perfect his title. The purchaser, on the faith of this advanced large sums, and paid off a mortgage on Muttah T. This latter Muttah having been sold, S. brought a suit to recover the amount advanced by him on account of that Muttah, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. Held, that the transaction created a lien, and bound the Muttah T. for the advances made by S.

Seemle.—By the Mohamedan law such a deposit for a security in respect of a contingent loss would be in the nature of a trust, not a pawn.

The registration of the name of a party in possession of land on the Collector's books, as owner, is not conclusive evidence of his title, as the land may be affected by prior equitable charges, and it is the duty of a purchaser to investigate the prior title.

The question in this case related to the validity of a lien, created by deposit of the title deeds of an estate called the Muttah of Tirupassur, in the Presidency of Madras, in consideration of pecuniary advances made by the Appellant for the benefit of that estate.

The facts were these:—

In the year 1851, Gulam Asen Khan Bahadoor, [308] and his father, Sharpul Umra Sahib, were in possession of three Muttahs, or Districts of villages, called respectively the Muttah of Tirupassur (otherwise called Tripassur), and the Muttah

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

of Ekattur (otherwise called Yagatoori), situate in Districts of Periyapalam, and the Muttah of Madhuravayal, in the Talook of Sydapetta, all in the Presidency of Madras.

In the month of September of that year, the three Muttahs of Tirupassur, Ekattur and Madhuravayal were attached by the Collector for kist due to Government, amounting to Rs. 8049. 4a.; and the Collector advertised the Muttahs for sale in October following, for the arrears.

In this state of things, Gulam Asen Khan and his father, applied to the Appellant for assistance to prevent the sale, and offered to sell to him the Muttah of Tirupassur for Rs. 4000, and the Muttah of Ekattur for Rs. 11,000, and stated that, except the claim of the Collector for arrears of revenue, there were no incumbrances affecting the properties; and it was, ultimately, on the 15th of September, 1851, agreed between them that the Appellant should purchase the Muttah of Ekattur for Rs. 11,000, and have the option of purchasing that [309] of Tirupassur for Rs. 4000; and that out of the Rs. 11,000, the purchase-money for the Muttah of Ekattur, he should pay to the Collector of the District Rs. 8049. 4a. in discharge of what was due for arrears of revenue.

Under this arrangement, the Appellant, on the 15th of September, paid Rs. 200 to Sharpul Umra Sahib, in part performance of the agreement for purchase of the Muttah of Ekattur. The Appellant also, in order to prevent the sale of the three Muttahs, paid to the Collector the sum of Rs. 8049. 4a. in discharge of the arrears.

The Appellant having thus paid the sums of Rs. 200 and Rs. 8049. 4a., in respect of his purchase of the Muttah of Ekattur, attended on the 14th of October following, at the house of the vendors, to complete his purchase, when Gulam Asen Khan, by the desire of Sharpul Umra Sahib, his father, executed to the Appellant a Bill of Sale of the Muttah of Ekattur, and upon the Appellant calling for the title deeds of that to be delivered up to him, the vendors alleged that they were with some of their relatives, and said they would send for them soon and deliver them to the Appellant. The Appellant, however, insisting that the title deeds ought to have been ready to be given up to him, they proposed and offered that, in the meantime, he should retain the residue of the purchase-money, and that they would deposit with him the title deeds of the Muttah of Tirupassur, to be held by way of equitable mortgage as a security for their delivering up to the Appellant the title deeds of the Muttah of Ekattur, in order to make his title thereto perfect; and, accordingly, Gulam Asen Khan delivered to the Appellant a Bill of Sale of the Muttah of Tirupassur, dated the 29th of December, 1834, [310] from one Tatipatri Bapu Rayar to Arcot Jivana Rayar, and another Bill of Sale of the same Muttah, dated the 30th of June, 1840, from Arcot Jivana Rayar, to Gulam Asen Khan, being the title deeds under which Gulam Asen Khan held the Muttah, and he also delivered to the Appellant a certificate of registration, granted by the Collector of the District to Gulam Asen Khan, dated the 8th of July, 1840.

On the 22nd of November, 1851, the Appellant, by the direction of Gulam Asen Khan, paid to one Rajah Jankeeran, by whom the sale had been conducted, on behalf of the vendors, a further sum of Rs. 300, on account of the purchase-money.

The Muttah of Ekattur consisted of five villages, one of which was the village of Kunnattur, and upon the Appellant proceeding to take possession of it under the sale to him, he discovered that the village of Kunnattur had been already sold by Gulam Asen Khan and Sharpul Umra Sahib to Kakaji Rai and others for Rs. 500. This fact was admitted by the vendors, and it was thereupon agreed between them and the Appellant that the sum of Rs. 500, should be deducted from the purchase-money of Rs. 11,000, by which the purchase-money for the Muttah of Ekattur became reduced to Rs. 10,500, of which sum the Appellant had paid the several sums of Rs. 200; Rs. 8049. 4a., and Rs. 300. In the year 1853, the Appellant further discovered that the vendors had before the sale to him in September, 1851, actually mortgaged the Muttah of Ekattur to one Mahomed Usen Sahib, who had possession of the title deeds thereof, and who had, in the year 1851, commenced proceedings in the Zillah Court of the Principal Sudder Ameen of Chingleput, to recover what was due to him on such mortgage; and that the Defendants, the vendors, [311] had filed a Razinama, or judgment by confession, in such suit, in which Mahomed Usen's mortgage claim on the Muttah was admitted; and it was agreed that, in default of payment of the sum therein mentioned,

the same should be recovered from the Muttah. In the month of November, 1853, Mahomed Usen proceeded to attach the Muttah for the sum of Rs. 5761, then due to him on the mortgage and the Razinamah; and, in order to prevent the sale of the Muttah then under attachment, and to redeem the Muttah, and obtain possession of the title deeds, the Appellant, on the 12th of December, 1853, paid to Mahomed Usen the sum of Rs. 5761, in satisfaction of the Razinamah, and received from him the title deeds of the Muttah.

In this manner, the Appellant had paid the various sums of Rs. 200, Rs. 8049. 4a., Rs. 300, and Rs. 5761, for the purchase of the Muttah of Ekattur, and upon the security of the title deeds of the Muttah of Tirupassur, so deposited with him as aforesaid, making in the whole Rs. 14,310. 4a., being the sum of Rs. 3810. 4a. over and above the amount of Rs. 10,500, the purchase-money of the Muttah of Ekattur, and for the repayment thereof held the equitable mortgage on the Muttah of Tirupassur, by the deposit of the title deeds of that Muttah.

In the month of October, 1855, the Appellant, having discovered that, during his absence from the neighbourhood, Gulam Asen Khan had caused the Muttah of Tirupassur to be transferred in the books of the Collector from his own name to the name of the Respondent, Luckpathy Royjee Lallah, and that they were then endeavouring to sell the same to the Respondent, Ouchterlony; filed a plaint in the Court of [312] the Principal Sudder Ameen of Chingleput, the District in which the Muttah of Tirupassur was situate, against Gulam Asen Khan, Sharpul Umra Sahib, and the Respondent, Luckpathy Royjee Lallah, in the plaint called Set Rakpati Roy Lala Sunkab to recover from them, and, as against the Muttah of Tirupassur, the sum of Rs. 3810. 4a., with interest, amounting to Rs. 803. 15a. 5p., in all Rs. 4614. 3a. 5p., and subsequent interest.

The Defendant, Gulam Asen Khan, by his answer, alleged that the Appellant was indebted to him. He admitted the sale by him to the Appellant of the Muttah of Ekattur, and the payment by the Appellant of the two sums of Rs. 8049. 4a., and Rs. 300, but alleged, that he had not authorized the payment of the sums of Rs. 200, Rs. 500 and Rs. 5761, before mentioned. The answer also alleged, that the Plaintiff borrowed from the Defendant the title deeds of the Muttah of Tirupassur, under the pretence that he wished to see the form of title deeds relating to Muttahs, and had not returned them; he admitted that the third Defendant had purchased the Muttah of Tirupassur from him, and enjoyed it for three years, and afterwards publicly sold it to the Defendant, Ouchterlony, who was then in possession of it. The answer further alleged, that the first and second Defendants had not mortgaged the title deeds of Ekattur to Mahomed Usen for Rs. 5761, and insisted that the Defendant had not authorized the Appellant to pay that sum.

The second Defendant, Sharpul Umra Sahib, made default, and it was ordered that, as against him, the suit should be heard *ex-parte*.

On the 21st of December, 1855, Ponna Lala, and [313] Sadasiva Takar, as Vakeels for the third Defendant, applied to the Court, praying, under the circumstances therein stated, that they might be permitted to put in an answer and defend the suit generally on his behalf; and on the hearing of such petition, it was ordered that the Plaintiff's Vakeel should include the Petitioners as Defendants in the suit instead of the third Defendant.

A supplemental plaint was then filed, making Ponna Lala and Sadasiva Takar Defendants to the suit; and by their answer they alleged that the third Defendant left in September, 1855, for Biganir, in the Raj of Satadar, which was 2000 miles distant; and that the Plaintiff ought not to have brought the suit in the Chingleput Court, the parties being resident elsewhere; that the third Defendant was under no obligation to the Plaintiff, and that the Plaintiff had obtained no document in connection with the Muttah of Tirupassur; and further, that the Muttah of Tirupassur had been registered by the Circar in the name of the third Defendant and the certificate and Sunnud, etc., issued in his favour, and who had remained in unmolested and public enjoyment thereof up to four years previously; and that a short time previously to the institution of the suit, the Muttah had been sold to the Respondent, Ouchterlony, and was registered by the Circar in his name, and remained in his enjoyment; the answer then suggested that no benefit could be derived from the simple possession of the certificates, etc., of earlier date, by a

party who had no interest whatever in them; and denied that any of the facts stated in the plaint in connection with the Muttah of Tirupassur had taken place.

The Appellant afterwards filed a supplemental plaint against Ouchterlony, making him a Defendant to [314] the suit. Ouchterlony by his answer alleged, that he was utterly ignorant of the transactions between the Plaintiff, and the first and second Defendants, and that whatever claims the Plaintiff might have against those Defendants, yet that he had no legal claim whatever upon the Muttah of Tirupassur; he denied having had any conference with the first or second Defendants at any time on any subject; and insisted that the transaction between the third Defendant and him was valid and conclusive; that the third Defendant, alleging that the Muttah or Tirupassur was his own property, asked him to purchase it, and showed a Bill of Sale, which he was then unable to produce, but which was executed a long time ago, either by the first and second Defendants, or one of them, and that the Muttah had been registered in his name by the Collector, and that, as the third Defendant had in himself the title and enjoyment thereof, he, Ouchterlony, purchased it from him just as he had it.

The Appellant entered into evidence, and proved the several matters hereinbefore stated. The first Defendant and the sixth Defendant, also adduced evidence. The cause was heard by T. Alaghia, the Principal Sudder Ameen, on the 14th of April, 1857, when that Judge pronounced judgment, declaring that the absence of a written agreement in favour of the Plaintiff could not vitiate his claim: for that it was quite clear the Plaintiff had a lien upon the first and second Defendants' estates long before the claim of the other Defendant began to exist; and that although those Defendants would not bring to notice in their pleadings the date of the deeds in their favour, it was certain by the depositions of their Vakeels taken at the hearing [315] of the cause, and by the other circumstances connected with it, that they did not acquire their right before the Plaintiffs claim to recover a surplus of Rs. 3810. 4a. 1p. on the security of the estates, came into existence, and the Court decreed that the first and second Defendants should pay to the Plaintiff the amount claimed, with interest up to the date of the decree, and that the Tirupassur Muttah be held responsible for the same, and that the costs should be paid by the first and second Defendants to the Plaintiff, and the other Defendant.

From this decree the Respondents, Ouchterlony and Luckpathy Royjee Lallah, by his attorneys, the fourth and fifth Defendants, appealed to the Civil Court of Chingleput, and the Judge of that Court (Mr. W. Dowdeswell), on the 31st of March, 1858, pronounced the following judgment:—"It appears, from the evidence in this case, that the first Defendant sold the Muttah of Ekattur to the Plaintiff on the 14th of October, 1851, and deposited the title deeds of the Tirupassur Muttah with the Plaintiff as security, until he should deliver up the title deeds of the Ekattur Muttah. The first Defendant has in his answer, admitted the sale, and the delivery of the title deeds of Tirupassur Muttah. It must be here remarked, that the first Defendant had filed a Razinamah, in the suit No. 37, of 1851, on the file of the Principal Sudder Ameen's Court, in which he had admitted Mahomed Usen's mortgage claim over the Ekattur Muttah, and had agreed that, in default of payment of the sum stipulated in the Razinamah, the same should be recovered from the Ekattur Muttah. Notwithstanding this agreement, filed in the Court of the Principal Sudder Ameen, the first Defendant assured the Plaintiff (as stated in the Bill of Sale) that there [316] were no liabilities whatsoever on the property; and it was entered in the Bill of Sale that 'in the event of there being any claim against the Ekattur Muttah, the first Defendant would hold himself responsible for clearing it off.' Subsequently to this sale having been effected, the Ekattur Muttah was attached in November, 1853, in satisfaction of the Razinamah, filed by first Defendant himself in the suit, No. 37, of 1851; and as the Defendant did not clear off the demand, the Plaintiff was forced to pay the mortgage claim of Mahomed Usen, amounting to Rs. 5761, in order to get the Muttah released from attachment. The evidence shows that this sum of Rs. 5761 was paid by Mr. Lazar, the Plaintiff's agent, and the receipt of it was acknowledged by Mahomed Usen in his petition, No. 705, of 1853. It is clear, then, that the Plaintiff could not have received the title deeds of the Ekattur Muttah till the year 1853, as they were not delivered back to Mahomed Usen by the Court till 1853; and he was clearly entitled to recover all sums paid by him over

and above the price of the property which it was necessary should be paid, before the title-deeds could be delivered to him, from the estate of Tirupassur Muttah, of which he held the title deeds as security. The Appellants set forth that the Court had no jurisdiction, the parties being residents in, Madras; moreover, that the Plaintiff had no lien on the Tirupassur Muttah. With regard to the first objection, it is clear the property from which the Plaintiff sought to recover the money due to him, is situate within this Zillah, and, therefore, was cognizable by the Civil Courts. With regard to the second, the Plaintiff has shown he has a lien upon the property, by producing the title deeds of it, and [317] showing he held them as security, previous to the period at which the sale to the third Defendant, whose agents have appealed, was made. The third Defendant, it appears, is abroad somewhere, and his agents; the fourth and fifth Defendants, were allowed to defend the suit on his behalf, and, as they were dissatisfied with the decision of the lower Court, they were allowed to make this appeal on his behalf. In the oral pleadings, the Vakeel on behalf of the third Defendant, stated that the Tirupassur Muttah was purchased by his client in 1852, from the first Defendant, and that a Bill of Sale was executed in his (the third Defendant's) favour, and the transfer of the Muttah to his name, and his possession and enjoyment of the property, conferred on him every title, and that the absence of the title deeds of the property was immaterial. The Civil Judge, however, considers that the third Defendant, by his own showing, neglected to observe even the common precautions which are used when property is purchased and sold, for he admits he did not see the title deeds, and it does not appear that he made any regular inquiry as to whether there were, or were not, claims on the property. The Plaintiff, it has been proved, received from the first Defendant, the title deeds of the Tirupassur Muttah, in 1851, as security for the delivery of the title deeds of the Ekattur Muttah; and, as these title deeds had been so pledged, the first Defendant had no power to effect the sale of the Tirupassur Muttah, until he had delivered the title deeds of the Ekattur Muttah, and the sale thereof to the third Defendant cannot prevent the Plaintiff from recovering the amount he was forced to pay, to enable him to obtain possession of the title deeds of Ekattur Muttah, [318] from the property of the Tirupassur Muttah, the title deeds of which Plaintiff held as security. The appeal is, therefore, dismissed with costs."

From this decree the third, fourth, fifth, and sixth Defendants to the original and supplemental suit, presented a special appeal to the Sudder Dewanny Adawlut at Madras, upon the following grounds:—Under cl. 1, sec. 4, Act, No. XVI. of 1853; first that the Plaintiff had no lien on the Tirupassur Muttah; secondly, that the third and sixth Defendants were respectively purchasers for valuable consideration, without notice, and with registry of the conveyances to them; thirdly, that neither the Principal Sudder Ameen, nor the Civil Judge, had any jurisdiction as against the third, fourth, fifth, and sixth Defendants. And, under cl. 4, of the same Act, first, that the third Defendant was never served with notice to appear or answer, and that the prosecution of the suit in his absence was wholly illegal; and secondly, that making the fourth and fifth parties was also illegal; lastly, that no points were recorded for the third, fourth, fifth, and sixth Defendants, or any of them.

The Sudder Court admitted the special appeal, in order to decide whether the sixth Defendant was to be considered a *bona fide* purchaser without notice, and if so, whether the property purchased by him was affected by the Plaintiff's asserted lien thereon.

The special appeal was heard before Messrs. Hooper, Strange, and Phillips, the Judges of the Sudder Dewanny Court, and, on the 23rd of July, 1859, the following decree was made:—"The Courts below have held, that the circumstances of the case give the Plaintiff a lien on the Tirupassur Muttah for the money overpaid by him on account of the Ekattur Muttah, and that the [319] omission of the third Defendant to inquire, as he was in duty bound, for the title deeds of the Tirupassur Muttah, when making purchase of that Muttah, serves to charge him constructively with notice of the Plaintiff's claim. In these opinions we cannot coincide. We consider the above doctrine of constructive notice inapplicable to the circumstances of the country, where, very commonly, old deeds connected with land do not exist, and inquiry for them ordinarily is not made. In the present instance, the third Defendant found the parties with whom he dealt in possession with their names on

the registry, and it appears to the Court reasonable that he should have looked for no further proof of title in them, to sell the property to him. In like manner the sixth Defendant found the third Defendant in possession with his name on the registry, and was justified in concluding that he might safely make the purchase from him. The Court hold, therefore, that neither the third nor the sixth Defendant is chargeable with notice, and that the Tirupassur Muttah, after passing to their hands, cannot be liable for any lien thereon which Plaintiff may have possessed. The Court is further of opinion, that the Plaintiff possessed no such lien. On the premises stated by him, he might have insisted on specific performance of the engagement of the first and second Defendants to sell him the Muttah, but this he has not done. On the contrary, he shows that he has receded from that arrangement by demanding back money which might have been taken as advanced towards completion of the purchase, and represents this money as an over payment made on account of the Ekattur Muttah. Now, it is clear, that the deposit with him of the [320] title deeds of the Tirupassur Muttah was not made with the end of holding that Muttah liable in hypothecation for payments made in connection with the Ekattur Muttah: it was a deposit without contemplation of a mortgage, and the Court hold, therefore, that no lien was created. The Court, for the above reasons, resolve to amend the decrees of the Courts below, so far as to declare that the Muttah of Tirupassur is not liable for the Plaintiff's demand upon the first and second Defendants. The costs of the Defendants, from three to six, are to be paid by the Plaintiff."

After an unsuccessful application to the Sudder Court for review of judgment, the Appellant, as the amount at issue was under the appealable value, applied by petition to the Privy Council, and was allowed, in the circumstances, special leave to appeal.

As the Respondents did not appear, the appeal was heard *ex parte*.

Mr. Teed, Q.C., and Mr. Cracknell, for the Appellant, submitted, that the decree of the Sudder Court could not be sustained, and in support of the appeal relied upon these grounds:—

First, that as the only point open to the Respondents, under the order of the Sudder Court of the 20th of January, 1859, admitting the special appeal, was, whether the Respondent, the sixth Defendant in the original suit, was to be considered a *bona fide* purchaser, without notice, of the Muttah of Tirupassur, and if so, whether that Muttah, as having been purchased by him, was thereby freed from the Appellant's claim upon it: it was, therefore, not [321] competent to the Court to entertain or determine the question, whether the Appellant had or had not the lien claimed by him on that Muttah under the circumstances of the case.

Secondly, that the Sudder Court ought to have determined that the sixth Defendant was not a purchaser *bona fide*, without notice, as the evidence in the cause proved notice to him before the institution of the suit: and, that there was no proof in fact of any conveyance of the Muttah to the third Defendant from the first and second Defendants; as the registry in the Collector's books of the third Defendant, as owner of the Muttah, was not proof of his title to it, as shown by the Circular Order of the 17th of September, 1832: neither was there any proof of any payment of purchase-money, or of other valuable consideration, for the purchase of the Muttah having been given by either the third or sixth Defendants, prior to notice of the Appellant's claim, or in fact, prior to the institution of the suit; the purchase by the sixth Defendant, if in fact made, being after the institution of the suit, and, therefore, *pendente lite*, and could not affect the Appellant's right. That the non-production by the first or second Defendant of any conveyance of the Muttah to them on the purchase of the Muttah by the third and sixth Defendants respectively, ought to have induced suspicion in those Defendants, and led them to inquire for the conveyance and the earlier title deeds, which inquiry, if made, would have made them acquainted with the Appellant's rights, and that, therefore, the third and sixth Defendants ought to be deemed to have had notice of them; and that the defence of being a purchaser *bona fide*, for value, and without notice of the Appellant's [322] rights, was not sufficiently pleaded by the third and sixth Defendants so as to entitle them to raise that defence.

Thirdly, that the evidence proved that the sale of the Muttah to the third and

sixth Defendants respectively, was not made *bona fide*, but if so made, was made in fraud of the Appellant.

Fourthly, that if the Sudder Court was at liberty to entertain the question whether the Appellant was, or not, entitled to the lien or charge claimed by him upon the Muttah of Tirupassur, it ought to have found that he was entitled to that lien.

Fifthly, that the Judge of the Civil Court of Chingleput having found as a fact, that the first Defendant had sold the Muttah of Ekattur to the Appellant on the 14th of October, 1851, and deposited the title deeds of the Muttah of Tirupassur with the Appellant as security, until he should deliver up the title deeds of the Ekattur Muttah, that finding, being a finding of fact, could not be controverted in the Sudder Court, as it had established the right of the Appellant to the equitable mortgage or lien upon the Muttah of Tirupassur, claimed by him, and confirmed by that decree. Equitable mortgages of land, by the deposit of the title deeds, being a well-known and customary species of security in the Madras Presidency.

Lastly, they contended, that the Sudder Court was wrong in not applying the principles of English law relating to equitable mortgages in deciding the case, and that, as the Appellant was an Armenian Christian, and the other parties Hindoo, Mahomedans, and Christian, the case fell to be determined according to justice, equity, and good conscience, as provided by [323] Mad. Reg. II. of 1802, sec. XVII., as no particular local law was applicable to the transaction (see *Abraham v. Abraham*, ante [9 Moo. Ind. App.], p. 210).

The case stood over for consideration, and their Lordships' judgment was now delivered by

The Right Hon. Lord Kingsdown (July 19, 1862).—This is an appeal from a decree of the Sudder Dewanny Adawlut at Madras, reversing a decision in favour of the Plaintiff so far as it established a lien on certain landed property called the Muttah of Tirupassur. This Muttah, which was the property of the first Defendant on the record, had been as the Plaintiff alleged, duly charged in his favour by the first Defendant as a security in respect of the non-delivery of the title deeds of another estate called the Muttah of Ekattur, purchased by the Plaintiff from him. After the creation of such charge the property was transferred, first to the third Defendant, and by him, pending the present litigation, to the last Defendant on the record, Mr. Ouchterlony.

The Plaintiff alleged the existence, continuance, and validity of his security as against the third and the last Defendant.

In the Court of original jurisdiction, and in the first appellate Court, the Plaintiff succeeded in establishing his charge, but on appeal to the Sudder Dewanny Adawlut at Madras the decree was reversed.

The Plaintiff is a Christian, and, from his name, appears to be an Armenian: the first Defendant is the son of the second Defendant, and both are Mahomedans: the third Defendant is a Hindoo; and the last on the record is a Christian and a British subject.

Though both the third and the last Defendants [324] pleaded, in effect, that they were *bona fide* purchasers for value, without notice, yet they did not prove that defence, though the Plaintiff charged notice and collusion with the first Defendant.

It appeared in evidence that, on the non-production of the title deeds of the estate, Ekattur, it was promised on the part of the seller that they would be produced in a few days, but this promise was not fulfilled, as they proved to be in the possession of a prior incumbrancer. The Plaintiff was obliged, in order to procure them, to pay off this incumbrance, and, having previously paid a large part of the purchase-money: his whole payments exceeded the purchase-money by a considerable sum (Rs. 3810), for which, with interest, he claimed to be indemnified by his alleged security on the pledged estate. The contract of pledge contained, also, a further stipulation of purchase.

The decision of the Sudder Dewanny Adawlut, so far as it respects the enforcement of the lien against the third and last Defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were

insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally, according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates that direction or not. The Court of appeal, reversing the prior decisions, has decided that the contract was not operative as a [325] hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the Plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one, not of pawn, but of trust (*Hedaya*, vol. iv. p. 208, tit. "Pawns"). It is not declared, that any writing or actual delivery is essential to the creation of such trust by that law; but as the contracting parties are not both Mahomedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The Plaintiff is a Christian: the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitae*, exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the General law of the place where the contract was made, that is, the English law, the deposit of title deeds as a security would create a lien on lands; though, as between parties who can convey by deed only, or [326] conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between parties themselves. The circumstance that the Plaintiff had not sued for a specific performance of the contract to sell the land to him (on which the Sudder Court laid some stress), does not in the least affect his claim for a lien. By the contract this latter interest is immediately created, and expressed to be immediate. The sale is contemplated as future. The first Defendant's own acts, in dealing with his land as he did, would effectually bar him, and those taking derivative titles from him, from insisting on this objection, if it had any original foundation of justice and equity to support it: but, in truth, they are distinct and independent parts of the same contract.

The contract, then, created between the parties a lien on the land. It is immaterial for the decision of this suit to consider or decide, whether that lien between these parties, looking to the power in the first Defendant to convey without writing, is legal or equitable (*Doe dem. Seebkristo v. The East India Company*, 6 Moore's Ind. App. Cases, 267).

The question to be considered is, whether the third and sixth Defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bona fide*, and without notice of this charge, whether legal or [327] equitable, would have had in these Courts an equity superior to that of the Plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof.

To give effect to the legal estate as against prior equitable title, would be an adoption of the English law; and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice. The law in India has not enabled a purchaser of land to look only to the apparent title on the Collector's books, or the presumed title of the owner in possession. It is beyond the province of a Court of Justice to effect by decision a change so important as that which is involved in the principle of this decision.

Their Lordships must, therefore, humbly advise Her Majesty to reverse the decree appealed against and to give to the Appellant the costs of the proceedings

in the Court below, and of the present appeal. Any costs paid by the Appellant under the decree reversed must, of course, be refunded.

[328] RAJAH MUHESH NARAIN SING,—*Appellant*: KISHANUND MISR and RUGHOBUR DYAL SING,—*Respondents* * [Dec. 5 and 6, 1862].

On appeal from the Sudder Dewanny Adawlut at Agra.

Principles regulating sales under Ben. Reg. XX. of 1795, considered.

The principal object of that Regulation is the security of the public revenue.

Where a purchaser for valuable consideration from a decree holder, had been in possession for nine years before the suit was brought to recover possession of real estate sold in execution of a decree, on the ground of non-compliance with the formalities prescribed by sec. 3 of Ben. Reg. XX. of 1795, the *onus* lies on the party claiming possession, to prove that the requirements of that section have not been observed.

Although at an auction sale, in satisfaction of a decree, the Collector cannot insist upon a deposit being made before the acceptance of a bidding; yet, in circumstances, showing that persons without means had been put forward to make sham biddings, such being a fraudulent contrivance to frustrate the sale, it was held, that the Collector was justified in inquiring into the trustworthiness of the bidder, before accepting his bidding, as it did not deter other persons really wishing to buy from offering their biddings.

This suit was brought by the Appellant to recover possession of an estate, called Talooka Bazaar Rajah, Pergunnah Gudwarree, from the Respondent, Kishanund Misr, who was in possession thereof under conveyances from purchasers at an auction sale made under a decree of the Civil Court, and which sale was sought to be set aside on the ground of irregularity, [329] informality, and want of compliance with the provisions of Ben. Reg. XX. of 1795, in carrying the sale out.

The sale took place under the following circumstances:—

The Talooka was formerly the property of the Rajah Ramdial Singh, the Appellant's grandfather, who being in arrear with the Government, was obliged, in order to save the estate from sale, to borrow a considerable sum of money from one Petumber Mookerjee, upon bond security, and Petumber Mookerjee, not being able to obtain payment either from him during his lifetime, or his son, Rajah Surnam Singh, upon whom on his death the Raj descended, in the year 1822, instituted a suit against the latter, to enforce his security, and on the 26th of May, 1830, obtained a decree in that suit for Rs. 18,700. 15a. 9p. principal and interest, the arrears then due. His next step was to apply for execution, which he accordingly did on the 25th August, in the same year; but he was prevented from obtaining it by Surruhjeet Singh, Sher Mongul Singh, and Ruchpal Singh, brothers of Surnam Singh, instituting a suit, in which they claimed, as Surnam Singh's brothers, to exempt three-fourths of the Talooka, as being their property, from liability to the decree, whereby an Order was obtained, on the 14th of December, 1830, postponing any award of execution beyond the one-fourth of Surnam Singh's share, until the final decision of that suit.

The effect of this, and other devices of the Rajah for delay, was to induce the decree-holder on the 19th of April, 1833, to agree to accept the sum of Rs. 16,000, in full, by certain instalments, provided that such instalments were regularly paid, and a [330] deed of compromise of that date was accordingly executed to carry out this agreement. Nothing was paid under this deed; and when, in the year 1835, the Zillah Court of Jounpore decided, that the three-fourths claimed by Surnam

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Singh's brothers were equally liable with the remaining one-fourth to the ancestor's debt, an appeal to the Sudder Dewanny Court was preferred, creating further delay, and which appeal was not decided until the year 1841, when that Court negatived the claim on the part of Surrubject Singh and his brothers, and expressed their conviction that the suit was merely collusive, and instituted for the purpose of delaying the decree-holder in his execution. Pending this appeal, Petumber Mookerjee proposed to a Mr. Barwise to sell the decree to him, and Barwise with the Rajah's consent, became the purchaser, paid Petumber Mookerjee the full consideration, and took from him an assignment of the decree, dated the 4th of April, 1837. Shortly after this, Surnam Singh died, and was succeeded in the Raj by the Appellant; and Barwise, being unable to obtain from him any satisfactory arrangement for payment of the amount due, in November, 1837, petitioned the Zillah Court for execution of the decree. This petition the Appellant opposed, and it was not until the 4th of May, 1843, that Barwise was able to obtain an effective order for the realization of the amount due under the decree of 1830.

In the course of these proceedings Barwise, on the 4th of April, 1840, obtained an Order for execution of the decree (afterwards rescinded on appeal), by which a sale was fixed to take place on the 30th of July in [331] that year; to thwart which the following plan was resorted to by the Appellant. A sum of Rs. 7000, Government revenue was withheld, in order that if the Collector let the Talooka to farm to obtain payment of the arrears, the Rajah might get the lease taken by some dependent of his own; and the Appellant contrived to get the 16th of July, 1840, fixed for the letting, in order that the lease might precede the execution sale, and thus interpose a five years' term in the decree-holder's title and leave him with a reversion to sell. This plan was defeated by an Order of the Civil Court, which directed that if it should become necessary to lease the Talooka for the arrears, the decree-holder was the person entitled to the lease; and at a later date, in 1843, the revenue being then in arrear, and Barwise having paid the arrears, a lease of the Talooka for ten years was granted to him.

Immediately after the passing of the Order of the 4th of May, 1843, by which execution was awarded, Barwise proceeded to put it in force by applying on the 31st of that month, to the Civil Court of Jounpore for a sale of the Talooka by public auction, through the Collector of Jounpore, with the consent of the Commissioner of the Benares division; filing with his petition the particulars of his claim, and a schedule describing the property as the Talooka Bazaar Rajah, paying a revenue of Rs. 19,406 11a. 6p. In this statement the number of Mouzahs was reckoned as forty-three, which number included the hamlets with the villages, as it was not until a subsequent adjustment that the hamlets were reckoned separately, which made the number of Mouzahs sixty-three, the [332] number sold and sought to be recovered, the jumma and area, however, remaining the same.

Upon this petition the Court submitted to the Commissioner of the Benares division the usual formal application for sale under sec. 16, Ben. Reg. XXVI. of 1803, and sec. 2, Reg. XX. of 1795.

This application the Commissioner, on the 16th of June, 1843, forwarded to the Collector, who on the 18th of July, fixed the sale for the 21st of August, and issued the usual advertisements, and forwarding information of the above, together with a statement of the lands required to be sold to the Commissioner. This statement contained the description—"Talooka Bazaar Rajah," area "14,996 beegahs," and jumma Rs. 19,406 11a. 6p., and made no mention of the number of Mouzahs; and on the receipt of it the Commissioner, on the 21st of July, 1843, forwarded his sanction of the sale to the Collector.

After various delays the sale was proceeded with; the decree-holder bidding to the extent of his demand, but one Sheopershad bidding higher, the estate was knocked down to him. Sheopershad was, it afterwards appeared, the Appellant's treasurer, sent by him for the purpose of bidding, and thus to delay the sale; and as the deposit-money required was only Rs. 500, he forfeited that sum, and was not to be found when the sale was to be completed; consequently, a fresh sale became necessary, which was fixed for the 13th of March, 1844. At this sale one Pritheepal Singh became the supposed purchaser at Rs. 47,000; but as no greater earnest than Rs. 500, was required (notwithstanding Barwise's requests to that effect), Pritheepal

Singh, who was also a creature of the [333] Appellant's like Sheopershad, could not be found to complete, and a third sale was fixed for the 15th of May, 1844 : on which occasion, one Pohip Singh another fictitious purchaser bought the Talooka at a lac of rupees, and who absconded in like manner when the completion of the purchase became necessary.

Barwise then requested that at any future sale an earnest of 15 per cent., according to section 2, Ben. Reg. XII. of 1796, should be required, but without any immediate effect, as the same course as on the previous sales was adopted, with the same result, on the 29th of July, 1844, the next day fixed for sale, when the estate was knocked down to Ram Pershad, who paid the deposit, Rs. 500 ; but he could not be found when the balance was required.

Two fresh days of sale were fixed for the 27th of September and the 8th of October, but the notices were in each case irregular ; and on the irregularities being pointed out by Barwise, the sale was ultimately fixed for the 15th of November, 1844. Before this last date the Sudder Board of Revenue passed an order requiring the purchaser to pay a deposit of 15 per cent. on the amount of the purchase-money, instead of the earnest being limited to Rs. 500, as before ; and that requisition was accordingly put in force at the sale (the fifth attempted sale by Barwise). After Barwise had bid Rs. 48,100, Nimkoo Singh, a low caste Kolee, having bid Rs. 48,500, contrived, by a trick upon the Collector, to get away without paying down the deposit ; the result of which was, a new sale became necessary, and it was ordered that on such sale, which was fixed for the 24th of December, 1844, the Collector should demand proof from the bidders of their trustworthiness and ability to purchase.

[334] In consequence of Barwise's determination to persist in the sale, the Appellant and Surrubject Singh so conducted themselves as to lead him to anticipate some attempt at violence on their part, and on the 14th of August, 1844, an order was issued upon his application for their arrest, for the purpose of their being held to bail. This order was, however, evaded, and, on the 15th of December in that year Barwise was murdered. The Appellant was arrested, but acquitted by the Nizamut Adawlut.

Barwise's executors then interfered, and after further delay, the Collector, on the 7th of June 1845, ordered a fresh notification of sale to be given, by which the sale was fixed for the 15th of July then next, and on that day the sale, which is the one complained of in this suit, was effected.

No fresh sanction of the Commissioner of the Benares division was obtained, that of the 16th June, 1843, not having been in any way modified or affected, it being considered sufficient for the purpose.

At this sale Hawes and Gibbons (Barwise's executors) first bid Rs. 48,000 ; upon which the artifices, which had been so effectual on former occasions to delay the sale were again resorted to by the Appellant, and one Hunooman Pershad, a labourer, and one of his dependents, who resided in Oude, out of the jurisdiction, made a bid of Rs. 49,000. Upon inquiry by the Collector, it appeared that he had no earnest money with him ; but he said that his servant was waiting with it. He admitted that he was in service, and said that he made the offer on the part of one Ram Dass, but had no power of attorney or other authority to produce from him. The Collector then proceeded to take other bids, and Shunkur Lall was [335] the next person who offered himself, and who professed to bid Rs. 50,000, on behalf of Sheo Lal, who also lived in Oude ; but Shunkur Lall had no power of attorney or guarantee of any kind, nor did he make any offer of the earnest-money, or appear in any way prepared with it. The Collector then made further inquiries of the first bidder, but his answers were unsatisfactory, and the Collector being of opinion that these biddings were, like the biddings on former sales, mere fraudulent contrivances to defeat the execution, concluded the sale with Hawes and Gibbons, at their bid of Rs. 48,000, which was the only *bona fide* one at the sale, and on the 21st of July, 1845, this sale was approved of by the Commissioner of the Benares division.

On the 30th of July, the Appellant presented a petition complaining of the sale ; but the only irregularity he alleged was the refusal of the Collector to accept the bids of Hunooman Pershad and Shunkur Lall.

The Talooka was afterwards, on the 12th of November, 1847, sold by Barwise's executors, to Rughobah Sing on behalf of his son, Ramnath, for Rs. 92,500, and by

him subsequently sold to the Respondent, Kishanund Misr, who had been in possession for nine years, when the plaint was filed by the Appellant, in the Civil Court of Zillah Jounpore, against him by Rughobar Dyal Sing.

The plaint sought the reversal of the sale on the ground of irregularity. The plaint stated that the suit was brought to recover possession of the Talooka, by cancelment of the auction sale, on the ground of the irregularity and informality of the sale effected by the Collector in execution of the decree, [336] and for the ejection of the Defendants, the successors of the auction purchasers, whose possession rested on, as it was alleged, an illegal basis, and to recover Rs. 17,721. 1a. 1p., as mesne profits, calculated from the date of the expiration of the Government lease or farm, viz. from the 18th of September, 1853, inclusive. The plaint then stated the principal facts before set out and submitted to the Court the two general heads, on which it was contended that the Appellant was entitled to a decree to set aside the auction sale. These were, first, that the original process of execution of the decree and the order of the Civil Court, directing the auction sale in question of the Appellant's family estate was irregular; and secondly, that the Officers who respectively ordered and conducted the sale committed gross irregularities in effecting the same, and the plaint set out in detail these alleged irregularities.

The answers upheld the validity of the sale and objected to the suit for want of parties.

The principal Sudder Ameen (Moulvee Mohmmud Hubeebvolla Khan), by his judgment, pronounced on the 23rd of February, 1855, overruled the Defendants' objection to the regularity of the suit, and decreed in the Appellant's favour, ordering the cancelment of the auction sale and setting aside the deeds of sale to the Respondent.

Against this decision the Respondents appealed to the Sudder Dewanny Adawlut, North West Provinces, and on the 10th of May, 1856, the Sudder Court, consisting of Messrs. Begbie, Harington, and Unwin, unanimously reversed the Zillah Court's decision. The Sudder Court by their judgment held that the sale was valid under the letter of sanction by the Revenue Com-[337]-missioner, and that though perhaps it might have been more regular, and more agreeable to established usage, if on the renewal for application for execution of the decree, a fresh application to the Commissioner had been made, under the provisions of cl. 4, Ben. Reg. VII. of 1825, but that it was quite clear, that the present Appellant had not sustained any injury by the alleged irregularity, nor had he urged any plea to that effect; and that such being the case, the Court could not admit that it afforded any sufficient ground for the annulment of the sale, and dismissed the Appellant's suit with costs.

The present appeal was brought from this decree, and was argued by the Solicitor-General (Sir R. Palmer), and Mr. Leith, for the Appellant, and Mr. Forsyth, Q.C., and Mr. W. Field, for the Respondents.

On the part of the Appellant it was submitted that the sale was void by Ben. Reg. XX. of 1795, sec. 3, as the sanction of the Board of Revenue was not obtained; that the letter of sanction of the Commissioner of the 21st of July, 1843, relied upon by the Sudder Court was restricted in terms to the sale then proposed and specifically referred to, which took place on the 21st of August, 1843, and that being restricted and qualified, it did not legally authorize the Collector to issue notification for another sale to take place on the 15th of July, 1845, embracing other Mouzahs, which sale was directed in a summary suit for execution of the decree: and that such sale, therefore, ought to be declared void on the grounds, first, that the proceedings of the Principal Sudder Ameen, as well as [338] of the Collector which preceded, were irregular; and secondly, that the conduct of the Collector at the sale in refusing to receive biddings, except upon deposit, was contrary to usage in regard to auction sales made in satisfaction of decrees. Further that the estate was sold for an inadequate price. And lastly, that the delay for nine years to bring the suit for annulment of the sale was no legal bar to the suit under the Regulation of Limitation of suits.

For the Respondent it was contended, that the question of sale of the 15th of July, 1845, was not liable to reversal on any of the grounds urged by the Appellant, and that the *onus* was upon him to establish the alleged irregularities which he had failed to do; and, moreover, that the lapse of time from the Respondents' possession,

and the institution of the suit was an answer to the claim for rescinding the auction sale.

Judgment was delivered by

The Right Hon. Sir John T. Coleridge (Dec. 9, 1862).—This is an appeal from a decree of the Sudder Dewanny Adawlut at Agra, which reversed a decree of the Civil Court of Zillah Jounpore, in favour of the Appellant. The suit in which these decrees were made respectively on the 23rd of February, 1855, and the 10th of May, 1856, was brought by the Appellant to recover back possession of an estate, called the Talooka Bazaar Rajah, Pergunnah Gudwarree, which had been the property of his father, Rajah Surnam Singh, and which had been sold in execution of a decree obtained by one Petumber Mookerjee in May, 1830, in a suit first instituted by him in 1822 [339] for the recovery of a debt. One Barwise, in 1837, had become by purchase the holder of this decree; and the Respondents claimed by purchase for a valuable consideration, and through mesne conveyances, from his representatives, who had been purchasers at the sale held in execution of the decree. The claim in the present suit was rested not upon any supposed miscarriage in the determination of the original suit, nor any defect in the title of Barwise to the benefit of the decree, but on certain alleged informalities and defects in the course of executing that decree, and the sale under it.

In order to understand the questions now raised, a short statement of the material facts will be necessary.

It will be observed that the litigation commenced in 1822, and that the decree in favour of the original Plaintiff was obtained in 1830; seven years were then passed in fruitless attempts by him to carry it into effect; his hopes or his means becoming exhausted, he was induced, for a valuable consideration, to make over this decree to an Englishman of the name of Barwise, who, being in the service of the Government, it was supposed probably by both parties, might be more successful in defeating the various devices by which its execution had been up to that time prevented. It is immaterial to the decision of this case whether he purchased on too favourable terms, or succeeded in obtaining too great advantages. It may have been so—on that we pronounce no opinion. It was not, however, until the 6th of June, 1845, and after he had been murdered, as alleged, by the Appellant, that his representatives obtained the Order from the Zillah Court of Jounpore, on which the sale actually took place, the validity of which is questioned in the present appeal.

[340] We propose now to examine the objections to this sale, adverting only, as we proceed, to the previous circumstances, so far as may be necessary for the understanding and disposing of these objections. The order for this sale is dated June 6, 1845, and is as follows:—"This case was brought up this day. It was found from the report of the Moonshee of execution of decrees, that Rs. 48,522. 0a. 1p., the total estimated value of the claim, composed of Rs. 46,856 14a., entered in the report of the 22nd November, 1844, and Rs. 1,664. 11a. on account of present interest up to the 22nd of May, 1845, and 8 annas for costs, is quite correct. As it appears from the accounts to be right and proper that Talooka Bazaar Rajah, embracing sixty-three original and dependent villages, be sold to realize the amount above specified, it is therefore, ordered that a copy of this proceeding be sent to the Collector of the Zillah, to apprise him of the above-mentioned facts, in order that the said Collector, after the issue of the second notification, may put up to sale the aforesaid estate, the property of the Defendant the debtor, for the sum claimed as above, and afterwards inform this Court of the result."

It will be observed that this Order dealt directly with the Collector of the Zillah, and is silent as to the Board of Revenue. This, it is said, is in breach of the Regulations on this matter, then in force, of Regulation XX of 1795, which directs that, when any Court of Civil Judicature shall have occasion to sell lands in satisfaction of a decree, it shall transmit a copy thereof to the Board of Revenue, which is, with all practicable dispatch, to cause the lands to be disposed of at the Presidency, or in the District in which the lands are situated, as they may deem most advantageous to the proprietor. The objec-[341]-tion founded on the apparent non-compliance with this Regulation was taken, both in the Zillah and Sudder Courts, in this suit, and overruled by both—and, their Lordships think, quite properly. It appears

that, when a former order for sale had been made by the same Court in 1843, this Regulation had been fully complied with; that the Commissioner had authorized the sale of the whole Talooka; that as many as four sales had taken place, ineffectual and nominal only because the best bidders on each occasion were men of straw, who had, no doubt, been put forward for the very purpose of rendering the decree abortive. It is said that the order directing these former sales must be considered as having been made in a different suit from that in which the order now in question was made, for that the proceedings had been taken off the file, and the lands to be sold and the sums to be recovered were different in the two orders. There is no foundation for either of these assertions. It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. Nor is it true, in any material sense, that either the properties to be sold or the sums to be recovered were different; in both, the same whole Talooka, rendering to the Government the same jumma, was directed to be sold, and for the same principal sum; but the number of villages comprised in it, owing to some inaccuracy, was differently stated, and the total [342] sum was increased in the later order by adding the interest which had accrued, due in the interval between the two, with a few annas for the costs. The principal object of the Regulation in question was the security of the public revenue, as appears not merely from its own preamble, but by the modifications which were made in it by Regulation VII., of 1825, tit. ii.; and this object had been fully answered by the communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. If this, therefore, had been a question raised between the original parties to the suit, and if the objection had been made promptly after the sale had taken place, their Lordships would still have been of opinion that it had received its proper answer in the Courts below; but it must never be forgotten that they are now called upon to give effect to it as against a purchaser for a valuable consideration, and, so far as appears, entirely without notice, in a suit commenced in July, 1854, the disputed sale having taken place in July, 1845. What safety could there be, except by the Statute of Limitations, for any man's title, where a judicial sale had taken place, if he were bound to satisfy himself of the decree-holder's compliance with every one of the many formalities prescribed by law for the conduct of it. This is a remark which their Lordships must bear in mind in considering the objection to which they now pass.

The next objection to be noticed is, the alleged want of due notification of the time and place of sale. At the time when this sale was to take place, this matter was regulated by Regulation XX., section 12, of 1795, which requires notices to be affixed one month before the day of sale in the Court Room of the Dewanny or Zillah, the Collector's office, in the principal town or village, and in the office of the Secretary of the Revenue. Now, if it be taken that the burden of proof in respect of these notices can be properly cast on the Respondent, it certainly does not appear to their Lordships that in respect of all of them it is clearly made out that they were duly given; but they are of opinion, that it cannot be so cast, considering how he claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before them. In this country it is in many cases required by Statute, that notices should be affixed on the walls or doors, of Courts, or in other specified places, and for certain specified times, in order to give jurisdiction to Magistrates to do certain acts which are speedily to follow. In such cases there is no injustice in calling upon the party who moves the Magistrates to exercise their statutory jurisdiction, to prove that these requirements have been complied with. But it would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time; in others, where the document

ought in strictness to be filed, it is but too common for the Officer, whose duty it would be to file it, to be neglectful.

Their Lordships are of opinion, therefore, that the *onus* lay upon the Appellant, and that he has not discharged himself of it.

It was said, in regard of another objection, and [344] might be said in regard of this, that at the time in question he was in prison on the charge of murder; and that was so: but it is clear that he at least knew of the time fixed for the sale, and was able to apply to the Court, because he presented a petition on the 14th of July, 1845, to the Zillah Court for its postponement for two months, which was heard and rejected by the Sudder Ameen of that Court.

The remaining objection is to the manner in which the sale was conducted. It will be remembered that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable, or unwilling, to complete them, and so they had been rendered illusory: the Collector, therefore, had been very properly cautioned to satisfy himself of the trustworthiness of a bidder, before he concluded the sale in his favour. On the present occasion, after the representatives of Mr. Barwise had bid a sum of Rs. 48,000, being a little below the amount of the decree, one Hunnooman Pershaud bid Rs. 49,000. The Collector asked if he was prepared with the deposit money; he was not. He was asked who and what he was: he said he was a servant, and was bidding for Ram Das, of Sultanpore. He was asked whether he held a Mookhtarnamah from Ram Das, and he said he did not. On this he was rejected as a bidder. Thereupon one Shunker Lall bid Rs. 50,000, and he was questioned as Hunnooman Pershaud had been. It does not appear whether he answered that he was prepared with the deposit or not, but he stated that he was bidding for one Sheo Lall, a Banker of Dostpoor. Like the former bidder, he had no Mookhtarnamah. The Collector rejected both their [345] biddings: and there being no other bidder, knocked the estate down to the representatives of Barwise for Rs. 48,000.

Both Narain Sing and these two persons, but not either Ram Das or Sheo Lall, petitioned the Court against this proceeding of the Collector. It was urged that a production of the deposit ought not to have been insisted on before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. Certainly the payment of the deposit could not be required before the acceptance of the bidding, and the knocking down of the estate; but the Collector was bound, in their Lordships' opinion, to satisfy himself reasonably that these persons were, what they professed to be, real bidders, and the course which he took for that purpose was perfectly justifiable; and so it was held in the Court below—their Lordships think quite correctly: they see not the least reason for believing that it was calculated to deter persons really wishing to buy from offering their biddings, or in any way to damp the sale. It might be unusual; but the circumstances were unusual; as practices had been suffered before in this case, which had made the sales under the Order of the Court mere mockeries, available only for the purpose of defeating the course of justice: the Collector, forewarned, was bound to take care that this sale should be a reality, which it could not be, unless care was taken to distinguish between real and sham biddings. The result shows that his conclusions were correct: if there were such persons as Ram Das or Sheo Lall, or if either of them had, however irregularly, deputed Hunnooman Pershaud or Shunker [346] Lall to bid for them, we may be quite certain that claims would have been made on their behalf by way of petition to the Court. It is said that the estate was sold for less than its value. It may have been; it was certainly sold, some time afterwards, at a great advance by the purchasers: but considering the character of the previous attempts to sell, and all the previous instances of the litigation, this is not to be wondered at. As a fact in itself, it is immaterial to the decision of the case: it is enough that the sale was a real one, conducted justly and regularly.

Their Lordships, in a judgment necessarily so long, have thought it right to take no notice of several matters, important in themselves, but not affecting their decision; they have now disposed of the various points relevant to that decision, and which were urged by the learned Counsel for the Appellant with their usual zeal and ability: but they cannot pass from this case without the expression of their

surprise and deep regret, that such a case should have been possible under the system of jurisprudence prevailing in any country under the British dominion.

“ ——— *puget hæc opprobria nobis,
Et dici potuisse et non potuisse refelli.*”

The subject-matter of the original suit a debt, it should seem undisputed, or at least as to which, in substance, no serious dispute was possible, where the Plaintiff's difficulty had not been to establish his right to the judgment of the Court in which he sued, but to make that judgment available when obtained, though the funds were ample for the purpose. By fraud and chicanery, by every possible abuse of the forms and procedure of law, by force and violence, [347] even, it is to be greatly feared, to the shedding of blood, justice was evaded and defied for fifteen years, from 1830, when the decree was pronounced, to 1845, when the final sale took place. The original Plaintiff, wearied out with the long delay and expense, fain to sell the benefit of his decree: the unhappy man who had been substituted for him losing his life, while vainly striving to realize its fruits. And now, in 1862, their Lordships have been called on to dispose of a suit, in which it is sought to invalidate the whole proceeding as against a purchaser for value, the second in succession from the execution creditor, against whom, or the party from whom he immediately purchased, no fraud, no collusion, no knowledge of the supposed defects in the title, has been alleged. They have had to deal with a record of nearly three hundred pages in folio, setting out more than three hundred documents and depositions. Their Lordships do not intend hastily to cast censure on any individuals: the materials are not before them for that purpose, nor is it within their province to do so: but it is useful to point out that a system under which all this is possible loudly called for amendment, administered as it here has been, defeated the very object for which it was instituted.

They will humbly recommend to Her Majesty that this appeal ought to be dismissed, with costs.

[348] RAMASAWMY AIYAN and Others.—*Appellants*; VENKATA ACHARI and Others.—*Respondents* * [Feb. 2, 3, 4, 1863].

On Appeal from the Sudder Dewanny Adawlut at Madras.

Suit by the representatives of the Arya Brahmins, claiming in hereditary right, the Mirassi and exclusive privilege of administering Purohitam (religious rites and ceremonies) to seventeen classes of pilgrims who resort to the shrine of the great Pagoda and other Temples in the Island of Rameswaram in Madras, dismissed; the Plaintiffs failing to establish their right, either (1) by documentary proof of its origin, or (2) by proof of such long and uninterrupted usage as, in the absence of documentary proof, would suffice to establish a prescriptive right.

The Appellants were Arya Brahmins settled at Rameswaram, an Island in the district of the Presidency of Madras, and claimed to have the hereditary right of administering Purohitam, or religious rites, to seventeen classes of pilgrims who resort to the great Pagoda and other temples in that Island, and to the fees paid, or presents offered, by the pilgrims resorting to the shrine. The Respondents were members of a sect or body of Brahmins, known as the Parishai Bhattars, who also administered the Purohitam, and had done so for many years, and who claimed the right from long usage, and were in the receipt of the income derived from the fees paid by the pilgrims resorting to that [349] Island: with the exception of a

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

small portion for the performance of certain inferior duties in the Pagoda, which the Appellants were, as it was alleged, on account of their origin alone competent to perform.

In the year 1849, the Appellants, twenty-seven in number, filed a plaint in the subordinate Court of Madura, against the Respondents, fifteen in number, to recover the rents alleged to be due to them, in respect of fees so received by the Respondents for six classes of pilgrims under a Swamubhogam, or annual rent deed, dated as far back as the year 1786, and for eleven other classes, seeking by the suit to be established in the enjoyment of all these rights. The plaint set forth the grounds of the claim, and the title under which the Plaintiffs claimed, and the loss incurred in connection with the Mirassi privilege of administering Purohitam to pilgrims, and prayed that the Arya Mahajanam should enjoy, without the interference of the Defendants (the Respondents), the Mirassi of administering Purohitam to eleven classes of pilgrims, capable, as alleged, of yielding an annual income of Rs. 1000, and which formed part of the Mirassi originally forcibly seized and then enjoyed by the Defendants: the plaint further prayed that the Defendants should continue to pay annually to the Arya Mahajanam, Brahmins of the Arya sect, and to the body of Gurukals, a community belonging to that sect, pons Rs. 100, or Rs. 126. 12a. 11p., being the amount of rent fixed on the Mirassi for administering Purohitam to the six classes of pilgrims, other than the eleven aforesaid, which were then in the enjoyment of the Defendants as therein detailed; and [350] that, in default of the Defendants so paying it, the Plaintiffs and others should enjoy without the interference of the Defendants, the Mirassi of administering Purohitam to such six classes, capable as alleged of yielding an annual income of Rs. 600. The plaint set forth, first, that from the time the Pagoda of Rameswaram came into existence, the Mirassi of administering Purohitam to all classes of pilgrims resorting to Rameswaram had belonged to the whole community of the Arya Brahmins. That while this privilege had been enjoyed by their ancestors, the Mirassi of administering Purohitam to the Siva Devijas and six other classes of pilgrims had been taken for Swamubhogam, or annual rent, by Sahasranama Dikshitar and Ullitars who were the ancestors of Ramanadha Aiyar and others officiating as Adhyena Bhattachars in the Pagoda of Rameswaram, from the ancestors of the Arya Mahajanam aforesaid, under a document passed one hundred and seventy-five years ago, stipulating an annual payment of pons 50. Secondly, that with regard to the Mirassi of administering Purohitam to the Tatwadi Brahmins, and nine other classes of pilgrims, besides the seven classes therein mentioned, it had been conferred a long time ago by the ancestors of the Arya Brahmins as Sridhana upon the community of the Gurukals. That while the Plaintiffs and Arya Mahajanam continued in the enjoyment of the income derived from the exercise of the Mirassi to the seven classes aforesaid, and also to the other pilgrims, about thirty years previous to the execution of the deed of rent thereafter referred to, Sasha Aiyar, Sonne Bhattan, Parvata Bhattan, Krishenaya Bhattan, Srinivassa Bhattan, and Giri [351] Bhattan (Tatwadi and Telugu Brahmins, who had removed from Manamadurai to Rameswaram, and were the ancestors of the Defendants), engaged to administer Purohitam to six out of the ten classes, namely, the Tatwadi Brahmins, the Tamil Brahmins and Telugu Brahmins of the Khon country, the Kanaris Brahmins, the Northern Brahmins, the Aradhya Brahmins, and the Telugu Brahmins; on condition of paying to the community of the Gurukals two out of ten per cent of the income derived therefrom. That this state of things continued for a few years, when a dispute arose between the Gurukals and Sesha Aiyar, in regard thereto. Thirdly, that both parties having laid the matter before the then Zemindar of Ramnad, that Zemindar convened a body of arbitrators, who decided that Sesha Aiyar should, in co-operation with the agents of the community of the Gurukals belonging to Arya Mahajanam, administer Purohitam to six classes of pilgrims, and that twenty per cent should, as before, be paid to the community of the Gurukals; that all the Tatwadi and Telugu Brahmins of Manamadurai had executed a "Parisha Tiriva Chit" (or deed of rent for administering Purohitam to pilgrims), in favour of the whole community of the Gurukals, belonging to Arya Mahajanam, and that the other five above mentioned had executed a document under date of the 9th Vayasi Parabhava, which passed one hundred and four years ago. Fourthly, that while that document remained in force, one Timmana Achari, the great-grandfather of one of the Defendants, who

was a member of the Brahmins of Manamadurai, suppressed the incomes derived [352] from the Purohitam administered to six classes of pilgrims, without fairly accounting for them, notwithstanding that Raghanadha Gurukal and others, members of the community of the Gurukals, remonstrated against the performance of the Purohitam by them. That Timmana Achari executed an agreement in favour of Raghanadha Gurukal, and other members of the community of the Gurukals representing the Arya Mahajanam, under date the 1st Chitra-Chitrabhanu (11th April, 1822), to the effect that, instead of paying two out of ten, or twenty per cent, he should enjoy the incomes derived from the performance of Purohitam for the six classes of pilgrims, on condition of paying, on that account, an annual rent of pons 100, in default of which the community of the Gurukals themselves might resume and enjoy the performance of Purohitam for the aforesaid six classes. That such rent was paid to the community of Gurukals, up to the year 1825. Fifthly, that afterwards, the father of the first Defendant, and others, brought an action in the District Moonsiff's Court of Paramagoody, asserting, among other allegations, that they were the proprietors of the Mirassi of administering Purohitam to twenty-four classes of pilgrims, including also the six classes; that Annasami Vadhiyar and three others, having, in the year Parthiva (1826), administered Purohitam to Sengendi Parishie, one of the twenty-four classes of pilgrims, appropriated themselves the incomes derived therefrom. That thereupon Chinmasami Aiyar and another, members of the Arya Mahajanam, presented an objecting petition, which they substantiated, alleging to the effect, that [353] the Mirassi of administering Purohitam to all the classes of pilgrims, including the twenty-four classes, belonged to them, and Arya Mahajanam alone, and not at all to the Parishai Battawars—*i.e.*, the Brahmins of Manamadurai; and that a decree was passed by the Moonsiff in that suit holding that the privileges aforesaid belonged to the present Plaintiffs and Arya Mahajanam, and they had the enjoyment accordingly. That this decree was confirmed in appeal, by the late Zillah Court, who observed that the Plaintiffs, in that suit—*i.e.*, the father of the first Defendant in this suit, and others—were agents of Arya Mahajanam; and that no special appeal was preferred against such decree. Sixthly, that the Defendants, and other Parishai Battawars had, from the time of their ancestors, dwelt on the grounds belonging to the Pagoda of Rameswaram, and continued to pay an annual quit-rent of pons 60, together with 6 pons for charges. That in a deed of gift executed by Vijaya Raghanadha Setupati, a late Zemindar of Ramnad, in favour of the Pagoda at Rameswaram, it was provided that the pons 66 should be appropriated to "Sukravarakuttalai," or "Friday services," of the Pagoda; and that the ancestors of the Defendants paid likewise an annual tax of pons 24, for the festival of Gangalanadha Swami in the Pagoda. That this tax, together with the aforesaid pons 66, amounting in all to pons 90, was paid by the Parishai Battawars, to the Pagoda, up to the year 1825; but that afterwards, the payments having fallen into arrear for seven or eight years, the fact was brought before the late Principal Collector, Mr. Blackburn, who [354] sent for the Defendants and directed them to pay the money as usual. Seventhly, that the Defendants falsely represented that the Mirassi of administering Purohitam to twenty-five classes of pilgrims belonged to them; that seventeen out of them remained in their unmolested enjoyment; but that in regard to the remaining eight classes of pilgrims, there had been a dispute between them and Arya Mahajanam, and a delay in the payment of the aforesaid pons 90. That the Collector, supposing the representations of the Defendants to be true, without, as it was alleged, conducting a proper examination, passed a decision, under date the 25th of February, 1835, to the effect, that the Parishai Bhattars should enjoy the Purohitam of twenty-one classes, made up of four out of the aforesaid eight classes, and the seventeen classes above referred to; and, that with regard to the Purohitam of the other classes of pilgrims, it should be enjoyed by Arya Mahajanam, who, however, forthwith represented to the Collector, by means of an Arzi, that the decision was unjust in declaring that the Mirassi of administering Purohitam to all classes of pilgrims belonged to the Defendants, and that they did not agree to it. That while this inquiry was going on the Defendants, arrogating the right to the Purohitam, on the strength of the above decision of the Collector, and subsequent to an engagement entered into by one Ramalinga Aiyar, a resident of Rameswaram, under date the 12th Chitra Manmadha (23rd April, 1835), agreeing

to pay a rent of pons 61 for the pilgrims of Karvatuand Reddi class to the Plaintiffs and other members of the Arya Ma-[355]-hajanam, who formed a part of the Parishai Battawars - fraudulently administered Purohitam to the aforesaid two classes of pilgrims, and appropriated to themselves the income derived therefrom. Eighthly, that six out of the aforesaid twenty-one classes pertained to the rent above referred to; and four were out of the seven classes taken by the Adhyena Bhattars for Swamubhogam rent. That the Purohitam Mirassi of these eleven classes, ought to be put into the possession of the Arya Mahajanam. Ninthly, that Perya Nayanar, Ramaswami Aiyans, and three other members of the Arya Mahajanam, had instituted a suit, No. 117 of 1835, on the file of the late Zillah Court, representing the history of their title, and praying for the recovery of Purohitam of the above-mentioned twenty-one classes of pilgrims, and the loss incurred in connection therewith; but that the Court dismissed the suit, observing, among other circumstances, that as it appeared upon the face of the plaint itself that there were others entitled to the Purohitam Mirassi, the suit ought to have been brought in conjunction with them; and that that decree was confirmed on appeal, No. 17 of 1840, preferred to the Provincial Court for the Southern Division. That as the original and appealed decrees aforesaid decided that certain other members of Arya Mahajanam should have joined in bringing the suit, No. 117, the Plaintiffs had not preferred a special appeal from the decree in the appeal suit No. 17, intending to bring an original action, inasmuch as the right of the Arya Mahajanam was confirmed in the year 1826, by certain original and appeal decrees, which had become final. Tenthly, [356] that with the fraudulent view of preventing the interference of the Arya Mahajanam and their people, with the Mirassi of administering Purohitam to the aforesaid twenty-one classes of pilgrims, the Defendants, owing to their influence with the Revenue officials, procured the issue of repeated, though unjust, orders, and consequently continued to enjoy the Mirassi forcibly. That since the year 1835, when the Adhyena Bhattars had been deprived of their enjoyment of the Mirassi of administering Purohitam to the aforesaid four classes, and the Arya Mahajanam of their right to the Purohitam of the aforesaid eleven classes of pilgrims, there had been a dispute about them ever since; and the plaint prayed for a decree, adjudging the Defendants (the Respondents) to pay Rs. 2916. 10a. 8p., the loss of income derivable from the exercise of Purohitam Mirassi to the six classes, for twenty-three years, from the year 1826 to 1848, at pons 100 per annum; and also Rs. 4400, the loss of income derivable from the other eleven classes of pilgrims from the year 1845 to 1848, at Rs. 100, for each class of pilgrims per annum, in all Rs. 7316. 10a. 8p., and for a declaration that the Purohitam Mirassi attaching to the above classes of pilgrims, yielding annually Rs. 1000, should be enjoyed by the Plaintiffs and other members of the Arya Mahajanam without the interference of the Defendants; that the Defendants might be directed regularly to pay to the Plaintiffs and other Arya Mahajanam, and the community of Gurukals, the fixed rent of Rs. 126. 12a. 11p. annually, otherwise that the Purohitam Mirassi of the above six classes of pilgrims, yielding annually Rs. 600, should [357] be enjoyed by the Plaintiffs and other members of the Arya Mahajanam and the community of Gurukals without the interference of the Defendants.

The Subordinate Judge of Madura, on the 12th of June, 1849, rejected this plaint, as inadmissible under sec. 10 of Mad. Reg. II. of 1802, being of opinion, that the same question had been decided by the Zillah Court, in the suit, No. 117, of 1835, referred to in the plaint, and confirmed on appeal, by the late Southern Provincial Court, in No. 17, of 1840.

The Appellants appealed to the Civil Judge of Madura from this decision, and that Judge, on the 7th of November, 1849, expressed a similar opinion.

The Appellants then appealed to the Sudder Court at Madras, and that Court by an Order, dated the 20th of November, 1851, after observing, that it appeared that the suit, No. 232 of 1826, was filed before the District Moonsiff of Paramagoody, for recovery of Rs. 126. 7a. 5p., as Priests' emoluments due from one out of the several classes of pilgrims frequenting Rameswaram; and that the Moonsiff decided that the right to this class belonged, not to the Plaintiffs, but to the Arya Brahmins; and that this decree was confirmed on appeal No. 183 of 1826, of the late Zillah Court of Madura; and that the suit No. 117 of 1835, of the late Zillah Court was

brought by four of the Arya Brahmins, who asserted themselves to have right over all the twenty-four classes of pilgrims, but sued for emoluments only in respect of four; the sums sued for being Rs. 91. 11a. 3p. and Rs. 200, and that the Zillah Court went into the whole question of the Arya Brahmins' rights, and allowed them to have none; that this was confirmed on appeal by the Southern Provincial Court [358] in No. 17 of 1840; that the plaint in question was brought by twenty-seven of the Arya Brahmins, and was for Rs. 7316. 10a. 8p., a loss incurred by evasion of their rights; and also, to gain possession of the right over eleven classes of pilgrims, yielding Rs. 1100, annually, to confirm the Aryas generally in their rights, and to receive from Defendants annually Rs. 126. 12a. 11p. as rent for six classes held by them, or to recover possession of the said six classes, the total value of the suit being Rs. 9016. 10a. 8p.; that in the suit No. 117, the Zillah Court went beyond the matter brought under the litigation before them, and the decree of that Court could not be considered as disposing of the general claims of the Aryas. That it was admitted in the decree, that all the Aryas were not represented in the suit; neither did the suit, in its subject, or its valuation, comprehend the matter of all their asserted rights. And the Court finally declared that a suit to bring the question of these rights to an issue might yet be laid; and that no bar to the reception of the plaint existed, which the Court accordingly directed to be received; and finally ordered, that the plaint should have been admitted on the file.

The plaint was accordingly filed, and contained the same allegations as the plaint of 1849 (see *ante* [9 Moo. Ind. App.], p. 349).

The Respondents by their answer, denied that the Appellants, or the other Arya Mahajanam, had any right to the Purohitam Mirassi, claiming title to it themselves under a grant from Mavalivana Rajah, dated about 1000 years previously. The Respondents also relied upon the decree in the suit No. 117, of [359] 1835, as a bar to the Appellants' claim; but they did not specifically plead the Regulations of limitation of suits as a defence thereto.

The suit being at issue, the Judge of the Subordinate Court of Madura, on the 6th of May, 1853, directed that the following points should be proved by the Appellants: first, their hereditary and exclusive title and right, as well as that of the other Arya Brahmins, to perform the service as Prohithars or administerers of rites to the people of all classes frequenting Rameswaram as pilgrims, and their ancestors' enjoyment accordingly. Second, that ten classes were granted to the ancestors of the Plaintiffs, twenty-one to twenty-seven, as Gurukalman Saleyars, and that the Defendants' ancestors had since rented from them six classes as specified in the second paragraph of the plaint, engaging to pay them annually 2-10ths of the emoluments thereof, under a written agreement which had been acted under. Third, that under a document the first Defendant's great-grandfather subsequently obtained these same six classes from the above-named Gurukalman Saleyars upon an annual rent of 100 pons, and that such was actually paid up to 1825. Fourth, that the Defendants took illegal possession of eleven other classes as described in the eighth paragraph of the plaint, from the year 1835, and that with the exception of these and the four classes obtained by Adhyena Bhattars, all other classes were under the enjoyment of the Plaintiffs and the other Arya Brahmins; and the Defendants' enjoyment of emolument equivalent to the loss claimed. That the Respondents were also to prove, first, that the litigated right to perform the Purohitam ser-[360]-vice to all classes of people belonged to them and other Parishai Bhattars exclusively, and that the Arya Brahmins had no title thereto, and that such Brahmins settled at Rameswaram posterior to Thundaver. Second, that in accordance with their right, they paid originally an annual Porapad tax amounting to 160 pons to the Zemindar, as fixed by him, and that they, with his consent and authority, subsequently paid 100 pons annually to the Gurukalman Saleyars for their maintenance.

Both parties having entered into evidence the cause came on to be heard (together with an objecting petition which had been presented by four other persons claiming title to the emoluments arising from certain classes of pilgrims) before Mr. A. W. Phillips, the acting subordinate Judge. The decree of that Court, dated the 4th of November, 1854, after stating the evidence in the cause, was in these terms: "The proceedings and documents connected with this case are most voluminous, and much that is introduced is totally foreign to the subject, which, divested of all

extraneous matter, consists, after all, of only two points to be decided on, first, as to whom the proprietary right of administering certain rites belongs. Secondly, whether the six classes were rented by the Plaintiffs' ancestors to those of the Defendants, or not. The Aryas (Plaintiffs) claim the hereditary right to the Mirassi of administering certain religious ceremonies to all classes of Hindoos resorting to the shrine at Rameswaram, and, in asserting that they have been unjustly deprived of their right, bring forward no less than twenty-four documents, of one sort or another, to prove the validity of their claim. [361] and to show that the privilege of administering the ceremonies to six of these classes was rented to the Defendant's ancestors by their own, on certain specified terms. The Defendants, on the other hand, deny *in toto* the hereditary right to be that of the Plaintiffs, and produce documents to back their assertions, declaring at the same time that they, and they only, are the proprietors of the whole, and as such, never could have rented the six classes as stated by their adversaries. The hereditary right of the Plaintiffs has been not only acknowledged, but proclaimed by the individual recognized by all classes of Hindoos (Brahmins included) as their head and High Priest. It has also been acknowledged by Brahmins, not parties to or interested in any way in this suit. The Zemindar of Ramnad, as appears from other documents, acknowledged the same, and directs the Aryas to perform the ceremonies with regard to himself. Several letters are also produced, showing that Maharajah Kistnabhojee Holkar has been in the regular habit of sending down the sacred water of the Ganges and other offerings, and, as the recognized and lawful Priests attached to the shrine in question, the Aryas were forbidden by the late Zillah Court of Ramnad to be taxed by the Zemindar. A separate document shows, that accordingly the Aryas did not pay the tax. Other proofs, too numerous to detail, are produced, all showing, in the plainest possible manner, that the right of the Plaintiffs was generally acknowledged. The Defendants, on their part, appear entirely to fail in establishing their claim by any satisfactory evidence whatever; indeed, the few documents they do produce tended rather to [362] strengthen the claims of their adversaries than their own. The Court feels no hesitation in declaring its opinion, that the Plaintiffs have fully and satisfactorily proved their proprietary right to the whole Mirassi. In support of the other question to be determined, namely, the renting of six classes from the Plaintiffs, and to show that they were rented to the Defendants' ancestors by those of the Plaintiffs, two documents were produced. The first of these is a deed executed by the Defendants' ancestors to the Gurukalman Saleyars (Aryas) about one hundred and twenty-four years ago, engaging to pay the Aryas twenty per cent. upon the income derived from six classes, which they, the Defendants' ancestors, rented of the Plaintiffs. The second is another document executed by the Defendants' ancestors some years subsequent, cancelling the former agreement, and engaging to pay in lieu of any per-centage on the receipts derived from the six classes (and which it appears led to dissensions) an annual fixed rent of 100 pons or Rs. 208. In return to these undeniable proofs, of not only the proprietorship of the Mirassi belonging to Plaintiffs, but of the six classes being rented to the Defendants' ancestors, the Defendants produce documents with the intention of proving that they are the owners of the Mirassi; but anything more crushing to their own case could not have been brought forward, as they plainly show that 100 pons were annually paid to the Gurukalman Saleyars, and tally precisely with what Plaintiffs asserted; and the attempt to show that it was paid by order of the Zemindar, and was a tax levied by him on the Mirassi, having entirely failed, the Court is of [363] opinion, that the second point also, as well as the first, is established in Plaintiffs' favour. The hereditary right of the Plaintiffs to the whole Mirassi right being established, and it having been shown to the Court's satisfaction that the six classes were rented to the Defendants' ancestors on certain terms, it decrees, that Defendants do continue to pay the stipulated rent from 1849, or deliver the six classes and all income derivable therefrom to the Plaintiffs as the rightful owners. It also decrees, that the Plaintiffs are entitled to the other eleven classes, and to all arrears of income as claimed from 1826 to 1848. All costs of suit to be borne by the Defendants."

The Respondents appealed from this decree to the Civil Court of Madura.

The appeal came on for hearing in the Civil Court of Madura on the 29th of June, 1857, when the Judge, Mr. C. E. Baynes, after stating the proceedings in the

suit, observed that—"The Sudder Court having overruled the objections taken by the Court below to the entertainment of the suit, as involving a question already finally decided against the Plaintiffs (Respondents), the Civil Judge had only to point to the proceedings of that Court, under date the 20th of November, 1851, as precluding him from taking into consideration the Appellants' first objection"; and, after stating his dissatisfaction with the documents produced by the Appellants (the original Defendants) to which his attention was called by the second objection, and that he could not draw the same conclusive inferences as the Subordinate Judge had done: and that, with the whole subject, before him, on the appeal, he was of opinion, that the evidence adduced did [364] not warrant the original decree: he proceeded thus:—"The Aryas found on a grant by Stree Rama, which certainly is not proved: the Parishais on a grant by Mavalivana Rajah, which is equally destitute of proof. In short, there is nothing on which to rest a judgment, save the apparent and notorious facts of the case, undeniable by either party, namely, that there is a Holy shrine at Rameswaram, to which pilgrims resort. Aryas, Parishai Bhattars, and Gurukals have been worshipping at it, and dwelling in its vicinity from times not only beyond all memory, but all history. Both Aryas and Parishais have been officiating as Probitudus, or ministering guides to pilgrims, each, of late years at all events, claiming a monopoly, and saying the other had no right to do so. The Parishais, it appears, are said to have, out of their profits, come under engagement or order to pay a certain sum annually to the Gurukals: if so, and they fail, the parties entitled have their remedy: but for declaring that either the Aryas or Parishais have any exclusive right to act as Probitudus to all, or any of the pilgrim classes, there appears to be no evidence or ground whatever, or for awarding any damages to either party. The original decree is, therefore, reversed, and it is declared, that both Aryas and Parishai Bhattars have a clear prescriptive right, and are both competent to act as ministering guides, or Probitudus, to any pilgrims who may choose to employ them as such. This recognition of their common right, while it is all to which the evidence adduced on either side appears to entitle them, is all which in the opinion of the Civil Judge could be awarded [365] to them, without infringing on the rights and liberties of third parties, who have hitherto apparently received little consideration in this case, namely, the pilgrims. I doubt if the Court would have any power to parcel out the Hindoo community as a flock of sheep between these rival shearers: and it is evident that the establishment of a legal monopoly in either of them would consign the flock to their mercy. It is necessary that the right of choice should be reserved to the pilgrims. All any minister can ask the Court to pronounce is, that there is nothing to prevent the exercise of his functions towards any party willing to employ him. Under the circumstances of this case, the Civil Judge considers that it would be equitable that each party pay their own costs in the original suit and appeal."

The Appellants appealed from this decision to the Sudder Dewanny Adawlut at Madras, when the Respondents for the first time set up as a defence, that the suit was barred by the Regulations of Limitation.

The appeal came on to be heard by the Sudder Court on the 30th of October, 1858, when that Court, consisting of Messrs. Morehead, Hooper, and Strange, before proceeding on the merits of the case, called upon the Appellants' Pleaders to show cause, why the suit should not be at once dismissed as being barred by the Regulations of Limitation, on the ground, that the cause of action in the case of the arrears of payments on account of the six classes having arisen in 1826, from which time the plaint stated that no payments had been made, and in the case of the eleven classes in 1828, at which time the Plaintiffs in bring-[366]-ing a similar suit had acknowledged that the right of administering to these classes was vested in the Defendants.

After hearing the Pleaders on that point, the Court pronounced the following judgment:—"The Plaintiffs and Defendants are of rival sects, and severally claim the privilege of administering the Purohitam to the classes of pilgrims resorting to Rameswaram. These classes are represented to amount to twenty-five in number; but the suit is laid for compensation as regards seventeen only thereof. These rival sects have already been in repeated litigation; but it is only necessary to refer to the matter appearing in the last suit preceding the present one, which has arisen between them. This is the appeal No. 17 of 1840, on the file of the late Provincial

Court for the Southern Division. From the decrees given in that suit, it appears, that the Collector undertook the adjustment of the dispute between these sects; that pending his decision, the pilgrims were left to select to which of the two they would resort; that this state of things subsisted for seven or eight years; that afterwards the Collector, on proceeding to arbitrate in the matter, found that the Plaintiffs' side conceded to the Defendants the privilege as respected seventeen of the classes of pilgrims, and that the contest between them related only to the remaining eight; and that he thereupon awarded four of these to the Plaintiffs' sect and four to the Defendants'. It further appears, that the above suit, No. 17 of 1840, which was instituted by certain of the Plaintiffs' sect, was in regard to the privilege over the four classes allotted [367] by the Collector to the Defendants' sect; and that the present suit is in regard to the seventeen classes excluded from the Collector's decision, as not then being in dispute. The Court thus find that the rights now contended for by the Plaintiffs have been in abeyance to their sect from about the year 1828, or from seven or eight years previous to the Collector's aforesaid decision; and that the claim is consequently barred by the Regulations of Limitation. The Plaintiff's Pleadings being unable to advance anything to relieve them from the above position, the Court resolved to dismiss this suit, and require the Plaintiffs to pay all the costs thereof."

The appeal was from this decree and was argued by Mr. Rolt, Q.C., and Mr. Cracknell, for the Appellants, and the Solicitor-General (Sir R. Palmer) and Mr. Millar, for the Respondents.

The Appellants in support of the appeal relied upon the following grounds,—

First, that the objection that the suit was barred by the Mad. Reg. II. of 1802, sec. 18, upon which the decree of the Sudder Court was alone founded, was not open to the Respondents, the same not having been pleaded by them, nor raised in any manner until the appeal to that Court.

Second, that, as to the Appellants' claim to an annual rent of Rs. 126. 12a. 11p. for the six classes mentioned in the proceedings, the Respondents were not at liberty to raise objections founded upon any [368] Regulation or rule as to limitation of actions, they being in the position of tenants in possession, under the Appellants as landlords, or owners.

Third, that, even if any such defence were open to the Respondents, there was no Regulation, or rule of limitation of actions or suits, applicable to the case, so as to bar the Appellant's right to maintain the suit.

Fourth, that the decision of the Sudder Court was inconsistent with and opposed to the decision of that Court on the 20th November, 1851, in directing that the Appellants' plaint should be received and prosecuted.

Fifth, that, upon the merits of the case, the Appellants' claim was fully substantiated by the evidence in the cause, and was not barred or affected by the decrees made in the suit No. 117 of 1835, relied upon by the Respondents; that suit being between different parties and for a different subject-matter, the decision in it, so far as it affected the matters in question in the present suit, being extrajudicial and ineffective to bind the Appellants.

Sixth, that the decision of the Judge of the Civil Court of Madura was founded upon a mistaken construction and a misconception of the effect of the documentary evidence, and was otherwise contrary to law, and to the usage of many ages, which had the effect and force of law.

Lastly, that the Judge of the Civil Court of Madura, had omitted to decide upon the Appellants' claim to the arrears and future payments of the annual sum of pons 100, or Rs. 126. 12a. 11p., claimed as or in the nature of rent from the Respondents.

[369] The Respondents contended that the decree appealed from was right, by reason—

First, that the Appellants' suit was barred by the law of limitation.

Secondly, that the Appellants' suit was barred by the decrees made in the original suit, No. 117, of 1835, and upon appeal.

Thirdly, that even if the Appellants' suit was not barred by those decrees, yet that the decrees were decisions upon the merits made, *in pari materiâ*, and ought to be followed, and

Lastly, that the Appellants upon their own admissions, and upon the evidence in the suit, had not made or proved any case to the exclusive privileges claimed, upon which a decree could be made in their favour.

Judgment was reserved, and now delivered by

The Right Hon. The Lord Justice Knight Bruce (April 27, 1863). The subject of litigation in this case is the right of administering what is called "Purohitam" to seventeen classes or castes of the numerous pilgrims who resort to the great Pagoda and other temples in the Island of Ramaswaram.

The Appellants, the Plaintiffs in this suit, sue, and the Respondents are sued, as representatives of the bodies to which they respectively belong. Whilst, however, the Respondents are all members of a homogeneous class, described indifferently as Tadvadi and Telugu Brahmins, or as Parishai Bhattars, resident in and about Ramaswaram: the Appellants are some of them Arya Brahmins, and other Gurukals: the differences between these two latter classes, their [370] rights and privileges, being some of the matters involved in the question at issue in this suit.

The case put forward by the Appellants is shortly this: they assert that ever since the first foundation of the Pagoda, an event which they ascribed to a very remote age, the Arya Brahmins possessed the privilege, and that an exclusive privilege, of administering Purohitam to all classes of pilgrims resorting to Ramaswaram. They treat, however, this privilege as alienable, or at least capable of delegation: and state that by an instrument bearing a date, which it is now agreed corresponds with A.D. 1765, the Arya Brahmins have, in consideration of an annual payment of 50 pons, transferred to a community called the Adhyena Bhattars, the privilege of administering Purohitam to seven specified classes of pilgrims: and in some way or another, and at some uncertain but distant date, have conferred the same privilege over ten other classes of pilgrims upon the community of the Gurukals. They further state, that the Gurukals again transferred the privilege as to six of those ten classes to the body represented by the Respondents, which it will be convenient to distinguish as Parishai Bhattars, on the condition that the latter would account to them for twenty per cent. of the emoluments derived from the exercise of the right: that a dispute having arisen between these two last named bodies, an arbitration took place A.D. 1726, which resulted in the execution of an instrument, and that difficulties having subsequently occurred in carrying that arrangement into effect, the payment of twenty per cent. on the collections was commuted for a fixed annuity of 100 pons, which, by an agree-[371]-ment, dated the 11th April, 1822, called a deed of rent of pilgrims, dated the 9th Vyasi Parabhava (19th May, 1786), executed by the ancestors of the Defendants to the community of Gurukals, in which they agreed to pay two pons out of every ten pons realized by them out of six classes of pilgrims, the Parishai Bhattars, some time about A.D. 1762, agreed to pay, and did in fact pay up to the year 1825, to the Gurukals. The Appellants' plaint, after stating these facts, notices the proceedings in a suit, No. 232 of 1826, in the Moonsiff's Court, the effect of which their Lordships will consider when they come to deal with the evidence. It also states the effect of a copper-plate grant passed by the late Zemindar of Ramnad in 1794, by which, in A.D. 1714, the then Zemindar of Ramnad granted certain dues payable to him by the Parishai Bhattars, and amounting to 90 pons, to a particular goddess in the Pagoda on account of the Friday services. It also states some proceedings before the Collector in 1835, when that officer endeavoured to compose the strife which had long existed between these rival sects of Brahmins, by an order which, as appears from the decision of the Collector itself, affirmed the rights of the Parishai Bhattars, to administer Purohitam to twenty-one classes of pilgrims, subject to the payment into the Pagoda of 190 pons annually: being the 90 pons for the Friday services, and the 100 pons payable to the Gurukals. This order assumed that the right of the Parishai Bhattars as to seventeen of their classes was not in dispute, and it left either party, if dissatisfied with it, to bring a civil suit. The plaint then shortly notices the proceedings in a [372] suit of 1835, which was brought by some of the Arya Brahmins against some of the Parishai Bhattars in respect of two of the classes comprised in the Collector's order, and was dismissed by a decree of the Zillah Judge, dated the 27th of June, 1840; a decree confirmed on appeal by the Provincial Court on the

28th of December, 1841. It then explains that the claim in the present suit is limited to seventeen of the twenty-one classes comprised in the Collector's order, because the remaining four belong to the Adhyena Bhattars under the deed of 1695; and further, that whilst the claim as to eleven of the seventeen classes is general, as to the remaining six, which were the subject to the instruments of 1726 and 1762, it is limited to the enforcement of the rights of the Gurukals under the latest of these documents. The particular relief prayed, is a decree for the payment of Rs. 2916. 10a. Sp., being the arrears for twenty-three years of the annuity of 100 pons payable to the Gurukals in respect of the six classes; of Rs. 4400, by way of damages incurred in respect of the other eleven classes; for a declaration that the Purohitam Mirassi of the eleven classes is henceforth to be enjoyed by the Arya Brahmins, without the interference of the Parishai Bhattars; and for an order that the Parishai Bhattars do regularly pay the 100 pons to the Appellants and the other Ayras, and the Gurukals, or otherwise that the Mirassi as to these classes also is to be enjoyed by the Appellants and other members of the Arya Mahajanum, and the community of the Gurukals, without the interference of the Parishai Bhattars.

The case set up by the Respondents in opposition [373] to that of the Appellants is, that their ancestors were established in the place or neighbourhood, and invested with the privilege of administering Purohitam to pilgrims resorting to Ramaswaram, by a certain Rajah, about 1000 years ago; that they afterwards from generation to generation enjoyed this privilege, and the emoluments resulting from its exercise, and so acquired the title of Parishai Bhattars; that the Zemindars of Ramnad imposed an annual tax upon them of 160 pons payable out of their receipts, which they continued to pay until the time of one Vijaya Raghunadha, who granted 100 out of the 160 pons to the community of the Gurukals on their complaint of having no income in the Pagoda, and afterwards granted the remaining 60, with some other dues payable by the Parishai Bhattars (making 90 pons in all), for the Friday services of the Pagoda.

They treat the latter grant as made by the copper-plate deed of 1714; but do not show in what precise form or by what instrument the first was made; and assert that after 1714, the whole of the 190 pons was paid into the Pagoda. They state that in 1827, there was an attempt to settle the disputes between their community and that of the Arya Brahmins by a native Punchayet (the failure of which is much to be regretted); that afterwards, in the course of an inquiry before the Sub-Collector, the Ayras admitted that, in respect of seventeen classes, there was no dispute as to right of the Parishai Bhattars, and that the Collector's order of 1835 was made on that admission. They further insist strongly upon the decrees in the suit of 1835 as a bar to the present suit, which they also contend is barred by the Regulation of Limitation.

[374] The issues settled in this suit (see *ante* [9 Moo. Ind. App.], p. 359) threw upon the Appellants the burden of proving, first, the hereditary and exclusive right of the Arya Brahmins to administer Purohitam to all classes of people frequenting Ramaswaram as pilgrims, and their ancestors' enjoyment accordingly; secondly, the grant, as alleged, of the ten classes to the Gurukals, and that the Parishai Bhattars had since rented from the Gurukals six of the ten classes, undertaking to pay them annually two-tenths of the emoluments under a written document which had been acted upon; thirdly, that, under another document, this liability had been commuted for an annual payment of 100 pons, and that the latter had been paid up to 1825; and, fourthly, that the Defendants had taken illegal possession of the eleven other classes, and that with the exception of these and the classes held by the Adhyena Bhattars all other classes were enjoyed by the Arya Brahmins. The issues which the Respondents were called upon to prove were, first, the alleged right of the Parishai Bhattars to perform Purohitam to all classes, that the Arya Brahmins had no title thereto, and had come to Ramaswaram since a particular date; second, that they had originally paid an annual tax of 100 pons to the Zemindar, and subsequently, with his consent, paid the 100 pons annually to the Gurukals for their maintenance.

The suit was first heard by the Judge of the Subordinate Court of Madura, who, on the 4th of November, 1854, made a decree in favour of the Appellants. From this there was an appeal to the Civil Court of Madura, and the Judge of that Court on [375] the 29th of June, 1857, reversed the decree below, and dismissed the suit on

the ground that the Appellants had failed to prove the conclusive right which they claimed; but directed each party to pay their own costs. A special appeal was then preferred to the *Sudder Dewanny Adawlut* at Madras. That Court on the 30th of October, 1858, dismissed the Appellants' suit with costs, on the ground that their claim was barred by the Regulation of Limitation, the only question which it allowed to be argued before it.

The present appeal is general. It has been argued before this Committee, both upon the merits of the case, and also upon the question whether the suit is effectually barred, either by the decrees in the former suit of 1835, or by lapse of time under the Regulation of Limitation.

Their Lordships propose, in the first instance, to deal with the merits of the case.

The first observation that arises is, that the existence or non-existence of the original and exclusive right to administer *Purohitam* to all classes of pilgrims, which is claimed by the *Arya Brahmins*, is an issue which goes to the whole case. It is true that that part of the claim which consists of the arrears of the annual payment of 100 pons, under the instrument of 1762, is founded upon contract. But the contract is one between the *Parishai Brahmins* and the *Gurukals*, and it is difficult to see how the Appellants, suing on behalf of the community of *Arya Brahmins*, can establish any title to relief in respect of this part of the case, unless they prove that the title of the *Gurukals* to these six classes was [376] derived, as alleged in the plaint, from the earlier and original title of the *Aryas*, and was so held by the *Gurukals* that the subsequent disposition of these classes must be taken to have been made for the benefit of the *Arya* community, as well as for that of the *Gurukals*.

What, then, are the proofs adduced in support of this first and principal issue?

The earliest in date consists of extracts from one of the *Puranas*. These, like the statements in the pleadings of the Appellants' case, carry us far beyond the bounds of legal or historical evidence. But it is argued, and fairly and properly argued, that these ancient books may legitimately be used as evidence that a certain state of facts, or a certain state of opinion, existed at the date of their compilation. That date is sufficiently uncertain; for we are not told when this particular *Purana* is supposed to have been written; and it appears from the writings of eminent Orientalists, that the period during which the eighteen recognized *Puranas* were composed is a very wide one, extending probably from the eighth to the sixteenth century.

Evidence of the Appellants' right, dating even from the latest of these epochs, would of course be most valuable. Their Lordships, however, fail to find in the extracts before them satisfactory proof that at the time when this *Purana* was compiled (whenever that may have been), the *Arya Brahmins* were in the enjoyment of the peculiar and exclusive privilege which is now claimed by their descendants.

There are passages which show that a community known as *Arya Brahmins* then existed at *Ramaswaram*. [377] and embody the legends concerning the miraculous origin of their ancestors, and their migration, at the summons of *Rama*, to the southern coast, from their native seat in *Oudh*. Other passages undoubtedly recommend in strong terms the ministrations of the *Arya Brahmins*, and imply that the full spiritual benefits of a pilgrimage are not to be obtained without them. But these do not lead with any certainty to the conclusion that even at that distant period all the pilgrims to *Ramaswaram* in fact resorted to the *Aryas* for *Purohitam*, or were under a positive and well-recognized obligation to do so. The very mode in which the peculiar efficacy of the ministrations of the *Aryas* is pressed leads to the inference that even then there was some variety of practice and opinion in this matter. Part of the *Purana* cited in these proceedings is in the shape of a dialogue, wherein one of the interlocutors begins by expressing his doubts whether *Puja* should be offered through the instrumentality of the *Aryas*, doubts which are of course ultimately removed. Taking the authority of these texts at the highest—and it must be remembered that there is little or no evidence as to their authority—their Lordships cannot find that they do more than enjoin upon pilgrims who wish to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the *Aryas* for their offices. They do not show that the duty was

universally recognized as imperative, or that the enjoyment of the privilege, as it then existed, was exclusive.

Again, the value of the texts, such as it is, as evidence in support of the Appellants' title, is, in their Lordships' opinion, much diminished by the consideration that the privilege now claimed is admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that by positive ordinance or by traditionary usage the privilege of administering certain religious rites had become vested in a particular class of priests, so that in the contemplation of all faithful Hindoos the efficacy of the rite must for all time depend on the *Status* or character of the ministrant. When the principle of alienation or delegation is admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force.

Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed. Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations. But the privilege of exercising these functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes a mere proprietary right; and every long-continued enjoyment of the privilege by others is of course capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost.

That the present claim of the Appellants is not supported by any general religious feeling or conviction on the part of the Hindoos, whether founded on the texts of the Puranas or independent of them, may be inferred from the very nature of the disputes which have continued for so many years. It is clear [379] that during that long period there has been great diversity of practice and opinion amongst those who resort to the Pagoda; that out of the vast concourse of pilgrims from all parts of the Deccan, if not of India, some have sought for Purohitam at the hands of the Aryas, others at the hands of the Parishai Bhattars, others, again, at the hands of the Adhyena Bhattars; probably as they have been moved by considerations of race, language, district, or caste. But we have more particular evidence upon this point in the Sreemokum of Sunkar Acharyar which was produced in evidence in the suit of 1835, and is referred to in the pleadings of this suit. That document was in the nature of a certificate from a person described as the High Priest of all the Hindoos of the south of India, and was strongly adverse to the claim of the Aryas. Mr. Elliot, who as Judge of First Instance, decided the suit of 1835, felt it to be of sufficient weight to relieve him from the necessity of pursuing the inquiries which he had directed through Pundits touching the authority of the texts from the Puranas. The Appellants themselves, in their pleadings, seem to admit the general authority of Sunkar Acharyar, but endeavour to take off the effect of his certificate by telling a not very credible story of his having given it when in a fit of irritation against the Aryas. They have also produced, by way of answer to it, Exhibits, consisting of Letters Patent from Sringeri Sankara Acharyar to his disciples. It is sufficient, on this part of the case, to observe that the effect of these conflicting documents is at most to leave the question in doubt, and that the Appellants cannot adduce, in support [380] of this claim, anything like a clear concurrence of opinion upon the part of those who may be supposed to be at the present time authoritative expounders of the ceremonial law and usages of the Hindoo religion.

We now proceed to consider the effect of the other documentary evidence.

The documents which purport to be the earliest in date, except the Puranas, are the deed said to have been executed to the Aryas in A.D. 1675 by the Adhyena Bhattars; the copper-plate deed produced by the Respondents, dated 1714; the deed said to have been executed by some on behalf of all the Parishai Bhattars to the Gurukals in 1726; and the subsequent agreement between the various parties, which purports to have been executed in 1762.

The first of these can at most prove that the Adhyena Bhattars, who are not parties to this suit, claim under a deed, purporting to be of considerable antiquity, the right of administering Purohitam to seven classes of pilgrims, other than the classes which are the subject of this litigation, under a title derived from the Aryas. The Adhyena Bhattars are said to have been since dispossessed of four of these seven classes by the

Parishai Bhattars. But whatever may be the merits of that dispute, they are not in question in this suit. This deed can prove nothing here except that in 1675, the Aryas claimed the right of disposing of the privilege as to these particular classes of pilgrims, and that the Adhyena Bhattars then admitted their title.

The effect of the deeds of 1726 and 1762 (if any) upon the issue which we are now considering, viz., the [381] original and exclusive right of the Arya Brahmins to administer Purohitam, is limited to the six classes of pilgrims which are the subject of these instruments. They do not touch the eleven other classes that are in question in this suit.

Their genuineness is questioned by the Respondents, who give an account of the origin of the payment of 100 pons that is inconsistent with them. It has been argued that suspicion is cast upon them by the circumstance that no mention is made of them in the proceedings in the suit between the Gurukals and the Aryas in 1807, although the Parishai Bhattars are there stated to possess the privilege of administering Purohitam to these six classes, and to be subject to the duty of paying 100 pons annually to the Gurukals, and that nothing was heard of them until the suit of 1826. It has been further argued that there is no proof of the custody whence they came, or other evidence to support them. Notwithstanding these arguments, their Lordships are disposed to deal with the case as if both these deeds, as well as the copper-plate deed of 1714, were genuine. They think the two former may well stand with the latter.

The copper-plate deed is, upon the face of it, nothing but the grant of certain subjects in favour of the goddess named in the heading of it, "on account of the Friday services." The annual payment of the Parishai Bhattars on this account appears on the whole evidence to be limited to 90 pons. This instrument, therefore, proves nothing as to the annual payment of 100 pons to the Gurukals, or its origin. It undoubtedly proves that in A.D. 1714, [382] the body which the Respondents represent was known as "Parishai Bhattars," a title which implies some connection with pilgrims, and that, as such, they carried on a business which may reasonably be inferred to have been the administration of Purohitam to some classes of pilgrims. And even if it be assumed that those classes of pilgrims included the six which are specified in the deeds of 1726 and 1762, that hypothesis is not necessarily inconsistent with these deeds, for the earlier deed does not purport to be the original grant of these classes, or to show how the administration of Purohitam to them by the Parishai Bhattars began. It recites the existence of a dispute between the Parishai Bhattars and the Gurukals touching the administration of Purohitam (a dispute which may have been of long standing), an appeal to the Zemindar, a reference to arbitration, and an award which, whilst it left the administration of the rite to the six classes with the Parishai Bhattars, imposed upon them the duty of paying 20 per cent. on their receipts to the Gurukals. The two deeds, 1726 and 1762, therefore, are not inconsistent with the copper-plate deed, which the Respondents may be taken to have proved, though they are inconsistent with their allegations touching the origin of the payment of 100 pons, which they have failed to prove. From the three documents taken together it follows, that before the year 1726, and possibly before 1714, the Parishai Bhattars were in the exercise of the functions involved in the administration of Purohitam to some classes of pilgrims, including, or at least extending to, the six classes which were the [383] subject of the agreement of 1726; but the material question with reference to the issue now under consideration is to what extent that arrangement with the Gurukals, and the description of the Gurukals in the two deeds as "forming the Arya Mahajanum," or "a part of the Arya Mahajanum," or "composed of the Arya Mahajanum," involve any admission or proof of the general title set up by the Appellants.

The answer to this question will be best supplied by a correct definition of the relation in which the Gurukals stood to the Arya Brahmins. Their Lordships must reject the statement upon this point which is contained in the fourth paragraph of the appeal petition, as inconsistent with others made by the Appellants in certain stages of the proceedings, and with the evidence in the cause. It was, in fact, almost given up by Mr. Rolt in his reply, and treated as a mere argument of the Appellants' Pleaders in answer to an objection taken by the Judge in the Court below.

The most credible account of this Gurukal community is probably to be found

in the proceedings in the suit of 1807 (the piece of evidence that is next in order of date), since it was given by the Gurukals themselves when engaged in litigation with the Arya Brahmins, and was then admitted by their opponents to be substantially correct. From that it would appear that the Gurukals were Marattah Brahmins invested with the office of performing the puja, or worship, in the interior of the Temples; that they were appointed by the Aryas, and were in the habit of marrying the daughters of Aryas; that the office of Gurukal was not hereditary, but [384] that on the death of any one of them another Marattah Brahmin was appointed in his place; that in 1807, the community of Gurukals were in the receipt of the 100 pons per annum from the Parishai Bhattars, and of fees payable in respect of other classes of pilgrims, by whomsoever the rite of Purohitam was administered; that the net emoluments of this community were divided amongst the members of it, and each man's share again apportioned between him and the particular Arya whose daughter he might have married. The two communities were, therefore, distinct bodies, different in race; and this very suit of 1807, shows that they might have different and conflicting interest. If this be so, the description of the Gurukals as "composing," or "composed of," or "forming part of the Arya Mahajanum," must be inaccurate, unless these words imply a body in which the two communities, though distinct for some, may coalesce for other purposes. Such an hypothesis is not inconsistent with the literal meaning of the words as it may be gathered from "Wilson's Dictionary."

Again, in this suit of 1807, the Gurukals seem to have claimed the right of administering Purohitam to the six and certain other classes of pilgrims as a prescriptive right, without admitting any earlier title in the Aryas. The Aryas, in their answer, seem to set up a joint interest in the emoluments, and speak of a compromise and arrangement effected by a deed, bearing a date which would correspond with 1745, of which there is no proof. Therefore the case made on either side in the suit of 1807 seems to be hardly consistent with that made in the present suit as to the derivation of [385] the Gurukals' title from that of the Aryas. And upon this part of the case it appears to their Lordships that it would be unsafe to infer from the deeds of 1726 and 1762, or from any evidence that has yet been considered, either that the Aryas have a common interest with the Gurukals in the annual payment of 100 pons, or that such title as the Gurukals may have had in the six classes of pilgrims before the arrangement of 1726 was necessarily derived from the original and exclusive title to all classes of pilgrims which is set up by the Aryas. This view of the case is in some degree confirmed by what is called the "Attachi." That paper purports to be a representation made in March, 1822, when the Pagoda was under the management of the Government officers, by some of the Appellants, to the effect, that the Parishai Bhattars have allowed the payment of 90 pons and 100 pons to fall into arrear. It treats the whole money as payable to the Pagoda, and therefore, in the existing circumstances, to the Circar or Government, but describes the 100 pons as the masadanum for the Sabhayar or community of Gurukals.

The rest of the documentary evidence may be reduced to three heads: the proceedings in the Moonsiff's Court in 1826; the proceedings which resulted in the Collector's Order of 1835; and the proceedings in the suit of 1835.

The first suit was brought by some Parishai Bhattars against some Aryas, and it is said to have been collusive. The Plaintiffs in it asserted the title of their body to administer Purohitam to twenty-four classes of pilgrims, admitting the duty of paying annually 190 pons to the Pagoda and the community [386] of Gurukals. But the immediate subject of the suit was the alleged invasion of this right as to a class called "Sangita," which is one of those that were afterwards awarded by the Collector to the Aryas. There is no question about that class in this suit. Other Arya Brahmins intervened by petition, and set up their general title in the Moonsiff's Court. The Moonsiff made a decree against a Defendant who had admitted (it is said collusively) the Plaintiff's claim, and dismissed the suit as against the other Defendants. He also intimated an opinion that the suit, if properly framed, should have been brought against the Arya Mahajanum, which appeared to have been in the enjoyment of the Purohitam of the Sangita class. This judgment has been treated as a decision in favour of the Arya Brahmins, but it cannot be taken for

more than an expression of opinion that they might have a good title as to the class of which they appeared to be in possession.

The chief importance of the proceedings which ended in the Collector's order consists in the admission supposed to have been made before Mr. Paris, a subordinate Collector, in the course of a local inquiry made by him in 1829. It is contained in an attested copy of a Mahratta document drawn out in 1827. It is referred to, though it is not very accurately described, by the Collector, (in his decision of the 21st of February, 1835,) and is the basis of his order. It was produced in the suit of 1835, and was proved to the satisfaction of Mr. Elliot, the Judge. He says of it in his judgment, "The Seristadar, it appears, wrote down in the presence of the Sub-Collector of Madura, from the mouths of the Plaintiffs, that they had no dispute respecting seventeen of [387] the twenty-five castes, but only for the remaining eight." Mr. Rolt argued strongly upon the improbability of the Aryas making such an admission so soon after the decision in the Moonsiff's Court. It does not, however, cover this Sangita class, which alone was the subject of the suit before the Moonsiff. And the improbability, such as it is, seems to their Lordships to be outweighed by the consideration that two officers with local experience have, whilst the facts were still recent, treated the document as genuine, and acted upon it. It is, therefore, difficult to suppose that the admission was not made by some at least of the Arya community, and it covers fifteen out of the seventeen classes that are the subject of this suit.

The decision of the Collector was almost immediately followed by the suit of 1835. The original Plaintiffs in this were four only of the Arya Brahmins. Two of them having died, twenty more members of the community intervened by petition, and seem to have adopted and prosecuted the suit. Its object was limited to the enforcement of the alleged right of the Arya Brahmins as to two only of the classes which are the subject of this suit; but the original title of the community was stated in terms as wide as those in which it is now stated, and was distinctly put in issue. It was, moreover, supported by much the same evidence as that which has been adduced in this suit. The decision, however, of the Zillah Judge, confirmed on appeal by the Provincial Court, was that the title was not made out, and the suit was accordingly dismissed.

Their Lordships may dismiss the oral testimony with the observation that it is almost necessarily [388] inconclusive. The question is one in which the Hindoo community has for many years been divided. Each witness, as a matter of course, deposes according to the practice, opinions, or traditions of his own family. Nor will proof of acts done even by so considerable a personage as Holkar do more than prove the practice or opinion of a particular family or individual.

Upon the whole it is their Lordships' opinion that the evidence, though it may establish that the Arya community has existed as part, and a principal part, of the Hierarchy of this Pagoda and its dependencies from a period of remote antiquity, and that the Appellants may be taken to be the actual representatives of that community, fails to show, either by documentary proof of its origin, or by such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the Appellants have made the foundation of their title. It also fails to show when and how, if the right ever existed, its enjoyment was first interrupted, and, consequently, leaves it uncertain, whether the interruption was caused by an invasion for which there is now a remedy, or by an actual or presumable act of alienation. It is not proved that the Appellants' community was at any particular time in the actual enjoyment of the privilege of administering Purohitam to eleven out of the seventeen classes which are the subject of this suit; whilst there is evidence that the Parishai Bhattars for some time anterior to 1835 were in the undisputed enjoyment of this privilege as to nine of these classes, and exercised it, [389] though subject to dispute, as to the remaining two. Nor is it inconsistent with the evidence in the cause to suppose that this state of things may have existed in or before the year 1714. And if the evidence as to the remaining six classes shows that the Parishai Bhattars' undisputed enjoyment of the privilege as to these six classes for nearly one hundred and fifty years has been subject to the payment of the 100 pons, under an arrangement which implies an acknowledgment of an earlier title

in the Gurukals, it fails, as their Lordships have already observed, to establish either that the Aryas have a common interest with the Gurukals in this annual payment, or that the title of the Gurukals to these classes was necessarily derived from the still earlier and more general title of the Aryas, which the Appellants assert.

The Appellants, therefore, on all points have failed to relieve themselves of that burthen which the necessities of their case, and the particular issues directed in the cause, imposed upon them. Nor is this failure the less fatal to this suit because the Respondents may also have failed to show that they had any exclusive right in the privilege which they enjoy; or because they may be under a liability to the Gurukals in respect of the annual payment of 100 pons, which may be capable of being enforced in a suit properly framed for that purpose.

Their Lordships, taking this view of the merits of the case, are relieved from the necessity of considering whether either the decrees in the former suit of 1835, or the Regulation of Limitation, present an effectual bar to the suit. They rest their decision on the ground that the Appellants have failed to support their claim by any sufficient evidence.

[390] Their Lordships, however, are of opinion, that the Sudder Court ought not to have limited the argument to the single question of limitation; and that it ought not to have thrown on the Appellants the whole costs of the suit. They think that the decree of the 29th June, 1857, sealed and signed on the 1st August in that year, was correct in the direction given by it as to the costs up to the latter date, and they will, therefore, humbly advise Her Majesty that the decree of the Sudder Court ought to be varied, and to stand and be simply for the dismissal, with costs of the appeal to that Court: the Appellants, however, paying the costs of this appeal.

[391] THE ADVOCATE-GENERAL OF BENGAL on behalf of Her Majesty,—*Appellant*; RANEE SURNOMOYE DOSSEE,—*Respondent* * [June 29 and 30, 1863].

On appeal from the Supreme Court at Calcutta.

The introduction and establishment of the English Criminal law in India, and its application to Natives as well as Europeans, considered in reference to the prerogative of the Crown to forfeiture of personal property of persons committing suicide in Calcutta.

The English law *felo de se*, and forfeiture of goods and chattels, does not extend to a native Hindoo, though a British subject, committing suicide at Calcutta. Where Englishmen establish themselves in an uninhabited, or barbarous country, they carry with them not only the laws, but the Sovereignty of their own State; and those who live amongst them and become members of their community, become partakers of and become subject to the same laws [9 Moo. Ind. App. 428].

This rule held not to apply to the early settlement of the English in India, as the permission to the settlers to use their own laws within the Factories, did not extend those laws to the Natives associated with them within the same limits.

The question in this case was, whether the interest of a Hindoo, a British subject, in a fund which was standing to the credit of an account in a cause in the Supreme Court at Calcutta, had been forfeited to the Crown, by reason of his having committed suicide in Calcutta, and found *felo de se* by a Coroner's jury there.

The question was raised by a petition presented [392] by the Advocate-General

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

of Bengal, on behalf of Her Majesty, for a transfer of this fund to the Crown, on the ground of such alleged forfeiture.

The circumstances which gave rise to the claim were as follows:

Rajah Hurrinauth Roy, a Hindoo, possessing considerable real and personal property in the Province of Bengal, made his Will on the 26th of November, 1832, and soon afterwards died, leaving his mother, Rancee Shoosharmohee Dossee; his wife, Rancee Hurrosoondery Dossee; an only son, Rajah Kistonaath Roy, and a daughter, Gobindsoondery Dossee, him surviving.

On the 28th of September, 1839, Rancee Hurrosoondery and Rancee Shoosharmohee filed a bill in the Supreme Court at Calcutta against Rajah Kistonaath Roy and James Charles Colebrook Sutherland (who with Nathaniel Alexander was named Executor), setting forth the Will, and praying that the trusts thereof might be carried into effect under the decree of that Court. A cross bill was subsequently filed by Rajah Kistonaath Roy against Rancee Hurrosoondery, Rancee Shoosharmohee Dossee, James Charles Colebrook Sutherland and Nathaniel Alexander.

On the 29th of June, 1843, the Supreme Court directed that out of the money then in Court, to the credit of these causes, a sum of Rs. 6,86,700, should be invested and transferred to a separate account; and that out of the interest thereof Rs. 800 per month should be paid to Rancee Shoosharmohee Dossee, and Rs. 1400 per month to Rancee Hurrosoondery Dossee during the term of their respective lives, which was done accordingly. Subject to these charges the fund so set apart belonged to and was part of the estate [393] of Rajah Kistonaath Roy as the only son and general legatee and devisee of the Testator.

On the 31st of October, 1844, Rajah Kistonaath Roy, whose family estates were situate at Berkhamptore in Bengal, out of the jurisdiction of the Supreme Court, but who had a residence at Calcutta, committed suicide at Calcutta. He was a Hindoo by birth and religion, and died childless, leaving the Respondent, his widow, his heiress and representative according to the Hindoo law, him surviving.

An inquest was held by the Coroner for the town of Calcutta, and an inquisition was returned by the jury, finding that the deceased died *felo de se*; and that he had at the time of his death, goods and chattels within the town of Calcutta to the value, including the fund in the Supreme Court, of Rs. 9,87,063. 3s. 5p., and without the town of Calcutta, to the value of Co. Rs. 2,89,500.

On the day on which he committed suicide, the deceased signed a paper-writing purporting to be his Will, whereby, after leaving various legacies, he directed that in the event, which happened, of no son being born to him, the greater part of his Zemindary and landed property should go to the foundation of a school or college, which he solicited the British Government of India to establish from the proceeds of it.

Shortly after Kistonaath Roy's death litigation arose concerning this Will. The Respondent alleged that the Will had been executed by Rajah Kistonaath Roy while of unsound mind; and its invalidity was declared in a suit in the Supreme Court, to which the British Government in India was a party. The Government thereupon gave up to the Respondent [394] all the real and personal property of Rajah Kistonaath situate out of Calcutta, which was at that time in its possession, or under its control, and permitted the Respondent to receive from the Registrar of the Supreme Court, with whom the same had been deposited, pending the result of the suit, all the personal property of Rajah Kistonaath Roy situate in Calcutta, with the exception of the money standing to the credit of the causes, to the possession of which the Rajah, or his representative, was at that time entitled.

The Respondent was advised by Counsel to take proceedings to set aside the verdict of *felo de se*, as being against the weight of evidence, as well as on the ground of misdirection by the Coroner in his charge to the jury, but no proceedings were taken for that purpose, in consequence of the Government of India, or their legal advisers, stating to her legal advisers that they would not prefer any claim under such verdict of *felo de se*.

In the absence of any claim to forfeiture by the Government of India, and in accordance with such waiver, the whole of the real estate, and such of the personal estate of the deceased as was not in Court, was absolutely given up to the present Respondent.

Ranee Shoosharmohee Dossee died on the 14th of February, 1848, and shortly after, the Respondent, as the representative of Rajah Kistonaath Roy, made claim to so much of the fund in Court as was not required to meet the sum of Rs. 1400 per month charged thereon in favour of Ranee Hurrosoondery; but the Court refused to make any order on such claim, and directed that the same [395] should stand over pending an application to Her Majesty, on the ground that there had been neither a grant by the Crown, nor any formal intimation on which the Court could act, that the Crown had intended to surrender, or to abstain from urging its right in respect to Rajah Kistonaath Roy's estate.

The Respondent accordingly caused notice of her claim to be served on Her Majesty's Attorney-General, and on the Solicitor of Her Majesty's Treasury in London, and also in 1849, to avoid litigation, presented a memorial to Her Majesty praying that Her Majesty would be graciously pleased either to abandon her claim, or to grant the same to the Respondent as Rajah Kistonaath Roy's widow.

In addition to these notices and memorial, the proceedings on the Coroner's inquest and the finding thereupon were, immediately after they had taken place, communicated to the Solicitors of Her Majesty's Treasury, in London, for instructions, in case Her Majesty should thereupon be advised to prefer any claim to the property of Rajah Kistonaath Roy; but no claim was made by the Crown. And, in August, 1860, a letter was sent by the Secretary of State for India to the Governor-General in Council, stating that the Commissioners of Her Majesty's Treasury waived all claim to the property of the late Rajah Kistonaath Roy so far as the interests of the Crown were concerned, and left it to the disposal of the Indian Government.

On the 16th of January, 1861, the Advocate-General presented a petition to the Supreme Court, claiming that the fund set apart by the Court, subject to the aforesaid charges, belonged to and was part of [396] the estate of Rajah Kistonaath Roy, as only son and general legatee and devisee of the Testator, Rajah Hurrynaath Roy; and that on the felonious suicide of Rajah Kistonaath Roy the right, title, and interest in and to the fund (subject as aforesaid) became forfeited to and was vested in Her Majesty, Her heirs and successors; and the petition prayed, that after retaining so much of the fund as might be required to meet the still subsisting charge of Rs. 1400, per month, and after paying the costs of that application, the remainder of the fund might be transferred to the Secretary of State for India in Council, for and on behalf of Her Majesty, for the purposes of the Government of India.

This petition was heard by the Supreme Court on the 19th of April, 1861, when judgment was delivered by the Chief Justice, Sir Barnes Peacock. After setting forth the facts above detailed, and stating the origin of the claim and the waiver by Her Majesty's Government in England of any claim on account of the alleged forfeiture of the estate of the late Rajah Kistonaath Roy, the learned Judge proceeded:—"Rajah Kistonaath Roy left a widow, Ranee Surnomoye Dossee, his mother, Ranee Hurrosoondery Dossee, and two nephews, Opendar Chunder Nundy and Juggender Chunder Nundy the sons of his sister, Gobindsoondery. These parties have appeared by their respective Counsel. Ranee Surnomoye Dossee, the widow, does not oppose the claim; but it has been contended on behalf of the mother and nephews, that the Crown is not entitled to any portion of the fund, and that according to the law in force in Calcutta it was not forfeited. In addition to that, which was the main argument, it was urged on behalf of the mother of [397] Rajah Kistonaath Roy, that he was never entitled to any part of the fund in Court, and that consequently, even admitting, for the sake of argument, that the law of forfeiture prevailed in Calcutta, no part of the fund passed to the Crown. The case of *Mussumat Golah Koomur v. The Collector of Benares* (4 Moore's Ind. App. Cases, p. 246) was cited to show that the forfeiture, even if it existed, could not affect the rights of the mother and widow of Rajah Hurrynaath Roy to maintenance. We entirely concur in that view; but we are of opinion that the mother and widow, although entitled to maintenance, were not entitled to the money brought into Court to secure it. It is sufficient for us to state shortly, that in our judgment, Rajah Kistonaath Roy, at the time of his death, was entitled to the fund, subject to its remaining in Court as a security for the maintenance of the mother and widow of Rajah Hurrynaath Roy until their respective deaths. The interest was one which, according to the law of forfeiture, if in force in

Calcutta to its full extent, would pass to the Crown upon a valid finding of *felo de se*. A preliminary objection was taken, namely, that this claim could not be made by petition without reviving the suits in which the money was ordered to be brought into Court, those suits having abated by the death of Rajah Kistonaath Roy. But we are clearly of opinion that that objection cannot prevail. The case referred to by Mr. Justice Jackson, *In re Jerroise* (12 Beav. 209), is a decisive authority, if any authority were necessary to that effect. The main question, therefore, to be decided in this case is, whether or not the goods and chattels of a Hindoo are forfeited to the Crown upon its appearing by a Corner's inquisition that he [398] committed *felo de se* within the local limits of the jurisdiction of the Supreme Court at Calcutta. That must depend upon whether the English law by which the goods and chattels of a *felo de se* are forfeited to the Crown, has ever been introduced into Calcutta, and if so, whether it applies to Hindoos and Mahomedans, as well as to European British subjects. It is a well recognized doctrine, and one which has been acted upon by this Court for more than half a century, that, speaking generally, the first introduction of English law into Calcutta, was effected by the Charter of George the First, by which, in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position; indeed, it was admitted by the learned Advocate-General in his argument in this case. The question is, whether the law by which goods and chattels of a *felo de se* are forfeited to the Crown, was introduced by that Charter, or at any other time. It is unnecessary to go back to a period antecedent to the Charter, for even if it could be held that British subjects carried with them to India any part of the laws of England—and probably they did, from necessity, carry with them some of their own laws, such as those relating to marriage—it is clear that they did not carry with them any law which could entitle the Crown, prior to the acquisition of sovereignty, to the goods and chattels of a native *felo de se*, if such a term could be used prior to the introduction of the English law of Felony. We will, therefore, consider, first, whether such a law was introduced by the Charter; secondly, whether it was introduced subsequently by any law expressly extending to Calcutta; and thirdly, whether it was intro-[399]-duced when Calcutta became part of the dominions of the Crown, as a necessary incident of sovereignty. It is clear, from the judgment of Lord Brougham in the case of *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, p. 272), that in the year 1726, and for many years afterwards, Calcutta was merely a Factory, established for the purposes of trade, by British subjects in a Foreign territory. It was not at that time part of the dominions of the Crown, although the Crown exercised jurisdiction over it as a Factory, in the same manner as the Government of England and other European Governments have done in many similar cases. It is laid down by Lord Brougham, in the most explicit manner, that for a long period of time after the first acquisition, no English authority existed there, which could affect the land, or bind any but English subjects. The situation of Calcutta, at that time, is so clearly pointed out in the judgment, that we cannot do better than read the following extract from it:—'The district on which Calcutta is built, was obtained by purchase from the Nabob of Bengal, the Emperor of Hindoostan's Lieutenant, at the very end of the seventeenth century. The Company had been struggling for nearly a hundred years to obtain a footing in Bengal, and until 1696, they never had more than a Factory here and there, as the French, Danes, and Dutch also had. Till 1678, their whole object was to obtain the power of trading, and it was only then that they secured it by a Firman from the Emperor. From that year till 1696, they in vain applied to the native government for leave to fortify their Factory on the Hooghly, and it was only then that they made a fortification, acting upon a kind of [400] half consent, given in an equivocal answer of the Nabob. Encouraged by the protection which they were thus enabled to afford the natives, many of them built houses, as well as the English subjects; and when the Nabob, on this account, was about to send a Kazi, or Judge, to administer justice to those natives, the Company's servants bribed him to abstain from this proceeding. Some years afterwards the Company obtained a grant of more land and villages from the Emperor, with renewed permission to fortify their Factories. During all this period tribute was paid to the Emperor, or his officer, the Nabob: first, for leave to

trade, afterwards as Zemindars, under the Emperor; and in 1757, the year memorable for the battle of Plassey, the treaty with Jaffer Ally, indemnifying them for their losses, ceding the French possessions, and securing their rights, and binding them to pay their revenues like other "Zemindars." Eight years later they likewise received from the native government a grant of the Dewanny or receivership of Bengal, Behar, and Orissa: and of their subsequent progress in power it is unnecessary to speak; enough has been said to show, that the settlement of the Company in Bengal was effected by leave of a regularly established government in possession of the country, invested with the rights of sovereignty, and exercising its powers; that by permission of that Government, Calcutta was founded and the Factory fortified, in a district purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising, by delegation, a part of its administrative authority. At what precise time, and [401] by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the crown, and for the Crown, the right of sovereignty, cannot be ascertained. The sovereignty has long since been vested in the Crown, and though it was at first recognized in terms by the Legislature in 1813; the Statute, 53rd Geo. III. c. 155, s. 95, is declaratory, and refers to the sovereignty as "undoubted," and as residing in the Crown; but it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty exercised; and that during all that time no English authority existed there, which could affect the land or bind any but English subjects. The Company and its servants were then in the situation of the Smyrna or the Lisbon Factories at the present time.' Such being the case, we will now examine the Charter of George I., in order to ascertain whether the law of forfeiture in the case of a *felo de se* was introduced by it. In the first place it recites 'that the United Company of Merchants trading in the East Indies have, by a strict and equal distribution of justice within the towns, Factories, Forts, and places belonging to the said Company, in the East Indies, and other parts beyond the Cape of Good Hope to the Straits of Magellan, very much encouraged, not only Our own subjects, but likewise the subjects of other Princes, and the Natives of the adjacent countries, to resort to, and settle in the said towns, forts, factories, and places for the better and more convenient carrying on of trade, by which means some of the said towns, factories, and places, are become very populous, and specially the town or place, [402] anciently called Chinapatnam, now called Madraspatnam, and Fort St. George, on the coast of Coromandel, and also the towns, factories, or places called Bombay, on the Island of Bombay, and Fort William, in Bengal, in the said East Indies and parts aforesaid; * * * and that there is a great want, in all the said places, of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanours, committed within the places and districts aforesaid, and in other the said Company's settlements.' Section 1, incorporates the Mayor and Aldermen of Madras. By section 7, a Sheriff is appointed. By section 9, a Mayor's Court is appointed. Section 14, constitutes the Governor, and five senior Members of the Council, Justices of the Peace, and a Court of Oyer and Terminer. Sections 16 to 22 incorporate the Mayor and Aldermen of Bombay, and give them similar powers. By Sections 24 to 30, the same provisions are extended to the Presidency of Fort William in Bengal. A Charter of Statute by which Courts of Justice are constituted, does not necessarily determine the law which they are to administer, but in construing the Charter of George I., there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place, and of the inhabitants, should admit. The words, give judgment according to justice and right, in suits and pleas between party and party, could have no other reasonable meaning than justice and right, according to the laws of England, so far as they regulated private rights between party and party. Such [403] general words could not possibly refer to any law, such as the Mortmain Act, or the Alien laws, which had reference merely to some views of public policy, supposed to be applicable to England, even though private rights might be affected by them. Still less could they be supposed to refer to the rights

or revenues of the Crown, depending upon prerogative, and which were wholly inapplicable to a territory to which the sovereignty did not extend. Then, was the law of forfeiture of the goods and chattels of a *felon de se* introduced by those clauses of the Charter by which the Courts of Oyer and Terminer were established? The only words under which it could be included are those which authorize the Justices of the Peace or Commissioners of Oyer to proceed to the arraignment, trial, conviction, and punishment of persons accused of crimes and offences. It is unnecessary to decide, whether these words impliedly introduced the law of forfeiture in the case of attainder or conviction of Felony (forfeiture being no part of the sentence or punishment), or whether they introduced the whole law of forfeiture for crimes, including the prerogative right of a year and a day, and waste in lands of inheritance of a person attainted, or only some and what part of the law: whether the law, if introduced, extended to Natives, or to British subjects only, and if to Natives, whether their lands were to be considered as lands of inheritance or merely as chattels: or, finally, whether, if that branch of the prerogative which related to forfeiture was introduced, the somewhat similar right of the Crown to deodands was in like manner extended in the case of Natives. These and other nice points of law will have to be determined should the question [404] ever arise. At present we express no opinion concerning them, nor as to the rights of the Crown in cases of crimes made felonies by Statutes passed since the sovereignty was acquired in India. At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felon de se*: and we now proceed to deal with that question, and with that question alone. It has been decided that the goods and chattels of felons of themselves are a different liberty, from the goods and chattels of felons, and that by the grant of one the other does not pass, *The King v. Sutton* (1 Saunders, 274 a). They are different in their nature, the former depending upon an inquisition of office taken, as it necessarily must be, after the death of the *felon de se*, the other resulting from an attainder on conviction of the felon after arraignment and trial in his presence. Now, the Charter of George the First clearly contemplated a trial. The recital is, that there is a great want of proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanours. It did not, and could not, recite that there was any want of the means of enforcing the Crown's prerogative right to the goods and chattels of felons of themselves, for the Crown had no prerogative rights in Calcutta. The Charter clearly contemplates the trial and punishment of persons accused of crimes, and not the creation of a right for the Crown, or the extension of any of its ordinary sources of revenue to a place in which the rights of sovereignty did not [405] exist. Further, the grant of the right to hold Courts of Oyer and Terminer was made to the East India Company, and upon their petition and for their benefit, and not at the instance of the Crown. No Coroner was appointed, no provision was made for an inquest of office, and no Officer appointed to secure forfeiture. It was contended in argument, that as the Justices of the Peace, and Commissioners of Oyer and Terminer, had jurisdiction to try persons accused of murder, so they might hold an inquest of office and inquire by what means a man came to his death, in the same manner as Justice could in England when a body was thrown into the sea or could not be found, and the 3 Inst. p. 54, was cited as an authority. The same rule is laid down in 1 Hale, P.C. 413, for it is said to be within the extent of their commission. But the commission of Oyer and Terminer in England is, to inquire of all murders, felonies, man-slaughters, killings, etc., by whomsoever and by whom, to whom, when, how, and in what manner, and also to hear and determine, etc. Whereas the power given by the Charter is to proceed by indictment or by such other ways, and in the same or the like manner as is used in England, as near as the condition and circumstances of the place will admit of: also to proceed to the arraignment, trial, conviction, and punishment of persons accused of any crimes or offences, in the same manner and as near as the condition and circumstances of the place will admit of, as Justices of the Peace or Commissioners of Oyer and Terminer in England by virtue of their commissions. We doubt whether these words or the words immediately following—shall and may respectively do all other acts that Justices of the [406] Peace and

Commissioners of Oyer and Terminer usually and legally do—authorized the Governor and Council to hold inquests of office. But whether they did so or not, we feel confident that they were never intended to give to a finding of *felo de se* upon such inquisition, the effect of vesting the goods and chattels of the offender in the Crown, to be carried to England, as part of the ordinary revenues of the Crown. If such had been the intention some provision would have been made for allowing the relatives of the deceased to traverse the inquisition, if not true, or to quash it if bad in law. Neither of these powers was given, nor was there any Court in existence which had power to try such traverse or to quash the inquisition. It could not be intended that the Mayor's Court should quash the inquisition of the Court of Oyer and Terminer, or try a traverse of the finding; for, independently of the fact, that the Mayor and Aldermen before whom the Mayor's Court was held were inferior to the President and Council who composed the Court of Oyer and Terminer (an appeal lying from the Mayor's Court to the President and Council), the Mayor's Court was authorized to try any civil suits, actions, and pleas between party and party. No Officer was appointed to appear for the Crown, and no case was intended to be tried before them in which they could not award execution for costs, either against the goods of the person of the Plaintiff or Defendant, as the case might be; a process which could not have been used in the case of the Crown; nor could it be intended to give jurisdiction to the Court of Oyer and Terminer to quash the inquisition taken before themselves, or to try a traverse [407] of the finding upon their own inquisition. Such a power was not one which could be exercised by a Court of Oyer and Terminer in England. We are, therefore, of opinion, that the Charter of George I. did not intend to render the goods and chattels of a *felo de se* liable to be forfeited to the Crown, even in the case of a British subject. But, even if it did so, it is wholly improbable that such a law should have been intended to apply to Mahomedans and Hindoos, even if the Crown had the power at that time to make a law binding upon them, which is disputed by Lord Brougham. At that time there was no law in India by which property was forfeited by suicide. By the Mahomedan law suicide was not an offence, and did not cause any forfeiture of property. Even wilful homicide was justified, if committed at the request of the person killed. Nor should it be forgotten that at that time Suttee, though not enjoined by the religion of the Hindoos, had not been declared to be a crime; and that the ignorant and deluded votaries of Juggernaut were under the belief that eternal happiness was obtained by self-sacrifice under the wheels of the Idol's car. It can scarcely be imagined that the Crown could have intended to introduce into a Factory in a Foreign territory the prerogative of forfeiture, and to render that prerogative applicable not only to its own subjects but to the subjects of a foreign Government over whom it had no power. Had such an intention been apparent, it would have been beyond the legal powers of the Crown to give effect to it. Having decided that the law was not introduced by the Charter of George I., the question is, has it ever been introduced at any other period? We find nothing to lead us to the [408] conclusion that it has been, nor indeed, has there been any such contention on the part of the Crown. It has not been urged, nor could it in our opinion have been urged with success, that the law was introduced by the 33rd Geo. III., c. 52, s. 157. By that section, the Governor-General in Council at Fort William, was authorized and empowered to appoint as many Coroners as he should think fit for the purpose of taking inquests upon the bodies of persons coming, or supposed to have come, to an untimely end; and such Coroners are vested with the like powers and jurisdictions as by law may be executed by Coroners in England. But there is nothing in that Act to show, that it was intended to introduce any law of forfeiture if it did not previously exist. If a law had existed by which goods and chattels of a *felo de se* were forfeited to the Crown, the appointment of Coroners might have provided means for putting the law into force, even though it might previously have lain dormant for want of the necessary machinery. The appointment of a Coroner could not alter the law, though it might have provided a means for enforcing a law. The appointment of a coroner could no more render a person in Calcutta liable to forfeiture of his property for *felo de se*, than it could make the act of wilful and intentional self-destruction in the Mofussil a Felony, in order that forfeiture might be the consequence; and it must not be forgotten that the

power of appointing Coroners was not limited to the Presidency towns, it extended to the whole of the Presidencies, and consequently if it introduced the law of forfeiture in the case of a *felo de se*, it did so not only in the Presidency towns, but also in the Mofussil, where Felony was not known as a crime, [409] and where the Mahomedan criminal law prevailed, by which, as before shown, self-destruction was not a crime. Our attention has been called to the case of *The Collector of Masulipatam v. Cavalry Fencible Narainapah* (8 Moore's Ind. App. Cases, 500). In that case it was held, that the general right of the Crown to succeed to immoveable property on failure of heirs was not excluded in the case of a Brahmin. The law of escheat was not disputed; the question raised was, whether the Crown could succeed to the property of a Brahmin on failure of heirs. In the present case the general right of the British Crown to succeed to all property, whether moveable or immoveable, upon a total failure of heirs is not disputed. That right attached immediately upon the acquisition of the sovereignty by the Crown as a necessary incident thereto, not only in those places such as the Presidency towns, in which the laws of England had been partially introduced, but in every other part of India over which the Sovereignty had been acquired. The right of the Crown exists, as well in the case of Mahomedans and Hindoos, as in the case of British subjects. Here there is no failure of heirs, but a claim on the part of the Crown by title paramount, upon the ground that the property was vested in the Crown by forfeiture before it came to the heirs. If the property of a Mahomedan, or a Hindoo, were claimed by the Crown upon the ground of a failure of heirs, the question of failure, or no failure of heirs, would not depend upon English law, but upon the Mahomedan or Hindoo law of inheritance, as the case might be. So here the question depends upon the law applicable to the offence. If the English law was [410] introduced as to *felo de se*, and the property was liable to forfeiture upon the finding of a Coroner's inquisition, the forfeiture would, no doubt, vest in the Crown by virtue of its prerogative. All we have to show here is, that the prerogative of the Crown did not of itself make self-murder a Felony, or subject the offender to the forfeiture of his goods and chattels. If the prerogative of the Crown rendered self-murder a Felony in Calcutta, and necessarily introduced the law of forfeiture as an incident, it must have had the same effect in every part of the British dominions in India over which the right of Sovereignty was acquired. It is not a necessary incident of Sovereignty that every offence for which property is forfeited in England should be a Felony, and cause a similar forfeiture in every part of the dominions of the Crown, otherwise it must follow that the right of Sovereignty introduced the law of a year and a day, and waste, in the case of attainder, in the Mofussil, and also the right to deodands. We hold that the law of forfeiture in the case of *felo de se*, has never been introduced into Calcutta, and consequently that the estate of Rajah Kistonaath Roy was not forfeited to the Crown. This petition, therefore, must be dismissed. There will be no order as to costs, for it is a petition presented on behalf of the Crown, and we doubt if there is any jurisdiction in this Court to order costs to be paid by the Crown."

The present appeal was from this decision.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Appellant.—The question in this case is, the right of the [411] Crown to the goods of a *felo de se*, a Hindoo inhabitant of Calcutta, and a subject of Her Majesty. There is no dispute regarding the commission of the crime within the town of Calcutta, or that the inquisition and finding by a jury before the Coroner of Calcutta, appointed by Statute, 33rd Geo. III. c. 52, sec. 157, was not strictly regular. By the Charter of 1774, sec. 4, which established the Mayor's Court of Oyer and Terminer and Criminal Jurisdiction, the office of Coroner was first introduced into India, the Judges of that Court being appointed Coroners. In this case the finding was officially communicated by the Coroner to the Government and the Accountant-General and Master of the Supreme Court at Calcutta, who had custody of part of the assets of the deceased, as well as notice given to the Collectors of the several Zillahs in which his property was situate, of the forfeiture of the goods and chattels to Her Majesty, and that meets in anticipation any question of delay, or waiver, in making or in enforcing our claim. [Lord Kingsdown: The claim arose twenty years ago. The parties might then have traversed the inquisition.]—The waiver relied on now, is merely an intimation of the Officers of the Crown here, that they did not claim on behalf of

Her Majesty; leaving it, therefore, for the Government in India to make the claim, and assert its right.

Now, first, the law prescribing the forfeiture of goods and chattels of a *jeu de se*, is part of the Common law of England, and under the Charter of the 13th Geo. I., the Supreme Court at Calcutta is bound to administer the Common law of England, as it was in the year 1726, unless such law has been subsequently altered by Statutes extending to India, or by Act of the Legislature of India; and our con-[412]-tention is, that no Imperial Statute, or Legislative Act, has altered the Common law in this respect. The history of the establishment of the British rule in India is elaborately treated of by Lord Brougham, in the case of *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, 175, 272-3), and the rule as to the introduction of English law in Calcutta is furnished by the finding of the Master, and the decision of Lord Lyndhurst in the case of *Freeman v. Fairlie* (1b. 309, 352), in which it was held, that a Will to pass lands in Calcutta must be attested by three witnesses. The introduction of the English law, as applicable to the Natives of India, must be referred to the establishment of the Mayor's Court by the Charter of 1726, though that Court has been subsequently superseded by the establishment of the Supreme Court at Calcutta, by the Charter of 1774, when the English laws were introduced to their full extent, and with all their consequences, Auber's Analysis of the Const. of the East India Comp. p. 234.—[Lord Kingsdown: When was the English law binding on the people in Calcutta?—It existed in 1726.—[Lord Kingsdown: It certainly could not be binding when Calcutta was a mere Factory for the purpose of trade. Neither could the Criminal law, in all its branches, now be applicable to Hindoo natives. Take the case of Bigamy for instance.]—The English Criminal law, we apprehend, must be taken as generally introduced in India by the Charter of 1726.

[Sir James Colville: The Mahomedan Criminal law was retained by Reg. IX., of 1793, secs. 47, 50, 74, and 75. It was only in 1832, by Reg. VI. of that year, sec. 5, that persons not professing the Mahomedan faith could claim the exemption from being tried under [413] that law.]—By the Statutes, 13th Geo. III., c. 63, sec. 14, and the 26th Geo. III., c. 57, sec. 29, the English law was applied to Natives as well as British subjects. Statute, 9th Geo. IV., c. 74, embodied all the Criminal law of England in India. Suttee was a crime, but was tolerated, in compliance with the reservation of the 37th Geo. III., c. 142, sec. 12, which respects religious usages, but Suttee was abolished by Regulation XVII. of 1829. So with respect to the crime of infanticide: these were, however, exceptional cases coming within the special usages reserved to the Hindoos. Then, the material question to be considered is, whether by the Charters and Statutes, the English Criminal law is not to be taken as imported into Calcutta, and in force there at the time the Rajah committed suicide. He was beyond all question a British subject, and as such was amenable to the law that had been introduced into India by the Charters and Acts of Parliament. The best exposition of the rule as to the governing law, is to be found in the *dictum* and decision of Lord Mansfield, in the well-known case of *Campbell v. Hall* (1 Cowp. 208), where he says, "that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privileges distinct from the natives." It follows, therefore, that in no case have the Natives of a Colony of Settlement privileges distinct from the settlers, unless such rights have been specially reserved to them. Lord Stowell, in *Ruding v. Smith* (2 Hagg. Cons. Rep. 383), quotes Lord Mansfield's proposi-[414]-tion with approbation, and says, "Huber, too, speaking upon general principles, had before promulgated the same doctrine:—" *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur.*" *De Conflict. Leg.* lib. I. t. 3, § 2. The question of the extent of the introduction of the English law in Grenada, in the West Indies, was also considered by Sir William Grant in *The Attorney-General v. Steward* (2 Mer. 160), and to Gibraltar, by this Tribunal, in *Jephson v. Riera* (3 Knapp's P.C. Cases, 130). Wherever, therefore, the English law has been introduced, including of course the Criminal law, self-murder is a felonious crime. It is viewed by the English law as the highest crime, Stephens, Comms. Vol. IV. p. 108.—[Lord Kingsdown: Do you

contented that the law of forfeiture was introduced by the Charter of 1726.] It may not be introduced by Charter, or Statute, in express words, but the appointment of a Coroner assumes the introduction of the English law of *felo de se*, and that there is judicial machinery for executing it. No reason appears why the law of forfeiture should not apply to Natives as well as Europeans.—[Sir Lawrence Peel: Does not your argument go too far? It would introduce the law of primogeniture and dower among Natives.]—If suicide is a crime, of course to assist a suicide is also a crime. Now, the Indian Penal Code of 1860, applies to the whole Territories vested in the Crown by Statute, 21st and 22nd Vict. c. 106. This Code assumes, but nowhere specifies or defines, that suicide is a crime. The 53rd section enumerates a list of punishments for offences under the Code, and expressly mentions in sec. 62, forfeiture of property [415] for offences; and by sec. 302 it is enacted, that whoever commits murder shall be punished with death, or transportation for life, and shall be liable to fine. Section 306 says, if any person commits suicide, or whoever abets the commission of such suicide, shall be punished with imprisonment for a term, and shall also be liable to fine; and section 309 provides, that whoever attempts to commit suicide shall be punished with imprisonment, for a term not exceeding one year, and shall also be liable to a fine. Now, it would be illogical to suppose that suicide is not a crime; the Code assumes that it is, and the Code applies to Hindoos and Mahomedans, as well as to Europeans.—[Lord Kingsdown: You cannot punish the individual who commits suicide. The Code only applies to those who attempt, or abet it.]

The important question of the prerogative of the Crown was not, however, considered by the Court below, and we contend that the same prerogative must attach in Calcutta as in the other British Colonies, Chalmers' Opinions, Vol. I. p. 232. Now, the right to forfeiture of goods and chattels is part of the prerogative of the Crown in this country. Stephens, Comms. Vol. II. p. 495 (5th Edit.), enumerates the prerogatives, and among them mentions forfeitures for offences. So treasure trove, as by the ancient law of India, Inst. of Menu, ch. VIII. secs. 37, 38, and Royal fish, are most ancient prerogatives of the Crown. In Bacon's Abr. tit. "Forfeiture" B, it is laid down, that if a man be *felo de se* he forfeits his goods and chattels (see also *Megit v. Johnson*, 2 Doug. 545); and in the note to *Toombs v. Etherington* (1 Saunders, 362), it is stated to accrue on inquisition.—[416] [Lord Kingsdown: The Common law, as stated in that case, distinguishes the forfeiture of lands and goods. The former is only upon attainder. Now, in India there is no distinction by Hindoo law between real and personal estate].—Lord Brougham, in *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, 281), enumerates the prerogatives the Crown is entitled to in India. That case, however, does not apply to the question here raised. The law there determined as to aliens holding lands, is by Statute, and is not part of the Common law. No doubt the prerogative attaches in cases of *felo de se* in India, whether by a British subject, or native Hindoo, if committed within the jurisdiction of the Supreme Court.

The Charter, 13th Cha. II., in 1661, upon the petition of the East India Company, granted the Governor, and East India Company, power to judge all persons living under them, and under that Charter the English law was administered in Calcutta. There was no Territorial sovereignty at that time, and, therefore, it did not extend to Natives. The Statute, 53rd Geo. III. c. 155, sec. 95, though it is the first statutable recognition of the sovereignty of the British Crown in the East Indies, was only declaratory of the existing law; for the Charter, 9th and 10th Will. III., expressly says, "The Sovereign right being always reserved over Forts, Factories, etc." Such right, therefore, existed in 1698, and the Statute, 13th Geo. III. c. 63, shows clearly that the Crown and Parliament recognized the Sovereignty of the East India Company. In *The East India Company v. Syed Ally* (7 Moore's Ind. App. Cases, 555), these rights were upheld; and in the cases of *The Secretary of* [417] *State for India v. Kamachee Boye* (7 Moore's Ind. App. Cases, 476; and see *The Rajah of Coorg v. The East India Company*, 29 Beav. 300), and *The Collector of Masulipatam v. Cavalry Vencata Narainapah* (8 Moore's Ind. App. Cases, 500) the Government of India was held entitled to take as an escheat a Raj, for want of male heirs. It has been determined that goods of a felon convicted in India are forfeited. That point arose in Bombay, *The Advocate-General v. Richmond* (Perry's Oriental

Cases, 566), and the right was not questioned: the only point raised being, whether the Crown or the East India Company was entitled to the escheat of the felon's goods: a point which does not arise here. In the matter of Govindo Lala (1 Strange's Mad. Cases, 74), goods, the property of a *felo de se*, were ordered by the Court to be delivered over to the East India Company as grantee of the Crown; and in *Khanoo Raoot Kulrekur v. Dhunbajee Kan* (2 Borr. Bom. Rep. 273), drift timber was held to belong to the Crown. No instance of forfeiture for Treason can be found.

Mr. Bovill, Q.C., and Mr. Cave, for the Respondent.—It lies on the Appellant to establish the proposition advanced by him—namely, that forfeiture of goods and chattels of a suicide is part of the law of India, applicable to Hindoos. The unanimous opinion of the Judges of the Supreme Court was, that the English law of forfeiture of the goods of a *felo de se*, did not apply to native Hindoos, unless it was specifically introduced by Statute, or Local enactment. The Appellant has failed to produce a single case in which a forfeiture of goods has been enforced by the Government in India for suicide. Govindo Lala's [418] case (1 Strange's Mad. Cases, p. 74), when examined, is no authority for such a proposition. It is simply the case of a Native who died without heirs, or next of kin, and the Court directed his property to be handed over to the Registrar, for the benefit of the East India Company. Being *bona vacantia*, the Sovereign right accrued. The Bombay case, *Khanoo Raoot Kulrekur v. Dhunbajee Kan* (2 Borr. Bom. Rep. 273) was a case of flotsam, and the right of the Crown was recognized, which might be in virtue of the tenure under which Bombay is held—namely, as part of the Manor of East Greenwich. These are the only two cases that can be brought to support such a claim as this. Then, there being no direct authority for the position contended for, is there any principle, or analogy of law, to support it? Our contention is, that the English law of Felony by self-murder, and consequent forfeiture of goods and chattels, has never been introduced, and cannot be applied, to Natives in any part of India. In England the ground of forfeiture is stated to be derelict; Bacon's Abr. tit. "Forfeiture," B.—[Lord Kingsdown: Was the forfeiture in England derelict, or was it not a punishment attached to *felo de se*?]—It may be punishment. A man takes his life away, and leaves goods and chattels; Bacon there lays it down, that the King takes them as the maintainer of public justice. By the feudal law of tenure, if a man deprives the Lord of a vassal, the Lord was entitled to compensation. So if the Tenant dies a natural death, the Lord could seize the best beast, or armour, according to custom, for a Heriot. By the Saxon law, land did not escheat for Felony. Reeve's "Hist. of the English Law," Vol. I. p. 10. So as to right of dower, Co. Litt. 41a; [419] Spelman, "On Tenures," p. 53; and Yorke's "Law of Forfeiture for High Treason," pp. 54, 56. It is doubtful whether forfeiture for *felo de se* existed in England before the introduction of the feudal system. It appears it did for Murder. In Striernhök, "*De-Jure Sueonum et Gothorum*," lib. II. ch. 6, and lib. III. ch. 3, forfeiture is spoken of for high Treason, but not for *felo de se*. He quotes the laws of Alfred, ch. IV, where it is thus laid down:—"Si quis vitæ Regis insidiatur per se, vel per ultores mercede conductos vel seruos suos, vitâ privetur, et omnibus quæ possidet." Then it goes on, "*Si quis vitæ Domini sui insidiatur hoc ipso vitam suam amittit, et omnia quæ possidet vel pro ratione aestimationis capitis Domini sui culpa eximitur.*" And the law of Canute, ch. LIV, is similar:—"Si quis Regi vel Domino insidiatur fuerit, vitam suam perdat, et omne quod habet nisi ad triflex ordalium pergat." Forfeiture is purely a part of the feudal policy which has never been introduced into India, or is capable of being applied to Hindoo Natives under the British rule. The law and customs of the Hindoos have always been respected and preserved to them. This was the provision of the Statute, 21st Geo. III. c. 70, sec. 17, and the assurance given to the Natives by Sir Elijah Impey, the first Chief Justice, when the Charter of 1774 was brought into force. "Memoirs of Sir Elijah Impey, the Ed. by his son," Appx. 427, [8vo. Lond. 1846].

There can be no doubt as a general proposition, that Englishmen settling in an uninhabited country carry with them as their birthright so much of the law of England as is applicable to, and requisite for, the state of the settlement, which will include, of course, so much of the Common law as is applicable to [420] their condition, as well as the Statute law, Chalmers' Opinions, Vol. I. p. 195. But the case of the original Settlements in the East Indies is quite different, as is shown in the

history given in *The Mayor of Lyons v. The East India Company*. The first settlers were only traders permitted by the Government of the Nabob of Bengal to reside and have Factories within his dominions. It was not until many years afterwards that they acquired as a Company, first Territorial and then Sovereign rights by Charters and Treaties. It was long after the establishment of the Company as a trading body, that they acquire anything like Sovereign rights. In the first instance, such of the Company's servants within the Factories as chose to adopt the English laws were permitted by the Crown to do so. Indeed, all the authorities show, that the English law was never generally, but only partially, introduced in India. Thus it has been held by the Supreme Court at Calcutta that the laws against Popery did not extend to India, *D'Conto v. Da Costa* (Morton's Dec. Cal. 356); and that the Statute making carnal knowledge of a female under the age of ten years, a Felony, did not extend to India, *Rex v. Chundichurn Bose* (Morton's Dec. Cal. 357); and by this Tribunal that the Mortmain law was not in force in India, *The Mayor of Lyons v. The East India Company* (1 Moore's Ind. App. Cases, 176; and see on this point, *Mitford v. Reynolds*, 1 Pill. pp. 185, 192. *Whicker v. Hume*, 7 H.L. Cases, 124. *Attorney-Gen. v. Stenard*, 2 Mer. 143. Clark's Col. Law, p. 7). It will only be necessary to trace the introduction of the English law into Calcutta, to show that this branch of the Criminal law was not in force in Calcutta at the time of the [421] commission of this suicide. The third Charter of April 3rd, 1661, gave power to the Governor and Council, where the East India Company had Factories, or places of trade within the East Indies, to judge all persons belonging to the Company, or under their control, in all cases, Civil or Criminal, according to the laws of England. The Charter of 1726, provided for the administration of justice in Civil and Criminal cases within the Factory of Fort William, by creating the Mayor's Court, and for the punishment of persons accused of any crime, to be as near to the laws of England as the condition and circumstances of the place and inhabitants would admit of. The Charter of 1753, substantially repealed these two Charters, and gave to the East India Company, besides further jurisdiction, fines and amercements made by the Court. Then came the Statute, 13th Geo. III. c. 63, sec. 13, and the Charter of 1774, which established the Supreme Court at Calcutta, as a Court of Oyer and Terminer, within the Town of Calcutta and the Factory of Fort William, with jurisdiction over Murder, and other felonies and misdemeanors, had, done, or committed within the Town and Factories. The Statute, 21st Geo. III. c. 70, sec. 17, gave the Supreme Court jurisdiction to entertain suits and actions of the native inhabitants of Calcutta, providing that the inheritance and succession to lands, etc., and contracts should be determined in the case of Mahomedans, by the Mahomedan law, and of Hindoos by the Hindoo law. And section 18 of that Statute expressly enacted, that the civil and religious usages of the Natives were to be respected, and acts done, according to the rule and [422] law of caste, were not to be adjudged as crimes, although the same may not be justifiable by the law of England. Section 19 also provided, that the process of the Supreme Court was to be accommodated to the religion and usages of the Natives. At this period Suttee, as well as infanticide, prevailed in India, and were, therefore, sanctioned by the law and recognized by the Government as part of the religious usages of the Natives. Then came the 33rd Geo. III. c. 52, sec. 157, which, for the first time, appointed Coroners for the Presidencies in India, empowering them to hold inquests in the same manner as Coroners in England. It is this Act that the other side now insists gives the right to the East India Company to seize the goods and chattels of a *felo de se*. But besides that they have failed to prove that the appointment of such Officers as Coroners would give the Crown a prerogative not previously enjoyed, it is impossible to argue that such a forfeiture would accrue for an offence held not only not blameable by the Hindoo inhabitants of India, but in the case of widows, absolutely praiseworthy, and in accordance with the religion of the country. *Felo de se* was, in fact, at this time, no offence at all. The Statute, 9th Geo. IV. c. 74, after reciting that many wholesome alterations have been made in the Criminal law of England, and the administration thereof, and that it was expedient that some of the said alterations should be extended to the British Territories in the East Indies, enacts, by section 18, that when any person shall be arraigned upon an indictment or inquisition for Treason, or Felony, the jury empanelled to try such persons shall

not be charged to inquire concerning the lands, tenements, or goods, nor [423] whether he fled for such Treason or Felony. But under this Statute, however, there must be a trial for Felony, not an inquisition, or inquiry, as before a Coroner. It is true that, by the 16th and 17th Viet. c. 95, sec. 27, all fines and penalties incurred by the sentence or order of any Court of justice within the Territories under the Government of the East India Company, and all forfeitures for crimes, of any real and personal estate within those Territories, and all property devolving as *bona vacantia*, for want of a rightful owner, shall belong to the East India Company, in trust for Her Majesty, for the service of the Government of India; and that by the 21st and 22nd Viet. c. 106, the Territories in the East Indies are absolutely vested in the Crown. None of these Statutes, however, introduced the English law of forfeiture of the goods and chattels of a *felo de se*, which is nowhere designated as a Felony in India, and is not even mentioned until the Penal Code of 1860, which first designated such a crime in India. Sec. 306 of the Code enacts, that if any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term not to exceed ten years, and shall also be liable to fine; and section 309 enacts, that whoever attempts to commit suicide shall be punished with simple imprisonment for a term of one year, and shall also be liable to fine; thus making the aiding and abetting a *felo de se* a misdemeanour; whereas such aiding or abetting by the Criminal law of England is a Felony, the party being a principal in the first degree. How then can it be argued, that with such a provision as this, there could have been previously anything like the English law of forfeiture prevailing [424] in India? By the Common law of England, to assist another to commit suicide is Murder. This is conclusive, that even at the time the Code was passed, forfeiture for *felo de se* was not considered part of the English law introduced into India; still less could it have been the law in the year 1774, the date which the Appellant's Counsel insist that this branch of the Criminal law of England was introduced into Calcutta; at a time too when we have shown it was not considered an offence there even if committed.

Supposing, however, the law of forfeiture of goods of *felo de se* to have been introduced in India, and applicable to Europeans, it does not apply to Hindoos and other Natives, by whom, in many cases, self-destruction is considered not merely legal, but even meritorious. Thus, *The Vakeel of Government v. Sohawun* (1 Niz. Adaw. Rep. 220) was the case of a Hindoo of the Rajpoot tribe, who had prepared a pit and set fire to the fuel in it, to enable his father, who was ill with the leprosy, to burn himself, and the prisoner was held justified under the tenets of the Hindoo religion, and acquitted under the provisions of the Mahomedan law; and the case of Shiecoo Subace and Chotoo (*ib.* 292) is to the same effect. Suicide from leprosy, or Suttee, though both are within the letter of sec. 3, Ben. Reg. VIII., of 1799, yet have not been considered by the Nizamut Adawlut within the purview of that section (see note to Sohawun's Case, 1 Niz. Adaw. Rep. 221); which Regulation, as there stated, was intended to preserve the lives of many from the effects of passion or revenge, aided by the enormous prejudice of superstition. The Institutes of Menu treat of punishments for certain offences, but nowhere mention [425] forfeiture for suicide. A Hindoo committing suicide does not alter the rule of succession, Strange's "Hindu Law," vol. I. p. 157.

Another important point, is the question of the deceased's domicile. His domicile was Berhampore, about one hundred miles from Calcutta, and though he commits suicide at Calcutta, that fact will not give the Supreme Court jurisdiction over his personal property. [Sir Lawrence Peel.—He had a residence at Calcutta, which would make him subject to civil process (see *Baboo Janakey Doss v. Binabun Doss*, 3 Moore's Ind. App. Cases, 175).]

Lastly, regard being had to the proceedings of the Indian Government, and to the absence of any claim on the part of the Crown, and the ultimate waiver of its rights, if any, it would be inequitable to enforce the law of forfeiture, if it exists in India, which we deny, against the estate of Rajah Kistonaath Roy. If the Crown had insisted upon its prerogative, under the Statute, 3rd and 4th Will. IV. c. 85, the inquisition might have been traversed, which could have been done with effect, *Toomes v. Etherington* (Saunders, 363a), 1 Hale, P.C. 417, first, as being against

evidence, and, secondly, on the ground of the misdirection of the Coroner. The Government have stood by for twenty years without asserting its claim.

The consideration of the case was adjourned, and their Lordships' judgment was now delivered by

The Right Hon. Lord Kingsdown (July 22, 1863).—The question in this case arises on the claim of the Crown to a portion of the personal estate of Rajah Kistonaath Roy, who destroyed himself in [426] Calcutta on the 31st of October, 1844, and was found by inquisition to have been *folo de se*.

We understand that the Rajah had a residence in Calcutta, though his Raj, or Zemindary, was at some distance from that city. He was a Hindoo both by birth and religion.

On the morning of the day on which he destroyed himself he made a Will, by which he left a large portion of his property to the East India Company for charitable purposes.

The Will was disputed by his widow, who was his heiress, and a suit was instituted by her against the East India Company and others, to determine its validity. It was agreed between the litigating parties that the question should be tried by an issue at law. The widow insisted, amongst other objections, that the Testator was not in a fit state of mind to make a Will at the time of its execution.

The issue was tried, and a verdict was found by the Judges against the Will, upon what ground does not distinctly appear, and the verdict was acquiesced in by the Indian Government.

If the Crown, by virtue of the inquisition, was entitled to all the personal property of the Rajah, the validity or invalidity of the Will was, as regards his personal estate, of no importance.

Now, the inquisition had found that the goods and chattels of the Rajah when he committed self-murder amounted within Calcutta to Rs. 9,87,063, and without the town of Calcutta to Rs. 2,89,500; and it stated that all this property was claimed by the widow.

No claim to any part of it appears at that time to have been set up by the East India Company on be-[427]-half of the Crown, and very large sums were from time to time, by the order, or with the consent of the Indian Government, paid over to the widow in the years 1846 and 1847.

A portion, however, of the Rajah's personal estate, amounting to between six and seven lacs of Rupees, was secured in the Supreme Court, in order to provide for the payment of life annuities to two ladies, both then living. The existence of these charges seems to have been the only reason why this fund was not transferred to the widow with the rest of the estate.

One of the annuitants is now dead, and the fund reserved to answer her annuity is of course set free. This fund is now claimed by the Indian Government under the finding on the inquisition of 1844.

It is stated in the affidavit of a gentleman who was Manager for the widow on the death of her husband, that he was advised in 1844, by three English Counsel of eminence, whom he names, that the verdict on the inquisition might be set aside on the ground both of misdirection by the Coroner, and as being against the weight of evidence, but that proceedings were not taken for that purpose, because the Government represented, through its law agents, that no claim would ever be made under the verdict.

If the facts be such as we have stated, it is impossible not to feel some surprise at the present demand; and, if we differed from the Court below, it would deserve much consideration whether a claim which seems to have been abandoned in 1844, ought now to be entertained. But these facts do not seem to have been noticed by the Judge in India; there may [428] possibly be circumstances with which we are unacquainted to account for the course taken by the Government, and we think it better to dispose of the case on the merits.

At what time then, and in what manner, did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in Calcutta?

The sum of the Appellant's argument was this:—that the English Criminal law was applicable to Natives as well as Europeans within Calcutta, at the time when the death of the Rajah took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen Elizabeth took with them the whole law of England, both Civil and Criminal, unless so far as it was inapplicable to them in their new condition; that the law of *jelo de se* was a part of the Criminal law of England which was not inapplicable to them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state: and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in India—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the Government [429] of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own government within the Factories, which they are permitted by the ruling powers of India to establish; but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of *The Indian Chief* (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence and weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

[430] But if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *jelo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

We were referred by Mr. Melvill in his very able argument, to the Charter of Charles II. in 1661, as the first, and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories, and it authorized such Governors and their Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of England, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over native subjects of the Mogul, and the Charter was admitted by Mr. Melvill (as we understood him) to apply only to the European servants of the Company; at all events it could have no application to the question now under consideration. The English law, Civil and Criminal, has been usually considered to have been made applicable to

Natives, within the limits of Calcutta, in the year 1726, by the Charter, 13th Geo. I. Neither that nor the [431] subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in England most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in England as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of *Hales v. Petit*, in Plowden's Reports, p. 261, than in any other book [432] which we have met with. It is there stated, that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estate; these distinctions, at least in the sense in which they are understood in England, not being known or intelligible to Hindoos and Mahomedans.

Self-destruction, though treated by the law of England as Murder, and spoken of in the case to which we have referred in Plowden as the worst of all Murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all other Murders, but from all other Felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code, as originally prepared by Lord Macaulay and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether [433] from the circumstances in which it is committed:—sometimes as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of Sutte and self-inmolation under the car of Juggernaut, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir Barnes Peacock in this case; and if it were not so introduced, then as regards Natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original

settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the Factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of the 33rd Geo. III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

[434] We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says:—"At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *jelo de se*; and we now proceed to deal with that question, and with that question alone" (*ante* [9 Moo. Ind. App.], p. 404).

The point so decided we think perfectly clear, and it is not necessary to go further. Since the New Code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case, humbly to advise Her Majesty to dismiss the appeal, with costs.

[Mews' Dig. tit. COLONY. I. GENERAL PRINCIPLES, 1. *English Law, Introduction and Applicability*; tit. FELO DE SE; tit. INDIA, 4; tit. INTERNATIONAL LAW, III. S.C. 2 Moo. P.C. (N.S.) 22; 9 Jur. (N.S.) 877; 8 L.T. 843; 2 N.R. 530; 12 W.R. 21. As to applicability to English law, see note to *Lyons (Mayor of) v. East India Co.*, 1836, 1 Moo. P.C. 175. See next case.]

[435] PRANNATH CHOWDRY,—*Appellant*; RANEE SURNOMOYE DOSSEE,—*Respondent* * [Feb. 23, 1863].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

A Zemindar granted his Zemindary by Pottah, or lease, as a Putnee Talook, at a fixed annual rent. Adjacent to the demised lands were other lands called Bheel Bhurruttee lands, to which the Zemindar had only a temporary interest, but which lands were included in the Pottah. The Bheel Bhurruttee lands were afterwards resumed by the Government under Ben. Reg. II., of 1819, and assessed separately from the Zemindary, the jumma being paid by the lessee for a period of nine years. Held, in a suit brought by the lessees against the lessor's representative for remission of the rent paid on the resumed lands, out of the fixed annual rent, that by the terms of the Pottah, the Bheel Bhurruttee lands were not included in the fixed annual rent.

In this suit, the question was, whether the Appellant was entitled to a reduction of the sum of Rs. 714. 11a. per annum, on the fixed annual rent of Rs. 16,001, reserved to Rajah Kistonaath Roy, under two separate sets of instruments. The first set being [436] a Pottah, or lease, of the Respondent's late husband, Rajah Kistonaath Roy, which created an hereditary Putnee Talook, and a corresponding Kaboolat, executed by the Putneedar, or lessee; and the second set, including a similar Pottah and Kaboolat, executed by the Respondent as Zemindar in succession to her husband, and the Appellant and Cassinath Chowdry, as purchasers of the Putnee Talook, and as such the assignees of the original Putneedar. The right

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

to the reduction of the rent was contended for by the Appellant on the ground, that the Appellant and Cassinath had entered into a settlement with the Government Collector for the payment of the sum of Rs. 714. 11a. per annum, as Government revenue, in respect of a small piece of land, described as Bheel Bhurutte land, previously only temporarily settled, and which settlement had expired by effluxion of time within less than a year of the dates of the first Pottah and Kabooleat. This new settlement, however, it appeared, was made voluntarily, and for their own benefit, by the Appellant and Cassinath previously to applying for the Pottah from the Respondent and executing the Kabooleat, by which they expressly undertook to pay to the Respondent, as Zemindar, the full amount of the fixed annual rents reserved by the original instruments, without any deduction whatever. There was a further question raised in the Court below, whether the Appellant was entitled to recover from the Respondent the gross sum of Rs. 7861. 9a., with interest out of the fixed annual rent of Rs. 16,001, which the Appellant had paid under these instruments, for a period of nine years, previous to the time when the suit was brought. This sum of Rs. 7861. [437] was the aggregate amount of the payments of Rs. 714. 11a. per annum, charged by the Appellants on account of the Government revenue during the period of nine years and upwards. The Zillah Court decided the two points in favour of the Appellant, but without allowing interest, and the Sudder Dewanny Adawlut on appeal, reversed that decree on both points. Hence this appeal.

The following were the facts of the case:—

Rajah Kistonaath Roy was possessed of a hereditary Zemindary, called Dehee Hajeepore Dehee, Nabudenttee, etc., appertaining to Pergunnah Boorun, otherwise Lockenathpore, the annual Government revenue payable for which, under the permanent settlement, was Rs. 9976. 8a. 4p., and was recorded as proprietor in the books of the Collector of Zillah Nuddea. It appeared that there was near or adjoining to the Zemindary a piece of reclaimed land, described as Bheel Bhurutte (filled up), which was not included in the perpetually settled lands of the Zemindary, but subsequently assessed for a short fixed period, this piece of land was, under the ordinary proceedings taken on behalf of Government. This resumption took place while the Rajah was a minor, and thereupon his guardians entered into a temporary settlement with Government for the land, for a period of ten years, ending in the years 1251 B.E., corresponding with the year 1844-5 C.E. The revenue assessed by the Government officer, and made payable under that settlement, was paid separately from the Government revenue payable for the Zemindary, first by the guardians, and subsequently by the Rajah; and this payment was made, as it appeared, not into the Collectorate of Zillah [438] Nuddea, where the Government revenue for this Zemindary was paid, but into the Collectorate of Barasett in the adjoining Zillah of the 24 Pergunnahs.

On the 18th of July, 1844, the Rajah, in consideration of Rs. 20,000, paid down, and an annual fixed rent of Rs. 16,001, exclusive of Suranjamee (collection expenses) and Malikanah (proprietor's maintenance allowance), reserved and made payable for ever to the Zemindar, gave to J. D. Herklotts, and his heirs, as a reward for past services as his manager, a beneficial lease of his Zemindary and Zemindary rights; and a Pottah was accordingly executed by the Rajah of that date, which created and granted to Herklotts and his heirs for ever, a tenure called a Putnee Talook, of the Zemindary, recognized and sanctioned by Ben. Reg. VIII. of 1819, to be held and enjoyed by Herklotts and his heirs and assigns, subject to the payment of the above annual fixed rent to the Zemindar. This Pottah described the premises granted by the Rajah as a Putnee Talook:—as “My Zemindary in Zillah Nuddea, the Sudder jumma of which is entered at Co.'s Rs. 996. 8a. 4p. in the Collectorate of the Zillah, together with the Modafat, the Mouzahs, the entire Zemindary rights, with the settled Churs resumed Chukeran, Khangee Lakhiraj Kureedgee (purchased), Dawuttur, Chuppur, and Backuppore (inhabited and uninhabited), Chuckbustee, in possession and out of possession, movable and immovable, the whole of the Mehals, together with the lands settled under Reg. II.” And the Pottah, after providing, that “whatever orders are in force, and such as may hereafter be issued from the authorities of the Collectorate, etc., [439] you will obey and act accordingly,” concluded as follows:—“The Zemindary rights that I have in the Dhees (villages)

aforesaid have been made over to you in Putnee, the boundaries of which, as they have existed in possession, you will preserve, and, paying the Malguzaree, you will continue to hold and enjoy from generation to generation."

The Kabooleat, or counterpart of the Pottah or lease was executed by Herklotts, followed entirely the Pottah, repeating only its provisions, with this addition, viz.:—"I will make Jurreep (measurement) Jummabundee (assessment) of rent payable by the Ryots) of the said Mehal (estate), and whatever excess (i.e., of rent) may arise thereby shall be my right. The same will have nothing to do with you."

The Rajah committed suicide (see as to the effect of *felo de se*, the case of *The Adm. Gen. of Bengal v. Ranee Surnomoye Dossee*, ante [9 Moo. Ind. App.], p. 391), whereupon the Respondent instituted a suit in the Supreme Court in Calcutta, as his widow and heiress-at-law, claiming to be entitled to the estate and property; and she was put into possession of the estate and property of the Rajah.

Before this took place, and on the 7th of December, 1844, Herklotts entered into an agreement with the Appellant and Cassinath to sell to them the Putnee Talook, and all his rights under the Pottah and Kabooleat, for the sum of Rs. 42,815, and Rs. 11,000, of that amount was on that date paid to Herklotts, as earnest-money. The Kubula (instrument of sale) was executed by Herklotts on the 10th of January, 1845. That instrument set out the premises in the language of the before-mentioned Pottah and [440] Kabooleat, the agreement for sale and payment of the earnest-money aforesaid, as well as the payment of the balance of the purchase-money, viz.—Rs. 31,815; and that Herklotts had on his part undertaken to put them in possession of the Putnee Talook, and to have the purchaser's names registered by the Zemindar, in the place of his own, as Talookdars; and that the latter would, on their part pay, according to the stipulations of my Putnee Pottah and the Kabooleat Kistbundee, Rs. 16,001, as Malguzary, to the Rajah, from year to year, and hold possession from generation to generation over the proceeds of the Putnee Talook aforesaid.

It appeared that the Appellant and Cassinath also got possession of the piece of Bheel Bhurruttee in the Zillah of 24 Pergunnahs, together with the lands granted to Herklotts in Putnee, situate in the Zillah Nuddea.

The temporary settlement of this piece of land being about to expire, a remeasurement of the same on the part of Government took place in the year 1251, when the same was set down at 1340 beegahs 1 cottah; and on the expiration of the term of the Settlement, the Government Collector made a new settlement, on the basis of the last measurement, and accordingly assessed the lands in question at the rate of 8 annas $6\frac{1}{2}$ gundahs, payable as Government revenue annually, per beegah, making the aggregate amount Rs. 7114. 11a., from which, however, was then deducted 12 per cent, on account of allowance for Surunjamee (collection) and other expenses, leaving a fixed annual revenue of Rs. 628. 14a. 16p., payable to Government, including the Malikanah of [441] Rs. 62. 14a. 8p. annually. It appeared, also, that on the application of the Appellant and Cassinath Chowdry, without communicating with the Respondent, as the heiress-at-law, or with the Court of Wards, a settlement was made with them by the Government Collector in respect of that piece of land, on the terms aforesaid, and for a settlement for a new term of ten years, commencing in the year 1252 B.E., and ending in the year 1261 B.E., and that, by such settlement, it was expressly provided that the Ijardars (farmers), should pay the Malikanah and should deposit the same in the Government treasury, having been calculated first at the rate of 13 per cent, being Rs. 81. 12a. 4p. per annum; but afterwards, on 10th of March, 1851, at the reduced rate of 10 per cent per annum, making Rs. 62. 14a. 3p., per annum, and that on the 17th of June, 1845, the Appellant and Cassinath without the privity of the Respondent, took an Amulnamah Pottah, or Ijarah (farming) lease of the Bheel Bhurruttee land from the Government, on the terms of the above settlement.

Subsequently, and in accordance with the provisions of Ben. Reg. VIII., of 1819, they, as purchasers of the Putnee Talook, applied to the Respondent, as heiress-at-law of her late husband, for a confirmation of the purchase and registration of their names in the Zemindary books, offering security for their due payment of the fixed annual rent of Rs. 16,001, in respect of their Putnee Talook.

Their names, as such purchasers, were accordingly registered in place of the

Herklots, in respect of the Putnee Talook, in the records of the Zemindary by the Appellant, on their executing the usual Ikrar [442] Kabooleat (agreement to pay rent). This Ikrar Kabooleat, executed on the 20th September, 1849, had no reference to, and made no mention of, the piece of Bheel Bhurruttee land, or of the new settlement thereof.

In accordance with custom, a Pottah of confirmation was executed and delivered by the Respondent to the parties, on the 19th of October, 1849. That Pottah recited the Ikrar Kabooleat, and concluded as follows:—"It is necessary that you, considering yourselves confirmed as Putneedars of the Mehals above mentioned, according to the stipulations of your respective Kabooleats and Ikrars, remain in possession of the Mehals, and enjoy the same, and that you, from month to month, and Kist to Kist, according to Kistbundee, pay the rent due from each, and in nowise depart from the Kabooleats and Ikrars given by you separately."

From the dates of the Pottahs and other deeds respectively, to the filing of the plaint in the suit, the Appellant and Cassinath paid to the Respondent, without making any objection, or protest in performance of their covenant in that behalf contained in their Ikrar Kabooleat, the fixed annual rent of Rs. 16,001, according to the prescribed instalments in the Kistbundee. And also paid into the Government treasury for the Respondent, the sum of Rs. 62. 14a. 3p. per annum, Malikanah allowance, together with the amount of Government revenue—Rs. 566. 0a. 7p.—making together the sum of Rs. 628. 14a. 10p., so reserved and made payable by them as such farmers of the piece of Bheel Bhurruttee land under the new settlement with the Government, without any objection on [443] their part, and it was not until the plaint hereinafter mentioned was filed, that any intimation was conveyed to the Respondent, that the Appellants considered themselves entitled to claim any deduction from the fixed annual rent of Rs. 16,001, on the ground of their having entered into the new settlement, and thereby undertaking to pay revenue in respect of that piece of Bheel Bhurruttee land.

The suit out of which this appeal arose was commenced by the Appellant and the others in the Zillah Court of the 24 Pergunnahs. The principal facts above set forth appeared in the plaint; which sought to recover the gross sum of Rs. 11,692. 4a. 13p., on account, as the Plaintiffs alleged, of rent twice paid, being the sum of Rs. 714. 11a., from the year 1252 to 1260 B.E., a period of nine years and five months, and it prayed that such sum of Rs. 714. 11a. might be deducted from the fixed annual rent of Rs. 16,001, of the Putnee Talook, and that the sum of Rs. 15,286. 5a. be fixed as the annual jumma of the Putnee Talook. The plaint did not allege that the Respondent was ever applied to by the Plaintiffs to enter into the new settlement with Government in respect of the piece of Bheel Bhurruttee land, or that there was any undertaking on the part of her late husband, that he or his heirs would do so.

The answer of the Respondents denied the right of the Appellants to recover, stating the circumstances under which the Putnee Talook was granted to Herklotts, and denied that the instruments creating the Putnee included, or that it was the intention of the Rajah and Herklotts to include, the jumma of the resumed lands within the permanent jumma of the Putnee tenure. [444] and the answer submitted to the Court that the Appellants were not entitled to recover the principal moneys claimed; and that, in any case, interest was not payable.

The suit being at issue the original Putnee Pottah and Kabooleat executed by the late Rajah and Herklotts respectively; the Kubbala, executed by Herklotts in favour of Appellant and Cassinath; the Pottah of confirmation executed by the Respondent were put in evidence.

The Respondent filed, as evidence, the Kabooleat executed by the Plaintiffs to the Respondent, containing their covenant, binding themselves to pay in full, without deduction, the fixed rent of Rs. 16,001, expressly reserved by the Respondent's Pottah, and applied that the Appellant and Cassinath might be examined, which the Court refused.

The hearing of the suit took place before Mr. J. S. Torrens, the Judge of the Zillah 24 Pergunnahs, on 6th of August, 1855, and his decree was made on the 19th of September, 1855, in favour of the claim of the Plaintiffs; the material part of this decree was as follows:—"On consideration, as it appears that the Plaintiffs have

been obliged to pay jumma twice over on their Putnee, owing to Defendant not fulfilling her part of the contract as far as in her power. I give a decree for the deduction; but as the claim must be calculated according to the engagement as exchanged at the time the Putnee was constituted, I deduct from this the jumma on the thirty-five beegabs measured in excess of the settlement as existing when the Putnee was given; also the Surrunjamee allowed to Plaintiffs by the Collector, viz., Rs. 83. 8a. per annum [445] on the jumma paid, the deduction henceforward from the Putnee jumma, and the refund on past collections to be calculated accordingly, subject to Defendant having a right to demand at any time from Plaintiffs the right of entering herself into settlement as Zemindar, and, in doing so, receiving the original Putnee jumma; such arrangement being in conformity with the object of the prayer of the plaint, which is only to avoid double payment. It does not appear either that the plaint sets forth that the demand for restitution was made to the Rance before the institution of the suit, and I, therefore, do not allow interest previously accruing; only that from date of the action. Costs to be modified accordingly."

The Respondent appealed from this decree to the Sudder Dewanny Adawlut, on the merits and on the special ground, that the Judge had refused to take the evidence of the Appellant and Cassinath. The Appellant also appealed against the decree, so far as it did not give interest on the claim.

The hearing of the two appeals came on before the full Bench of the Sudder Dewanny Adawlut, consisting of Messrs. C. B. Trevor, G. Loch, and H. V. Bayley, on the 30th of April, 1858; when the Court reversed the decree of the Zillah Judge, and delivered the following judgment:—"After giving our best consideration to the arguments of the Pleaders and the circumstances of the case, we are of opinion, that neither the terms of the lease generally, nor the special words relied on, 'settled Churs,' and 'lands settled under Reg. II., of 1819,' include, or can be fairly construed to include, the lands in suit. The lease is definite and distinct throughout as to its [446] being a lease for Mehal Dehee Hajeepoor and Dehee Nabudcuttee, in Zillah Nuddea, paying a jumma there of Rs. 9996. 15a. 8p. The 'settled Chur,' and 'lands settled under Regulation II.,' and the other supplementary definitions of what is included in the lease, refer to the appurtenances of the Putnee Mehal, with its above jumma, as paid into the Nuddea Collectorate; and to no separate Mehal, such as Bheel Bhurruttee lands in suit. We observe that the Zillah Judge refers to the admission made by the Defendant as to Herklotts having received these lands along with his Putnee; but this is not so. The words in the answer are, that such rights in the Bheel Bhurruttee as the Rajah had, were given to Herklotts. But those rights were merely those of settlement, and we cannot see that there is any admission here that the Bheel Bhurruttee lands formed part of the Putnee lease. We further observe, that the revenue of the Putnee Mehal was paid into the Nuddea Collectorate separately, and that of the Bheel Bhurruttee lands into the Twenty-four Pergunnahs Collectorate separately; that the Plaintiffs got possession simultaneously of the Putnee Mehal and separate Bheel Bhurruttee land; that the Plaintiffs paid the rents of the Putnee and Bheel Bhurruttee independently and separately, for nine years and more, without protest, although they had full and obvious occasion for making such protest when they registered themselves as Putneedars in the Zemindari Sherishta, and when they received the farming lease of the lands in suit. These facts show an acquiescence by Plaintiffs, which affords a strong legal presumption that the lands in suit were not included in the Putnee lease. Under these circum-[447]stances, it is needless to give our opinion at any length as to the evidence of Defendant's witnesses. We deem it, however, in itself vague and unsatisfactory as to the point of the parties intending and speaking of the intention that the lands in suit should be considered included in the Putnee, and insufficient of itself to rebut the evidence to the contrary afforded by the terms of the deed and the facts of the case. We, therefore, reverse the decision of the Judge in the appeal, No. 157, and decree the appeal, with costs, on the Plaintiffs. In the appeal No. 158, in which Prannath Chowdry appeals on the point of interest, we dismiss his appeal as a necessary consequence of our judgment in the foregoing case, with costs."

The Sudder Court refused leave to appeal, but upon special petition leave was

granted by the Judicial Committee (see case reported upon this point, 7 Moore's Ind. App. Cases, 553).

Mr. Rolfe, Q.C., and Mr. W. M. Jervis, for the Appellant, in support of the appeal, contended that the resumed lands in question were originally appurtenant to and included within the Zemindary of Rajah Kistonaath Roy, and that the lands were resumed and a summary settlement made under Ben. Reg. II., of 1819, with the guardians of the Zemindar for ten years from April, 1835, to April, 1845, and the Putnee Pottah of the 18th of July, 1844, expressly included the lands settled under that Regulation, and bore date before the settlement made with the guardians of the Zemindar [448] had expired. That the subsequent instruments in like manner included the lands so settled under that Regulation, and insisted that there were no other lands settled under the Regulation to which the Putnee Pottah and other instruments could refer. That even if the resumed lands were in any way referred to as the Putnee Pottah, there was no reasonable grounds for contending that such Pottah comprised only the Zemindary right to a settlement with Government in respect thereof, and did not comprise the land itself as covered by the purchase money and annual Putnee jumma. That the acts of the Respondent and the deceased Zemindar, whom she represented, were consistent only with such a construction of the Pottah. And they further contended, that the payment of the Government jumma of the resumed lands into the Collectorate of the Twenty-four Pergunnahs and not into the Collectorate of Nuddea, was a mere fiscal arrangement, which could not affect the construction of the contract between the parties.

The Solicitor-General (Sir R. Palmer) and Mr. Leith, appeared for the Respondent, but were not called upon.

The Right Hon. Lord Kingsdown.—Their Lordships are of opinion that this case is perfectly clear,—and that there can be no doubt that the judgment of the Sudder Court must be affirmed.

The Rajah held the Zemindary at a jumma rent of nearly Rs. 10,000, he sells the Zemindary to a purchaser for Rs. 20,000, and a jumma rent of Rs. 16,000.

In addition to the Zemindary, which he held in perpetuity, there were certain lands which were added [449] by accretion to the Zemindary, which he held for a term of ten years at a jumma rent, with a right of renewal, more or less defined, but at all events with some preferential rights.

In that state of things he sells his Zemindary, and says nothing about the other lands. What does he sell then? He sells, of course, the interest he had; he sells the perpetual interest he had in the lands he held in perpetuity, and he sells the interest he had in the lands he held for ten years for the remainder of that term. At the time the sale is made, it appears that there were only ten months of that term to run. The jumma was a simple one, and it was not necessary to mention the rent for that jumma in the contract. The expiration of the term, namely, at the expiration of the ten months, the purchaser asks a renewal of the term. He has the right of renewal, or the right of throwing up the lands, but he has no contract or engagement with the vendor that will run for his benefit; but he makes a renewal, and he makes a renewal by which he engages to pay a certain rent, he continues to pay a certain rent to the Government, and, having engaged to pay that rent, he continues to pay it for nine years, and then he and others, institute a suit for the purpose of obtaining repayment of what he has thus paid, insisting that he was entitled to it, and asking to have deducted out of Rs. 16,000, which he had engaged to pay to the Ranee. He had obtained by some reason or other a renewal of the grant from the Ranee, and in it he stipulates for payment of Rs. 16,000, per annum, from which he now says Rs. 714. 11a. are to be deducted.

Their Lordships are satisfied that there is no ground [450] for the claim, and will advise Her Majesty to dismiss the appeal with costs, as the appeal in their opinion was groundless.

THE COLLECTOR OF MADURA.—*Appellant*: VEERACAMOO UMMAL.—*Respondent* * [June 30, 1863].

On appeal from the Sudder Dewanny Adawlut at Madras.

Suit by Government for possession of the Polliam of Erasaca Naiknoor in Madras, as an escheat for want of male heirs, dismissed. The Government having acquiesced in the right of female succession to the Polliam, and possession had for a period of eighteen years after the alleged escheat.

Females are not precluded by any rule of descent, custom, or usage of the Cumbala Tottier caste, from succeeding to a Polliam.

In this case the appeal was brought from a decree of the Sudder Dewanny Adawlut at Madras, by which decree the Appellant, as sole surviving heiress of her deceased father, was declared entitled to the Zemindary of Erasaca Naiknoor, with mesne profits.

The facts of the case were these:—

In the year 1802, Mooltalagari Naiker was put into the possession, as Polligar, of the Polliam of Erasaca Naiknoor, by the Government, upon condition of payment of tribute, and other conditions specified [451] in the Moolchilka executed by Mooltalagari Naiker, dated the 17th of December, 1802. It did not appear that any Sunnud-i-Milkeut Istimrar had been granted by the Government of the Polliam in question.

Mooltalagari Naiker died on the 9th of December, 1814. Upon his death the Government did not assume possession of, or interfere with the Polliam, but the same remained in the charge of Ellappa Mudali, the Manager who had conducted the affairs of the Polliam during the lifetime of Mooltalagari Naiker, for the benefit of his son, Chinnobola Naiker, who became the Polligar of Erasaca Naiknoor. Chinnobola Naiker died in the year 1835, without male issue, leaving two widows, named Chinnammal and Papanmmal, by the latter of whom he left one daughter, the Respondent, Veeracamoo Ummal. Shortly after the death of Chinnobola Naiker, one Shuckama Naiker, who had entered upon the management of the affairs of Erasaca Naiknoor Polliam, claimed to be entitled thereto as the nearest male heir of Chinnobola Naiker; whereupon the two widows presented a petition to the Board of Revenue, praying to be put in possession of the Polliam: and an Order having been passed by the Board, granting the prayer of the petition, the Collector of Madura issued a Sunnud on the 4th of April, 1836, putting them in possession.

Disputes arose between the widows as to the joint enjoyment of the Polliam; and, in December, 1836, Papanmmal filed a plaint in the Court of the Sudder Ameen of Madura, against Chinnammal and five other Defendants, for the recovery of half the value of the produce of the Polliam. The Sudder Ameen made a decree in favour of Papanmmal, and from that decree Chinnammal appealed to the [452] Zillah Court of Madura. After putting in her answer, Papanmmal died. The Zillah Court pronounced judgment on the appeal on the 4th of December, 1839, and thereby determined that Chinnammal, as the sole surviving widow of the late Zemindar, should remain in full possession of her husband's Zemindary and other immoveable property; and that, after her death, the deceased widow's only daughter, the Respondent, was the sole heiress.

On the 29th of October, 1841, Shuckama Naiker instituted a suit in the Court of the Subordinate Judge of Madura, against Chinnammal, whereby he claimed the Polliam as an undivided cousin and nearest male heir of the late Chinnobola Naiker; and a decree was made in that suit in his favour by the Subordinate Judge. Against that decree an appeal was brought by Chinnammal to the Zillah Court of Madura; and on the 15th of December, 1848, that Court reversed the original decree, and nonsuited Shuckama Naiker.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Chinnammal leased the Polliam to Chockalinga Pillay, in the year 1818, for a term of nine years.

On the 12th of July, 1853, Chinnammal died, and upon her death the Respondent, and Radurasawmy Naiker, the son of Shuckama Naiker, then deceased, put in their several claims to the Polliam of Erasaca Naiknoor, and severally claimed to be put in possession thereof by the Collector of Madura. The Respondent's title was founded upon being the grand-daughter of Chinnobola Naiker, and upon the before-mentioned two decrees of the Zillah Court of Madura, made upon appeal. Radurasawmy Naiker grounded his claim on the fact that Chinnobola Naiker, the last male Polligar, was of the Cumbala Tottier caste, [453] and the custom in that caste, by which he insisted, females were excluded from succeeding to a Polliam, and relied on certain declarations alleged to have been made by Chinnobola Naiker in favour of his branch of the family.

The then Collector of Madura made a report to the Board of Revenue, dated the 6th of September, 1853, upon the respective claims to the Polliam, and reported that it had escheated to the Government. He, at the same time, drew attention to the fact of the lease by Chinnammal to Chokalinga Pillay, and recommended that, as the conditions of the lease had been performed by the lessee, it should stand ratified and confirmed for the period which then remained unexpired; and he also submitted for consideration, whether, in the case of the property being declared to have escheated, a pension should be granted by the Government to the Respondent.

In the year 1854, proceedings were taken by the Respondent in the Court of the Subordinate Judge and in the Zillah Court of Madura, with a view of obtaining a precept in the execution of the before-mentioned decree of 1818, on appeal, requiring the Collector to place her, as the daughter and heiress of Papammal, in possession of the Polliam. Those proceedings resulted in an order of the Zillah Court, directing that the Polliam should be delivered over to the Respondent. Upon appeal to the Sudder Dewanny Adawlut, however, the Order of the Zillah Court was, on the 26th of February, 1855, set aside, upon the ground, that the Collector was in possession, and was not a party to the suit in which it had been decided that the Polliam should go to the Respondent upon the death of Chinnammal.

[454] The Government shortly afterwards declared that the Polliam of Erasaca Naiknoor had escheated by the failure of male heirs.

In consequence of which, the Respondent, on the 2nd of January, 1856, instituted the present suit in the Civil Court of Madura, against the Collector of Madura and three other Defendants, one of such three Defendants being the adopted son and heir of Chokalinga Pillay, and the other two Defendants being sub-lessees of portions of the Polliam by virtue of leases from Chokalinga Pillay. By the plaint the Respondent prayed for a decree awarding to her the Polliam of Erasaca Naiknoor, together with the mesne profits, amounting to the sum of Rs. 113. 13a. 7p.

The Collector of Madura by his answer insisted, first, that according to the custom of the Cumbala Tottier caste, to which he alleged the Respondent belonged, females were not competent to succeed to a Polliam, and secondly, that the enjoyment of the Polliam by Chinnammal and Papammal was merely permissive on the part of the Government, and that the Respondent could derive no title as against the Government from a decision in a suit in which the Government was not a party. The second Defendant, by his answer, insisted upon the validity of the lease from Chinnammal. The other Defendants did not appear.

The Respondent put in evidence a decree of the Southern Provincial Court, in a suit, No. 10 of 1824, concerning the possession of a Zemindary, called Sandayoor, by which it was decided that the widows of the late Zemindar were entitled to that Zemindary; and examined three witnesses with reference to the custom of females of the Cumbala Tottier caste succeeding to a Polliam.

[455] The evidence adduced by the Collector was solely documentary, the chief of which consisted of copies of answers from Zemindars of the District in which Erasaca Naiker Polliam was situate (one of them being the copy of answers given by Chinnobala Naiker, the last Polligar of Erasaca Naiknoor), with respect to the succession to their respective Polliams. These answers were given at the request of the Government, and were to the effect, that females were debarred from inheriting landed property. A letter to the Board of Revenue from the Collector of Madura,

dated the 31st of January, 1804, with respect to Zemindaries to which females could not succeed, was also put in.

After great delay arising from the sickness of the former Collector of Madura, as the suit had not then come to a hearing, the then Collector, on the 11th of February, 1859, presented a petition to the Civil Court, praying the Court to reopen the case and examine his witnesses, and allow him to file documents in support of the statement in the answer that no female of the Cumbala Tottier caste could succeed to a Polliam, and by such petition he submitted, that the right decision of that question was of grave importance, not only to the Government, but to the numerous Polligars, of that caste in the South of India. The Civil Judge, however, on the 14th of February, 1859, passed an order refusing the application.

The officiating Civil Judge, Mr. R. R. Cotton, pronounced judgment on the merits on the 30th of March, 1859. The material part of his judgment was in these terms:— "In the present case it appears clear, that the Plaintiff has been declared the heir and successor to her father's estate after the death of [456] her stepmother, Chinnammal, and that though the first Defendant, on the plea that it was not usual for females to succeed to estates, has prevented her being put in possession of the Erasaca Naiknoor Polliam, he has entirely failed to show that such custom has either the force of law, or is acted up to; on the contrary, he admits in opposition to it that females have been, by order of the Revenue Board, and with his sanction, for the last eighteen years, in enjoyment of this very estate, while the Plaintiff has shown a like enjoyment by females of Sandayoor estate since 1824. With regard to the first Defendant's arguments, that the decree in appeal, No. 20, of 1838, cannot effect the present suit, inasmuch as the Plaintiff was not a party to it, or the estate the property litigated for, the officiating Civil Judge considers them erroneous; it is evident that the Plaintiff on the death of her mother became a party to the suit, as appears from the questions put to the Pundits, and their answer in that case, and that although the suit was brought for recovery of a sum of money, the proprietary right to the estate was the basis on which the suit was brought. As regards the claim made against the second Defendant, as the lease was continued and endorsed by the first Defendant, he must be considered the responsible party. The second Defendant pleaded, that the profits were too highly calculated, and was directed to show this; he filed eight exhibits, receipts for money, which, however, do not disprove the claim of the Plaintiff, whose documentary evidence supports it. It is difficult to reconcile the fact of the first Defendant ignoring the late Chinnammal's right to the estate, and his acknowledging and endorsing an agreement made by her (though at most a life [457] tenant) extending over seven years, and four beyond her decease. Under the above circumstances, the officiating Civil Judge considers that the Plaintiff is entitled to a verdict, and he, therefore, decrees, that the first Defendant do make over to her, as sole surviving heiress of her deceased father, the estate of Erasaca Naiknoor, and do also pay her the mesne profits sued for, and all her costs in this suit. The first and second Defendants will each pay their own costs."

From this decree the Appellant appealed to the Sudder Dewanny Adawlut at Madras, and that Court, consisting of Messrs. T. L. Strange and H. Frere, on the 10th of July, 1860, pronounced the following decree—"The Court is of opinion, that the first Defendant is precluded from challenging the succession of females to the estate in issue by the act of the Revenue Board, representing the Government, in installing Chinnammal and Papammal as the legitimate heirs of the previous Polliar, a condition of things that was kept up unchallenged until the death of the survivor of the widows, eighteen years afterwards. It has not been shown that this recognition of the widows was made under any limitation, or reservation. It must be taken, therefore, to have been absolute. It is urged that Polliams of the description of that in question, namely, not assured by Istimirar Sunnud, are not hereditary, but are held at the will of the Government, who on each lapse may appoint thereto whom they please. This plea, the Sudder Court notice, was not advanced in the Court below. The plea there urged was, in fact, inconsistent therewith. It was there contended, that the estate had fallen to the Government by escheat from lack of heirs, implying, [458] therefore, clearly, that had there been an heir, that person would have been entitled to the property. The plea is also inconsistent with the

installation and recognition by the Government of Chinnammal and Papammal as heirs of the preceding Polligar, and with the allegation that the Plaintiff's pretensions are to be negatived, not because such is the will of the Government, but, as she is a female, a certain rule, being a rule of descent, being urged against her. The Court declines to entertain a plea thus urged upon them, not only novel in its nature, but inconsistent with the former pleadings upon which the defence has been based. The Court do not view the decrees cited by the Civil Judge as declaring the Plaintiff's heirship to be conclusive against the Government, who were no parties to the suits in which they were given, but it being clear that on the demise of Chinnammal, without personal heirs, the estate reverts to the line of her husband, whose daughter the Plaintiff is, it is apparent to them that the Plaintiff is the next entitled to succession. The Court, finding no ground for interfering with the decree of the Civil Judge, dismiss this appeal with costs."

The present appeal was from this decree.

As the Respondent did not appear the appeal was heard *ex parte*.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Appellant, contended. First, that by the rule and custom of the Cumbala Tottier caste, to which the Polligars of the Polliam of Erasaca Naiknoor belonged, no female could succeed to the Polliam, and the Respondent, [459] therefore, had no title, and further that, at the death of the last male possessor in 1835, in default of male issue, the Polliam, which was not assured by Istinnirar Sumud, escheated to Government, although the Government permitted the widows the enjoyment thereof for their lives.

Secondly, that there had been a miscarriage of justice, as evidence to prove the rule and custom of succession to the Polliam, which had been tendered to the Civil Court of Madura, before the hearing of the suit, had been refused, and it was submitted that on that ground the case should be remitted to India to take further evidence.

Their Lordships, after observing upon the delay on the part of the Government in asserting their claim to the Polliam by escheat for the want of male heirs, and the evidence as to the custom and usage for females to succeed to the Polliam in question adduced by the Respondent, expressed their opinion, that the judgment appealed from was perfectly right, and dismissed the appeal, with costs.

[460] GHOOLAM MOORTOOZAH KHAN BAHADOOR.—*Appellant*; THE GOVERNMENT, representing the estate of the late Nabob of the Carnatic,—*Respondent* * [June 15, 16, 1863].

On appeal from the Supreme Court at Madras.

Act, No. XXX. of 1858, of the Legislative Council of India, for the administration of the estate, and payment of the debts of the late Nabob of the Carnatic, empowered the Supreme Court of Madras, to investigate in a summary manner, claims against the Nabob's estate. Held, that the provisions of that Act not only limited the extraordinary remedy which it gave to certain defined classes of debt, but threw upon a Claimant more than the ordinary burthen of proof; by compelling the holder of any written acknowledgment, or security, to prove the actual consideration given for it; and upon those claiming the price of the goods delivered, proof of the fair and actual value of such goods.

It is not the practice of the Judicial Committee to disturb the finding of the Court below upon mere issues of fact, unless their Lordships are clearly

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

satisfied that there has been some miscarriage, either in the reception, or in the appreciation, of evidence.

In cases that turn upon the credibility of the testimony given, the appellate Court is disposed to defer to the judgment of the Judges who, with the advantage of local experience, have had the means of seeing the witnesses under examination, and of inspecting the original documents.

This appeal was brought from such part of an Order of the Supreme Court at Madras, made in the matter of a claim of the Appellant, Ghoolam Moor-[461]-toozah Khan Bahadoor, as a creditor of the estate of the late Nabob of the Carnatic, as did not allow certain sums of money and interest claimed by him against the Nabob's estate.

The Nabob and his family, under the provisions of the Treaty by which the territory of the Carnatic was ceded to the British Government, was by Act of the Legislative Council of India, No. I. of 1844, exempted from process of the ordinary Courts of justice in Madras.

The last Nabob of the Carnatic died on the 7th of October, 1855, leaving debts and liabilities to a large amount unsatisfied, some of which were contracted by himself and some by Azeem Jah Bahadoor, as Nabob Regent, or Naib-i-Mooktar, during the infancy of the late Nabob.

By an Act of the Legislative Council of India, No. XXX. of 1858, provision was made for the appointment of a Receiver for the administration of the estate of the Nabob, and with respect to the satisfaction of all such debts as should be proved to have been fairly and justly contracted by the Nabob, or on his behalf, during his minority by Azeem Jah Bahadoor, as Nabob Regent. Section 14 of that Act enacts, that "Any person claiming to be a creditor of the said late Nabob, who, within the period of three months from the passing of this Act, shall file in the office of the Registrar of the said Supreme Court (at Madras), a written declaration, stating that he is willing to receive in full discharge of all his claims against the said late Nabob, or any property to which the said late Nabob at the time of his death was entitled, either at law or in equity, or which is liable either at law or in equity to satisfy the debts of the Nabob, such amount as shall be [462] ascertained by the said Supreme Court to have been justly and fairly due to him from the said late Nabob at the time of his death, or to be a charge upon such property, and to remain unpaid (the amount to be estimated in respect of moneys at the amount which shall be proved to have been actually advanced to or paid for the use of the said Nabob, and in respect of goods supplied or other matters at the amount which shall be proved to have been the fair and actual value thereof at the time when such debts were incurred), together with such interest (if any) not exceeding the rate of six per cent. per annum, as shall be awarded by the said Court; and that he is willing to give up any mortgage or security which he may hold upon any part of such property as aforesaid, or which shall have been charged with the debt,—shall be entitled, upon giving up such mortgage, or security, to the said Receiver, to have the amount of his claim ascertained by the said Court, in manner hereinafter mentioned."

Section 22 of the same Act, so far as the same is material in this case, was as follows:—"Upon the day so fixed, or upon any other day to which the Court may think fit to postpone the investigation, the Court, after proof of the service of the notice required by section 19 of this Act, shall proceed to ascertain and determine, in a summary way, what amount is justly and fairly due from the estate of the said Nabob at the time of his death to the Claimant, whether the debt be payable by instalments or not, and whether or not the day or days fixed for the payment thereof shall have arrived. In ascertaining such amount the said Court shall not allow to any person claiming to be a creditor in respect of money lent or advanced, any larger sum than the amount which shall be [463] proved to have been actually advanced to or for the said late Nabob. * * * *"

It appeared from the evidence adduced before the Supreme Court in support of the Appellant's claim, that the Appellant was the nearest male relative of the late Nabob, and many years older than the Nabob, and, having been associated with him from his early childhood, was upon terms of the greatest intimacy with him: that he had been brought up by the Nabob's grandmother, commonly called the

Nabob Begum, and was the intimate friend and confidential agent of the Nabob Begum; and also of the Nabob's mother, Ennayet Oonissa Begum, commonly called Bhow Begum; that prior to the year 1843, the Appellant received from the two Begums gifts of houses and other property, and also large sums of money, to the amount of about 4 laes of Rupees; but in consequence of his extravagance, he was obliged to take the benefit of the Indian Insolvent Act in July, 1843; that subsequently to that period, the Appellant was constantly employed by the young Nabob, who had been installed in August, 1842, in obtaining loans of large sums of money for him through money-lenders; and there appeared to have been numerous confidential pecuniary transactions between the Nabob, his mother and grandmother, and the Appellant; that in the year 1848, the Nabob, being involved in debt, established an office called Istafa Cutcherry, or an office for the settling of accounts; and from that office Bonds were issued in settlement of accounts ascertained to be due, such Bonds bearing or not bearing interest, according to the terms thereof; that shortly after the establishment of the Istafa Cutcherry, the Appellant sent in a document, purporting to be an [464] account of balances due to him; but, inasmuch as such account was a mere abstract, without any particulars, and the particulars, though demanded, were never obtained from the Appellant, his account was not settled, as were the accounts sent in by other persons, and the same remained unsettled at the time of the death of the Nabob in 1855; that the Nabob's mother died some time before the month of May, 1849; the Nabob's grandmother in the year 1857; and the mother of the Appellant about the same time.

On the 19th of November, 1858, the Appellant filed a written declaration, in the term prescribed by section 14 of the Act, No. XXX., of 1858, in the office of the Registrar of the Supreme Court, and thereby claimed to be a creditor of the late Nabob. Notice of such declaration was subsequently given to the Solicitor of the Government at Madras, together with the particulars of his claim, filed by him, and showing as due to him from the Nabob's estate, upon a balance of account, the sum of Rs. 13,50,958. 8a. 7p.

The particulars of claim consisted of two parts; and in the first part—the items in respect of which a claim for principal and interest was made—were described as follows:—1st item. “1846, January 10.—To cash deposited by this Claimant's mother with Ennayet Oonissa Begum, the mother of the late Nabob, prior to the date, which money was admitted by the late Nabob to be due and payable by him to this Claimant, in a letter addressed to this Claimant, written by his order and signed by Salar-ool Moolk, his private secretary, dated the 11th day of Shaban, 1271, the original of which is filed herewith. This Claimant is unable, as he does not know when [465] these moneys were paid, to give the dates of the payments; but on this 10th of January, 1846, the late Nabob executed and delivered to this Claimant's mother a bond for Rs. 7,00,000, payable to Mr. J. Arathoon, or order, which bond was given to this Claimant by his mother, and was delivered up by this Claimant to the Istafa Cutcherry, on or about the 1st September, 1851, Rs. 9,00,000.” 2nd item. “1847, September 1.—To cash lent on or about this date by this Claimant's mother to the said Ennayet Oonissa Begum, the mother of the late Nabob, in cash; which money the late Nabob promised to repay to this Claimant, with interest at 6 per cent., by monthly instalments of Rs. 2000. Rs. 1,00,000.” 3rd item. “1841, September 1.—To cash paid by the grandmother of the late Nabob of the Carnatic to his the Nabob's mother, in trust to pay the same to this Claimant as a gift, Rs. 2,00,000.”

In the second part of the particulars, the items in respect of which a claim for principal and interest was made were described as follow:—1st item. “1847, January 1.—To cash paid by this Claimant to the late Nabob of the Carnatic himself, prior to this date, the dates and particulars of which he is unable to give; but, in 1847, this Claimant furnished an account, containing this item, to the Istafa Cutcherry. Rs. 43,462.” 2nd item. “1855, March 5.—To cash paid by this Claimant on this date to the late Nabob of the Carnatic for his use, in cash, Rs. 70,475. 4a. 6p.”

The Claimant was examined and many documents were adduced by him, of which those principally relied on in support of the first item, were, in substance, as follow:—A memorandum in the handwriting of the late [466] Nabob, being an account of loans received by the Nabob from his mother, from January to July, 1843,

such loans amounting in the aggregate to Rs. 6,26,132. A document, purporting to be an account of moneys deposited by the mother of the Claimant with the Nabob's mother, and showing Rs. 2,50,000, so deposited in September, 1842, and Rs. 4,50,000, in January, 1843—total Rs. 7,00,000—and also purporting to comprise an account of the amount borrowed by the Nabob out of that sum, setting forth Rs. 6,27,132 as the amount so borrowed prior to August, 1843, and showing Rs. 72,868, as since borrowed up to January, 1844, making together the whole sum of Rs. 7,00,000. A document, purporting to be an account of the moneys borrowed by the Nabob between January and April, 1844, to the amount of Rs. 2,00,000, out of a sum of that amount stated to have been deposited by the Claimant's mother with the Nabob's mother, on the 22nd of January, 1844. A document purporting to be an account of the moneys deposited by the Claimant's mother with the Nabob's mother, and shewing Rs. 2,50,000, so deposited in September, 1842, Rs. 4,50,000, on January 7, 1843, and Rs. 2,00,000, in January, 1844—total Rs. 9,00,000. With respect to the last three documents, no evidence was adduced to prove when or by whom they were written. Though they were found among a miscellaneous collection of papers in a bundle brought from the Nabob's palace, it was urged by the Government that they were open to considerable suspicion, from the fact of the late Nabob's records having been kept in boxes, or bags, which had not, since the death of the Nabob, been securely [467] protected, and were accessible to many persons; and also from the fact of their not having been known to exist by the Officers of Government before the hearing of the claim, although such Officers had been for some time engaged in investigating the claim, and had required all documents bearing thereon to be produced. Another document, called "Memorandum of the account of balances down to the 31st day of December, in the year of Christ, 1847," alleged to have been submitted for settlement by the Claimant to the Istafa Cutcherry shortly after its establishment, which contained the following, amongst other, items:—"The former balance, without any document, Rs. 2 lacs." A document, written on the 10th of January, 1846. "The limited time for repayment is the 31st of December of the said year, for Rs. 7 lacs." A petition of the Claimant to the Nabob, having reference solely to the fact of the Nabob having mortgaged the house in which the Claimant resided. A Letter from Salar-ool Moolk, the Private Secretary of the Nabob, written according to the statements of Salar-ool Moolk and his brother-in-law, Gholam Mahomed, from the dictation of the Nabob, and stated to be, in reply to the above petition. This letter was the document referred to in the statement of this first item in the particulars, and commenced as follows:—"My respected Sir.—In conformity with the Order of His Illustrious Highness, I beg to inform your Honour, in reply to your petition, that, out of the sum of 9 lacs of rupees which belong to the mother of your Honour, and which was, at different times, deposited in the presence of His Highness, in charge of the respected [468] mother of His Highness, a sum of 7 lacs of Rupees was, on one occasion, applied to her use by the respected mother of His Highness, and a bond was thereupon given for it by His Highness, with his signature, under date the 10th day of the month of January, of the year of Christ, 1846." The Claimant also produced a promissory note, dated the 10th of January, 1846, signed by the Nabob in favour of John Arathoon, for 7 lacs of Rupees, which, from indorsements thereon, appeared to have been satisfied by payments from the Istafa Cutcherry, the first payment being of 6 lacs of Rupees on 1st of September, 1851, and the other payment of 1 lac of Rupees, on 28th August, 1852. This promissory note was alleged by the Claimant to have been given by the Nabob on account of the amount alleged to be shown to have been borrowed by the Nabob out of moneys deposited with his mother by the Claimant's mother. The Claimant was examined with reference to his knowledge of the pecuniary transactions between the Nabob and his mother, but all his knowledge was derived solely from certain alleged conversations with those parties; and his evidence as to the subject and effect of any conversation could not be relied on, as he confessed to an exceedingly defective memory.

The principal evidence as to the second item of the first part, namely, Rs. 1,00,000, was as follows:—A document, purporting to be a statement of the amount of loan received by the Nabob's mother from the Claimant's mother, to be repaid by instalments of Rs. 2000; such amount being 1 lac of Rupees. There was, however, no

evidence as to when, or by whom, the above document was written. A letter [469] from the Nabob to his Dewan, in which the following passage occurred:—"I then caused the payment to be made, by adding to the fund the sum of two thousand rupees, on account of the instalment of Moomtazool Moolk, which my deceased mother used to pay, in discharge of the balances, amounting to fifty-eight thousand rupees."

The Claimant claimed this second item as against the estate of the Nabob, upon the ground, that he took possession of his mother's property upon her death, but no evidence was adduced as to the amount of such property.

No evidence was given by the Claimant in support of the statement in the particulars as to this second item, namely, that the late Nabob had promised to repay the sum to the Claimant, with interest at six per cent., by monthly instalment of Rs. 2000. Nor was any evidence adduced to show any liability on the part of the late Nabob, or his estate, in respect of the sum comprised in the second item; on the contrary, the Claimant himself stated that he did not include this second item in the account sent in to the Istafa Cutcherry, because it was not the debt of the Nabob, but was the debt of the Nabob's mother.

The principal evidence as to the third item of the first part of the claim, namely, Rs. 2,00,000, was as follows:—A document purporting to be an account of money deposited by the Nabob's grandmother with the Nabob's mother, for the use of the Claimant, on the 4th of September, 1841, to the amount of 2 lacs of Rupees: and also purporting to contain an account of the amount borrowed by the Nabob out of that sum, from time to time, between the years 1844 and 1847, showing the whole sum to have been so borrowed prior [470] to August, 1847. The before-mentioned letter from Salar-ool Moolk which contained the following passage:—"Besides this, a sum of 2 lacs of Rupees which was, one year previous to the coronation of His Highness, deposited with great secrecy with the respected mother of His Highness, by the respected grandmother of His Highness, namely the Nabob Begum Sahib, who had brought you up, and who had deposited it for your use like your mother, was also at the same time applied by His Highness to his own use. Documents and instalments will be caused to be issued to your Honour for the same. The omission of this item in the account sent by your Honour to the Istafa Cutcherry was, it is believed, owing to the ignorance of your Honour respecting this matter. You having written your petition to His Highness, that His Highness has altogether forgotten your transactions; but since a transaction of which you were not aware has been made known to you, it is manifest that His Highness has not forgotten your transactions."

According to the evidence of the Claimant himself, he never knew anything about the alleged deposit of this sum of 2 lacs of Rupees until the receipt of the last-mentioned letter in 1855, although he admitted he was in constant communication with the Nabob's grandmother.

In the particulars as to the first item of the second part, viz., Rs. 43,462, the Claimant stated, that he furnished an account containing this item to the Istafa Cutcherry in 1847. In the account to which, according to his evidence, the Claimant thus referred, there was no such item as Rs. 43,462, but the Claimant stated that such sum was made up of a portion of an [471] item and of other items comprised in that account, the portion of an item being the sum of Rs. 25,000 and odd, part of a sum of Rs. 55,000, described in such account as "paid to His Highness on different occasions," but part of which, viz., the sum of Rs. 29,000, and odd, was stated not to have been paid by the Claimant, but by a person, called Rajah Coondun Lall, and the other items in that account, alleged as making with the sum of Rs. 25,000 and odd, the sum of Rs. 43,462, being as follows:—"On account of Cotarya Nund Loll and others, Rs. 8150; for the expenses of the feast called Eed-ool Fitus, Rs. 1000; purchasing a horse from Arathoon, Rs. 400; purchasing two horses, Rs. 1000; two watches, with chains, etc., Rs. 840; composed of various kinds, for discharging the money of the Bond belonging to the Meer-i-Somany, or the Commissariat department of the Durbar, Rs. 1050; the account of Miller, for the purchase of utensils, etc., Rs. 4666. 8a.; for the purpose of sending the servants of His Highness to Ennore at night, Rs. 400."

With respect to the sum of Rs. 25,000 and odd, being, after deducting the other items from the sum of Rs. 43,462, the sum of Rs. 25,955. 8a., no evidence was adduced, except certain statements of the Claimant, alleging that the sum was due to

him. The claimant was not able to state when or for what sum, or whether any part thereof, was paid by him, and he did not produce any accounts, in fact he admitted that he never kept any regular accounts at all. With respect to the sum of Rs. 8150, the Claimant confined his claim to the sum of Rs. 5000, part thereof, and such sum was awarded to him by the judgment of the Supreme Court. With respect [472] to the next sum of Rs. 1000, there was no evidence whatsoever, except the fact of such sum being included in the account, and the statement of the Claimant that he had paid such sum for the Nabob, but the Claimant was unable to produce any corroborative evidence, or even to state in what year such alleged payment had been made. With respect to the next sum of Rs. 400, for the purchase of a horse from Mr. Arathoon, the Claimant was unable to depose as to the amount he paid Arathoon. Mr. Arathoon, in giving evidence, said that he had no recollection of the Claimant purchasing a horse for Rs. 400; but, upon the production of his account-book for the year 1846, it appeared that he had in that year sold a horse to the Claimant for Rs. 350. The sum of Rs. 350 was awarded to the Claimant by the judgment of the Supreme Court. With respect to the next sum of Rs. 1000, for the purchase of two horses, the only evidence given was that of the Claimant and of Arathoon. The Claimant did not recollect whether he bought the horses from Major Taylor, or Arathoon, nor clearly as to the price given by him; and Arathoon knew nothing whatsoever about the price, though he recollected the purchase of two horses from Major Taylor. With respect to the next two sums, of Rs. 840 and Rs. 1050 the Supreme Court deemed the evidence sufficient, and awarded the same to the Claimant. With respect to the next sum, of Rs. 4666. 8a., in addition to the statement of the Claimant that he had paid that sum, Mr. Miller was examined, and he proved the payment by the Claimant of Rs. 4000, on account of the Nabob, on the 10th of May, 1847. The sum of Rs. 4000, was awarded to the Claimant by the judgment of the [473] Supreme Court. With respect to the next sum of Rs. 400 there was no evidence whatsoever, except the fact of its being an item in the account.

With respect to the second item of the second part, viz., Rs. 70,475. 4a. 6p., the present appeal had no reference, as the Supreme Court, deeming the evidence in support thereof sufficient, awarded the same to the Claimant.

The evidence adduced on behalf of the Government in opposition to the claim, comprised the following documents, namely, a letter from Gholam Mahomed, the Moonshee of the Istafa Cutcherry, to the Claimant, which showed that the Claimant was called upon to furnish a full and detailed account of the debts contracted by the Nabob through or with the Claimant, in lieu of the account which had then been sent in, and was described in such letter as "an abstract account." A letter from the Nabob to the managers of the Istafa Cutcherry, which was as follows:—"Gentlemen.—In answer to your letter, bearing this day's date, it is written, that certainly the matter of Moomtaz-ool-Bahadoor, in consequence of there being no satisfactory documents, showing the receipts and balances, etc., as to afford entire satisfaction to you, the members have no right to obtain a speedy and complete settlement. Nevertheless, it appears to me just and proper, that for the present the settlement of the money that stands payable by my deceased Auliya (or Highness, meaning thereby the Nabob's mother)—that is to say, six lacs of Rupees, which is a part of the money mentioned in the bond for seven lacs of Rupees now remaining with the said Bahadoor—should, one way or other, be made in the first instance, in order that she may not be subjected to any demand or [474] caption in the day of resurrection, which in my opinion, and according to my principles, is worst of all things. After this, respecting other matters of the said Bahadoor, anything that is to be done in accordance with the rules of those gentlemen will be done. What more should I trouble you with?—Mohummud Ghous."

It appeared that shortly after the above letter, and in consequence thereof, the sum of six lacs of Rupees was paid by the Istafa Cutcherry to the creditors of the Claimant, and an indorsement of such payment made on the promissory note as hereinbefore mentioned. The terms of the above letter were directly opposed to the allegations of the Claimant as to the promissory note having been given by the Nabob in respect of moneys borrowed by him out of the nine lacs of Rupees, alleged to have been deposited by the Claimant's mother with the Nabob's mother. A letter from Gholam Mahomed to the Claimant, reproaching him for his negligence, and re-

questing him immediately to send in his accounts and notes of hand: and another letter from Gholam Mahomed to the Claimant, stating that no answer had been received to his previous letter of the 14th of September, and pressing for the accounts, in order that they might be submitted to the Nabob, were also produced.

The claim was heard before Sir Adam Bittleston, the Officiating Chief Justice, in the months of June, September, and October, 1860; and on the 14th of December, 1860, that Judge pronounced judgment and passed an Order thereon. By such Order and judgment the Supreme Court disallowed the whole of the items comprised in the first part of [475] the Claimant's particulars, with costs; and with respect to the second part of such particulars, the Court awarded to the Claimant the several sums of Rs. 70,475, 1a 6p., Rs. 5000, Rs. 350, Rs. 840, Rs. 1050, and Rs. 4000, and interest and costs of and incident thereto, and disallowed the residue of the claim to the items in such second part, with costs.

The Claimant being dissatisfied with the Order and judgment of the Supreme Court, obtained leave to appeal to Her Majesty in Council against so much thereof as did not allow to him the moneys and interest claimed in his particulars, over and above the sums and interest mentioned as allowed in the Order and judgment (save only as to the sum of Rs. 3150, paid by the Istafa Cutcherry, as admitted by the Claimant, and his costs thereof), and also against so much of the Order and judgment as directed the payment by him of such costs, as in that Order mentioned.

Before any proceedings were taken in the appeal, Ghoolam Moortoozah Khan Bahadoor died, having by his Will appointed George Gilbert Keble Richardson and James Scott Savery Richardson, two of his executors thereof, who, on the 24th of April, 1862, proved the same in the Supreme Court at Madras. By an Order in Council, dated the 3rd of February, 1863, the appeal was revived, and leave was given to them, as executors, to prosecute the appeal, which was accordingly done.

In support of the appeal, the Appellants by their case contended, that the judgment of the Supreme Court at Madras was erroneous.

First, as the Government were bound by the [476] admissions of the late Nabob, that he was indebted to the Claimant for the amounts claimed for money advanced to and paid on account of the Nabob.

Second, that there was sufficient evidence to show that the sums in question were advanced and paid on account of the Claimant; and

Third, that the Supreme Court ought not in equity to have ordered the Claimant to pay the Respondents the costs of appearing and opposing his claim at the hearing.

The Government submitted, that the Order and judgment was right—

First, as respected the first and third items of the first part, that there was no trustworthy evidence of the Claimant's mother having made the alleged deposits with the Nabob's mother, and that the means and the conduct of the Claimant's mother, so far as the same appeared in evidence, were opposed to the supposition of such deposit having been made.

Second, that with regard to the second item of the first part, there was no trustworthy evidence of the Nabob's grandmother having made the alleged deposit with the Nabob's mother, and that the conduct of the Nabob's grandmother was opposed to the supposition of such deposit having been made.

Third, with regard to the items of the first part, that even if the alleged deposits by the Claimant's mother and the Nabob's grandmother with the Nabob's mother were in fact made, it was not proved that the Nabob borrowed, or appropriated to his own use, the sums so deposited, or any of them.

Fourth, as respected all the items of the first part, even if the moneys were, in fact, deposited, and the [477] Nabob did actually borrow or appropriate the same to his own use, the claim of the former Appellant in respect thereof was not such a claim as could be allowed, consistently with the provisions of Act, No. XXX. of 1858, under which the claim was preferred.

Fifth, as respected the sums and portions of sums comprised in the first item of the second part, which were disallowed by the judgment appealed from, that there was not sufficient evidence to prove that such sums, or portions of sums, were justly and fairly due to the former Appellant from the Nabob at the time of his death; and

Lastly, that the parts of the Order appealed against were in accordance with the probabilities of the case, and no other Order with respect to the subject-matter of the appeal would have been warranted by the evidence adduced in the case.

Sir Hugh Cairns, Q.C., and Mr. Ayrton, were heard for the Appellants.

At the conclusion of their argument, their Lordships, without calling upon the Solicitor-General (Sir R. Palmer), Mr. Forsyth, Q.C., and Mr. W. H. Melvill, who appeared for the Government, directed the case to stand over.

After consideration, judgment was now delivered by

The Right Hon. Lord Kingsdown (July 9, 1863).—This case stood over after the Appellant's Counsel had been heard, in order that their Lordships might have an opportunity of examining the evidence on which the questions raised by the appeal depend. [478] They have accordingly done so, and having considered it carefully, and fully weighed the arguments advanced on the part of the original Appellant, in the course of which everything that can be found in the record favourable to his case, was well connected and arranged, they have come to the conclusion that the appeal cannot be supported.

It is brought against an Order of the Supreme Court of Madras, disallowing some, while it allowed other items of a claim preferred by Ghoolam Moortoozah Khan Bahadoor, the deceased Appellant, under the Act passed in 1858, by the then Legislative Council of India, for the administration of the estate and for the payment of the debts of the last Nabob of the Carnatic.

The claim was made under the 14th section of the Act, No. XXX. of 1858. By that and the subsequent sections it is provided, that any person claiming to be a creditor of the late Nabob, who shall file a declaration stating that he is willing to receive in full discharge of all his claims against the Nabob, or his estate, such amount as the Supreme Court shall award under the provisions of that Act, shall be entitled to have his claim investigated in a summary way, and to receive the amount awarded out of the assets of the late Nabob, in the hands of the Receiver appointed under the Act, if these shall be sufficient for the purpose; and if they shall be insufficient, out of the Public Treasury. The Court, however, in the exercise of this summary jurisdiction, is by the 22nd section forbidden to allow to any Claimant, in respect to money lent or advanced, any larger sum than the amount which shall be proved to have been actually advanced to or for the late Nabob, with simple interest [479] thereon, not exceeding the rate of six per centum per annum; or to any Claimant in respect of goods supplied, or of any other matters, any larger sum than the amount shall be proved to have been the fair and actual value thereof at the time when the debt was incurred, with simple interest, not exceeding the rate aforesaid, if the Court shall consider the Claimant entitled to interest. It would seem, therefore, that the Act not only limits the extraordinary remedy which it gives to certain defined classes of debt, but throws upon the Claimant more than the ordinary burden of proof, compelling the holder of any written acknowledgment, or security, to prove the actual consideration for it; and those claiming the price of goods delivered, to prove the fair and actual value of them.

The late Appellant, who was a kinsman of the Nabob, and was always on terms of intimacy with him, appears to have been an extravagant, and, for many years, a needy person. In 1843, he took the step, most unusual, as we understand, for a person of his rank, of passing through the Insolvent Court. In 1851, on the occasion of making a final settlement with his creditors, he was assisted by the issue, by the Nabob, of some securities, known as the Istafa Cutcherry Bonds, to the extent of seven lacs of Rupees. These Bonds were handed over to creditors of the late Appellant; they have been since paid, and are not now in question. It is said on the part of the Appellant that they were given in part discharge of a large debt due from the Nabob, but that this payment left other demands still unsatisfied, which are the subject of the present proceedings.

The principal item now in controversy, is founded [480] upon moneys said to have been placed by the mother of the late Appellant in the hands of the mother of the Nabob; three lacs by way of loan, two lacs by way of deposit in trust for the late Appellant.

For these sums it is not pretended that the Nabob was originally liable, but it is stated, that he received them from his mother, and thereby became liable for them, and acknowledged his liability. The debt of seven lacs of Rupees was said also to have consisted mainly of moneys advanced in the same way by the mother of the Nabob, and secured by his promissory note.

The story told on behalf of the late Appellant seems to their Lordships full of the grossest improbabilities. It is highly improbable that his mother, who appears to have been in the receipt of a small pension only, should have had the means of advancing, as she is said to have done, no less than ten lacs of Rupees to the mother of the Nabob, especially within the short period within which these sums are alleged to have been advanced. It is equally improbable that these advances, if in fact made by the late Appellant's mother, should have been made, as they are alleged to have been, without his knowledge. If these sums were really due, it is scarcely to be credited that the claim for them should not have been prosecuted in 1818, when the account was sent in to the Istafa Cutcherry,—an account, it is to be observed, in which written documents not now produced are referred to as vouchers for some of the items. Again, it is most improbable that the grandmother of the Nabob should have deposited two lacs of Rupees with the Nabob's mother as a provision for the late Appellant, and that no communication should for several years have been [481] made to him upon the subject. Yet there is no trustworthy evidence to explain any of these improbabilities, or to support the ingenious theories suggested at the Bar. The promissory note for seven lacs of Rupees, part of these alleged advances, is not given to the lady who is said to have made the advances, but to Arathoon, who appears to have been engaged in other pecuniary transactions with the Nabob. No reliance can, in their Lordships' judgment, be placed on the letters alleged to have been written by or by the direction of the Nabob admitting the late Appellant's claims, or upon the extracts alleged to have been made from the Nabob's accounts. The letter of the 26th of April, 1818, in their Lordships' opinion, bears upon the face of it palpable marks of having been concocted for the mere purpose of sustaining the late Appellant's claims, and cannot be relied upon to support them; and if this document be fabricated, the fabrication is all but fatal to the Appellant's case. Beyond this, it is plain upon the evidence, that the Istafa Cutcherry disputed the late Appellant's claims. He was called upon for accounts and particulars. He rendered none, and did not prosecute his claim in the lifetime of the Nabob. Moreover, the evidence shows that the late Appellant for some time at least acted as agent for the Nabob, and was in receipt of moneys on his account, and there is no proof of these moneys having been fully accounted for by him. Their Lordships are satisfied that the Court below was quite right in holding that no sufficient evidence had been offered in support of this charge.

Nor have they been able to satisfy themselves that any of the smaller items which have been disallowed [482] on the second part of the claim ought to have been allowed. It is unnecessary to consider whether some of the items disallowed, if satisfactorily proved, would have constituted debts recoverable under the 14th section of the Act, because their Lordships think that they are not proved. It is not the course of this Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents. Their Lordships also feel that in the exercise of this Statutory and peculiar jurisdiction, the Court below was almost bound to insist on the utmost strictness of proof. For it needs but little knowledge of human nature, as it exists in India, to see that a scheme involving the payment out of the public Treasury of the debts of a native Prince, who seems to have lived and died in a state of chronic insolvency, was calculated to bring forth a host of Claimants not likely to be very scrupulous, either in the statement of their demands, or in the manufacture of evidence to support them. And, it is obvious that the Government which has thus undertaken to pay the debts of the Nabob, must be without many of the means which an ordinary representative of a deceased person would have of resisting claims, either wholly false or dishonestly swollen.

Upon the whole case their Lordships are unable to see any sufficient ground for disturbing the judgment [483] of the Court below, and they must, therefore, humbly recommend to Her Majesty that this appeal be dismissed, with costs.

RAJAH LELANUND SING.—*Appellant*; THE GOVERNMENT OF BENGAL, KALYPERSHAD (Ghatwal), the son and heir of BIKRUM SINGH, deceased, and GOOMAN SINGH,—*Respondents* * [Nov. 26, 27, 28, 1863].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

The Sudder Dewanny Adawlut, at Calcutta, acting as Special Commissioners, under Ben. Reg. III. of 1828, in resumption suits have jurisdiction in a summary way to direct payment of wasilat, or mesne profits, of lands taken possession of by Government for resumption, to the party entitled to the same, upon a decree declaring the lands not liable to assessment.

If the Court is not satisfied with the title of the party claiming the wasilat, the proper course to pursue is to direct inquiries to find the party entitled.

In this case the appeal was brought from such part of a decree of the Sudder Dewanny Adawlut, dated the 29th of February, 1860, as did not award to the Appellant, the wasilat, or mesne profits, of certain Ghatwally lands released from assessment by such decree. The decree in question was made in a suit instituted by the [484] Bengal Government to resume and assess certain Ghatwally lands. The lands consisted of thirteen mouzalis, situate in Pergunnahs, Wusluh and Mahalat Khurruckpore, in the Zemindary of Khurruckpore, to which the Appellant, as heir of his father, the late Rajah Bidanund Sing, succeeded as Zemindar; and were held of that Zemindary by the Ghatwals, for the protection of the Zemindar's other lands, by guarding the ghats, or passes, in the neighbouring mountains from the invasions of Hill men and robbers. A decree, in the first instance, was made in the suit in favour of Government by the Special Deputy Collector, which decree was reversed on appeal by the Zillah Judge, exercising the powers of a Special Commissioner of Government under Ben Reg. III. of 1828. The decision of the Zillah Judge was, in its turn, reversed, and the decision of the Deputy Collector substantially restored by the Officiating Judge of the Sudder Dewanny Adawlut, exercising the powers of a special Commissioner under that Regulation. Subsequently, a decree was made by Her Majesty in Council in an analogous case (*Raja Lelanund Sing Bahadoor v. The Government of Bengal*, 6 Moore's Ind. App. Cases, 101, where the nature and tenure of Ghatwally is fully described) wholly inconsistent with the decree in the present case, and in consequence thereof the Sudder Dewanny Adawlut by three of its Judges, also exercising the powers of Special Commissioners, upon a petition for review, pronounced a final decree, a part of which was now appealed from, and by such decree it was declared, that the resumption and assessment of the lands in question was illegal and the relinquishment thereof by Government ordered. The Court, how-[485]-ever, refused to decide on the right of the Appellant, as Zemindar, to have from the Government the wasilat, or mesne profits, of the lands in question, being a portion of his Zemindary, after the resumption and during the long period they were in the possession of the Government, or of the other parties with whom the Government made a temporary settlement thereof.

By the Order made in the appeal of *Raja Lelanund Sing Bahadoor v. The Government of Bengal* (6 Moore's Ind. App. Cases, 132), known as suit, No. 2045, their Lordships reversed the decree in that suit made by the Special Commissioner, and declared that the Ghatwally lands in that suit were not within the meaning of cl. 4, sec. 8, Reg. I. of 1793, as included in allowances made to the Zemindar for Police establishments; but that they formed a part of the Zemindary of Khurruckpore, and were included in the Permanent Settlement for that Zemindary, and covered by the jumma assessed upon it.

In consequence of that decision the Appellant, on the 9th of July, 1856, presented a petition in another resumption suit, which, with many others relating to

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the same subject and in the same Zemindary, had been instituted by the Government, to the Special Commissioner of Calcutta, stating the judgment of the Lords of the Judicial Committee in the above appeal, submitting that the two cases were similar, and that the decree ought to be the same in both, and praying that an order might be made admitting a review of the judgment and decree of the Special Commissioner made on the 14th of August, 1851, in the present suit. This petition, although it [486] had special reference to the present appeal, applied also to eighty-two other cases in which the Government had sued to resume Ghatwally lands within that Zemindary, and had obtained decrees in its favour. The Ghatwals were not represented by Vakeels before the Commissioners.

The hearing of the petition for review took place on the 29th of February, 1860, before Messrs. H. T. Raikes, C. Binny Trevor, and E. Alexander Samuels, three of the Judges of the Sudder Dewanny Adawlut, acting as Special Commissioners, when they pronounced judgment, granting a review of the judgment complained of, as well as that passed by the Court, sitting as Special Commissioners, in the eighty-three, and two other cases specified, but they declined to decide the question of the Appellant's right to the wasilat, or mesne profits, as being beyond their jurisdiction, the Ghatwals not being represented by Vakeels, and refused to make any Order in respect of a sum of money paid by the Zemindar to the Government. The material part of this decision will be found in the judgment of their Lordships on this appeal (*Post* [9 Moo. Ind. App.], pp. 487-8).

The Appellant presented a petition for leave to appeal to Her Majesty in Council, from so much of his decree as was adverse to the claim of the Appellant, to the wasilat, and possession of the mouzahs in question.

On the 7th of February, 1861, an Order was made by the Sudder Dewanny Adawlut, upon the petition of the Appellant, directing that the names of Kallypershad, Ghatwal (son of Bikrum Sing), and Gooman Singh, a purchaser, should be inserted as Respondents, with the Bengal Government: such insertion [487] was accordingly made, and subsequently the appeal was admitted.

The Government of Bengal alone appeared before the Privy Council to support the decision of the Special Commissioners.

Mr. Rolt, Q.C., and Mr. Leith, for the Appellant, argued—First, that the Mouzahs in respect of which the wasilat accrued, were a portion of the Zemindary of the Appellant, for which the revenue had been and still was under the Permanent Settlement paid to Government by him, or those through whom he claimed title as Zemindar, and consequently any mesne profits received by the Government in respect of the mouzahs ought to have been paid over to him the Appellant, as Zemindar.

Second, that as to that portion of the wasilat which was paid out of the Government Treasury to the Appellant, under a former decree in his favour, the same having been subsequently deposited by him with the Government under protest to abide the result of the litigation as to the resumption of the lands themselves by Government, the same ought to have been refunded to the Appellant, as a matter of course, on the final decision in his favour.

Third, that even as between the Zemindar and the Ghatwals, the Court below had jurisdiction to determine any question of right as to the mesne profits, regard being had to the powers formerly exercised by the ordinary Courts of Judicature in like cases under cl. I. sec. 31, Ben. Reg. II. of 1819, to grant redress in any case in which the Revenue authorities should violate the rights secured to a Zemindar by the Per-[488]-manent Settlement, and with reference to the powers of Special Commissioners, appointed under Ben. Reg. III. of 1828, section 2, for the final determination of like cases, in place of the ordinary Courts, whose powers are by such Regulation expressly taken away, and the decree of such Special Commissioners made final: and further that if there was any defect of parties, by reason of the Ghatwal not appearing by Vakeel, on the hearing on the petition for review the court might have ordered such defect to be remedied, and, if necessary, might have postponed the hearing for that purpose, so that complete justice might have been done in that suit.

The Attorney-General (Sir R. Palmer), Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Bengal Government, contended, first, that the right to demand payment of the wasilat and interest thereon from the Government Treasury was in the Ghatwal, if

in any one, as the Ghatwal was in possession of the lands in question at the time of the institution of the resumption proceedings, and he had paid into the Government Treasury the principal sum claimed by the Appellant, the Zemindar, and that there was nothing to show that, independently of those proceedings, such possession could have been interfered with, and

Secondly, That no claim was made to the wasilat before the Special Commissioners on the part of any person other than the Appellant, and, therefore, the Court below could not properly have adjudicated upon the claim to the wasilat between the Ghatwal and the Zemindar.

[489] Their Lordships' judgment was delivered by

The Right Hon. the Lord Justice Knight Bruce.—The appeal in this case is by the Zemindar of Khurruckpore, from a portion of a decree pronounced in the year 1860, by three Judges of the Sudder Dewanny Adawlut at Calcutta, acting as Special Commissioners under Regulation III. of 1828. The Government of Bengal, the only party besides that has (whether both or either of the other Respondents, or nominal Respondents, could or could not have) appeared here is content with the decree, has submitted to it, and desires to support it as it stands.

The matter arose thus:—Some years before the year 1855, the Government of Bengal claimed a right to resume or reassess lands of considerable extent and value within the Zemindary of Kurruckpore in the possession of various Ghatwals, who held them by Ghatwally tenure under the Zemindar. The claim was enforced by the Government, though opposed on the part of the Zemindar, and for some time at least on the part of some, if not all, of the Ghatwals. There was a great and complicated mass of litigation upon the subject before various Tribunals, with various success; sometimes one party gaining a decision, sometimes another. The suits were numerous. At last the Zemindar brought one of them by appeal before Her Majesty in Council, and upon that appeal (*Raja Lelanund Sing Bahadoor v. The Government of Bengal* [6 Moo. Ind. App. 101]) the Judicial Committee, in 1855, decided against the Bengal Government on grounds fatal in principle to its entire claim of resumption and reassessment as to all the Ghatwally lands. That decision was in the same year sanctioned by Her Majesty. [490] The case, with the judgment delivered here by Lord Kingsdown on the part of the Judicial Committee, is reported in Mr. Moore's Sixth volume of "Reports of Indian Appeals," p. 101, a report to which their Lordships refer, and which has, during the argument on the present appeal, been cited more than once. This decision the Bengal Government, or the Special Commissioners, determined very properly to consider binding as to all the Ghatwally lands that had been resumed, or reassessed, and the invalidity of the resumption and reassessment from the beginning may be treated as now established. But there remained a material question—the question as to the right to recover from the Bengal Government the large sums which, as rents, or profits, they had wrongfully or erroneously, by means of the invalid resumption, or reassessment, obtained from the Ghatwals. The Government had latterly not disputed, nor does dispute, its liability to make good this amount with interest to some person or persons, but for some years has, in consequence of the decision of 1855, considered itself, as owing the amount with interest to or holding it for some person, or persons. After the judgment of 1855, the Zemindar instituted, or continued a proceeding before the Judges of the Sudder Dewanny Adawlut, as Special Commissioners, for the purpose of obtaining the benefit of that judgment, and payment of the principal and interest of the sums which in respect of the lands or part of the lands the Government had wrongfully or erroneously received. This proceeding was brought to a hearing in 1860, and upon it the Judges made the decree now under partial appeal as already stated. The material portion of it is as follows:—"The Government Pleader argues [491] that it is nowhere contended that these lands when resumed were not in the possession of the Ghatwals, who paid, in some instances, a small quit-rent to the Zemindar, and in others, nothing at all; but they were bound in either case to render certain public services, as the conditions of holding their tenures. That, as the services of the Ghatwals were excused during the resumption of their lands, they might, with some reason, claim a refund of the past collections on the release of the lands, minus the value of the services they would have performed

if no resumption had taken place; that the landlord cannot, however, under any circumstances, be entitled to this refund; that, moreover, the Ghatwals themselves have raised no claim for refund, and are not represented before the Court; and as the Zemindar has paid nothing, he has no right to demand the wasilat. It appears to us that, under the circumstances thus disclosed in the statements of the parties before us, the applications for a review of the several judgments passed by this Court, as Special Commissioner, at different times in the eighty-three cases now under consideration, should be granted; and, as the only point for determination is the applicability of the decision passed by the Privy Council on the 13th of August, 1855, in case No. 2045, to the cases now before us, and that point is conceded by the Government, who has also intimated to us, through the Government Pleader, that out of deference to the decision of that High Court of appeal, the lands have been already restored to the Ghatwals, it seems to us unnecessary to postpone judgment in these cases. On the authority, then, of the Privy Council's decree, and for the reasons set forth therein, we [492] reverse the decision passed in the several cases brought up for revision before us, and direct that the resumed lands be released from assessment. As to the wasilat, which has been taken by the Government from the parties in possession, if the contest before us was confined to the simple question whether the Government was liable or not to the Zemindar for the amount, we should have no hesitation in declaring, that as the Government Officers are held to have had no valid ground for the proceedings under which they resumed and assessed the lands dispensing with the services previously rendered by the Ghatwals, and not showing that any expenditure was made for the employment of others in their place and vocation, so they cannot be allowed to appropriate these collections for the benefit of the State, on the grounds and assignments set up by the Government Pleader in this case. But the contest is not confined to this question, but involves the rights of the Applicant and others, the Ghatwals, not now before the Court, whose rights are altogether denied by the Zemindar to receive the refund. Now, *prima facie*, the right to receive the sums collected, with deductions for quit-rent due to the Zemindar, is with the Ghatwals, and not with the Applicant before us. But, be that as it may, it is not within the competency of this Court, acting as Special Commissioners, under Reg. III. of 1828, sec. 3, summarily to determine a question of disputed private right of this nature, the more especially when one of the parties interested has not appeared before us, and is probably ignorant that such a question would be mooted in these proceedings. Such question must be left to be decided by the regular Civil Courts of the country. It is only [493] necessary to add, that as the resumption proceedings have been determined to be contrary to law, we award to the Zemindar the entire costs of these proceedings in the resumption Courts, with interest thereon, from the date on which he filed his application for review of their judgment. Copy of this Order to be filed in the other eighty-two cases, to which it equally applies."

The Zemindar complains here of the omission to decide as to the right to the fund, which, as has already been mentioned, the Government did not then and does not now claim to retain for its own use, and contends that it ought to have been wholly adjudged to him. The Bengal Government, on the contrary, supports the title or alleged title of the Ghatwals, or their representatives, to receive back the money which was unduly, or in an improper manner, taken from them. To this appeal one Ghatwal and a purchaser from him have been added, at least nominally, as parties Respondents. Neither of them, however, has appeared here, nor are their Lordships convinced that without the consent of the Zemindar, either of them would have been allowed to appear as a Respondent on this appeal.

Part of the fund claimed was, during a period of temporary success on the Zemindar's part against the Government, paid to the Zemindar under an express liability to pay it back if there should be a subsequent decision against him, as there was, and he paid it back, and with regard to this portion of the fund claimed it has been, in an especial manner, strongly urged for him that it ought clearly to be now restored to him, whatever may be done as to the rest. Their Lordships, however, considering the circumstances in which the amount received by [494] him came to his hands and left them again, are of opinion that both portions of the fund ought to be dealt with on one and the same principle. Their Lordships are also of opinion, that the Judges who pronounced the decision now under appeal, though

acting as Special Commissioners, had, from the nature of the subject, jurisdiction to direct payment of the whole money in dispute, with interest, to the person or persons entitled; that jurisdiction their admitted power of deciding as to the correctness or incorrectness of the resumption appears to us to have included. The Judges, therefore, who made the decree of 1860, should, in their Lordships' view of the matter, have not been silent as to the title to the money, but have declared and acted on it, if able, from the materials and parties before them to do so, or if not so able, have directed an inquiry to ascertain the person or persons entitled. Now, the Ghatwals were not represented, or were imperfectly represented, before the Court, when the decree of 1860, was made, and their Lordships from the materials before them are not satisfied that a portion at least of the fund does not belong to the Ghatwals from whom it was received, or their representatives. In using these expressions their Lordships treat the controversy as extending to all the sums received by the Government under the resumption or reassessment, though their conclusion would be substantially the same if it were treated as confined to the fund strictly subject specifically to the particular proceeding in which the Order of 1855, or the decree of 1860 was made. That a portion of the fund belongs to the Zemindar their Lordships think highly probable, if on account only of his quit-rent or [495] quit-rents, fallen into arrear, but possibly also he may have a just claim on more than this portion, or even the whole fund, in respect of services which the Ghatwals were, or had been, under an obligation to perform, and have, from any cause whatever, not performed. Subject to that deduction, or those deductions, as the case may be, in favour of the Zemindar, there appears to their Lordships a title fit to be considered to the whole fund in the Ghatwals who were in the actual enjoyment of the lands, or their representatives. But their Lordships are of opinion, that they have not, and that in 1860, the Judges of the Sudder Dewanny Adawlut (the Special Commissioners) had not before them, sufficient materials to enable them to direct safely, or without hazard to justice, the payment, apportionment, or distribution of the fund or any part of it, and that accordingly the decree of 1860, should be added to, and that it should be declared that the Special Commissioners, the Judges of the Sudder Dewanny Adawlut, had and have jurisdiction to decide upon the true title to the funds in question upon this appeal, and to direct the payment and disposition of those funds, with interest, accordingly, but that, at the hearing on which the decree under appeal was made, it did not sufficiently appear who was or were the person, or persons, justly entitled to the money, and that an inquiry ought to have been directed by the Court on that subject; and that with this declaration the case should be remitted to India, in order to be further dealt with by the Special Commissioners on that footing. We conceive that the Government ought to pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

[496] KHAJAH MOHAMED GOUHUR ALI KHAN,—*Appellant*; ASHRUFOONISSA, KHAJAH WAHED HOSSEIN KHAN and WAJED HOSSEIN KHAN, heirs of KHAJAH BURKUTOOLLAH KHAN, and KHAJAH HOEBEOOLLAH KHAN, heir-at-law of the late Khajah Wahed Ali Khan, deceased.—*Respondents* * [July 15 and 16, 1863].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

In an action of ejectment to recover real estate, the Plaintiffs claimed as heirs. The issue directed by the Court was, whether the party in possession, under a decree made in a summary suit, pursuant to the Act, No. XIX. of 1841, was legitimate. In such circumstances held, that as the title of the Plain-

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessor,—The Right Hon. Sir Lawrence Peel.

tiffs depended upon the illegitimacy of the Defendant, they were bound to prove by sufficient general evidence, their heirship, in order to throw upon the Defendant the *onus* of proving his legitimacy.

The evidence upon that issue being unsatisfactory, the case was remitted to India for further proof.

It is the duty of a Judge in India trying a suit to state in his judgment, the grounds upon which he has arrived at the conclusion he has formed upon the evidence: and not simply to state, in a general manner, that a party was entitled, as such a course does not afford the appellate Court the assistance it is bound to expect from the Court below.

This appeal was brought from a decree of the Sudder Dewanny Adawlut at Calcutta, by which that Court decreed to the Respondents ten shares of the real estate of Ibrahim Khan, otherwise called Newab Jan.

Khajah Burkutoollah Khan and Khajah Wahed Ali [497] Khan were the uterine brothers of one Khajah Aboo Mahomed Khan, who was the father of Ibrahim Khan, and who, besides Ibrahim, had another son, called Wuzeer Jan, otherwise called Abdool Kadir Khan, who, with Burkutoollah Khan and Wajed Ali Khan, were the heirs of Ibrahim Khan, and entitled to the shares of his estate which was decreed to the Respondents, if it was established that Wuzeer Jan died without leaving legitimate issue. The Appellant alleged that he was the lawful son of Wuzeer Jan by Mussumat Alarukhee. The Respondents denied that such was the case, and the only question in the appeal was, whether the Appellant had made out his alleged heirship by satisfactory evidence.

The circumstances of the case were these:—

Burkutoollah Khan and Wajed Ali Khan and Aboo Mahomed Khan, were the sons, by different mothers, of Bahadour Beg Khan, a Mahomedan of wealth and high position: and on his death, his property was divided between the three sons as his heirs. Aboo Mahomed Khan had two sons Ibrahim Khan and Wuzeer Jan. Ibrahim Khan was married, during his father's lifetime, to Khudijah Begum. Wuzeer Jan, the other son, as it was alleged by the Respondents, was of weak intellect from his birth, a cripple and impotent, and never married.

In the year 1840, Aboo Mahomed Khan died, leaving surviving his widow, Fatimatoonnissa, Ibrahim Khan, and a daughter named Soorut Begum, who became entitled to his property in certain proportions, and who, on the 6th Mough, 1250 (1843), executed a Tukseennama, or deed of partition, by which Ibrahim Khan took nine anna, the widow two, and Soorut Begum four anna shares; and they enjoyed the property [498] accordingly until the death of Soorut Begum, who died childless, in 1848, when a fresh partition was made between Ibrahim Khan and Fatimatoonnissa, who held possession until Ibrahim Khan's death, in May, 1850, and, upon his death, the right to the property devolved in equal thirds upon his mother, Fatimatoonnissa, and his uncles Burkutoollah Khan and Wajed Ali Khan.

Shortly after Ibrahim Khan's death, the Appellant, who was then an infant, was set up as the child of Wuzeer Jan.

It appears that Ibrahim Khan, who had been married to Khudijah Begum, was, on the 28th of July, 1845, divorced from her, and, as was alleged, never cohabited with her afterwards. Notwithstanding, however, that the effect of the divorce was to deprive Khudijah Begum of all right to any share in the succession of Ibrahim Khan, she, upon his death, claimed her share as if she had remained his wife, and accordingly she filed a petition under the Act, No. XIX. of 1841, claiming a four anna share. Burkutoollah Khan and Wajed Ali Khan also filed petitions in a similar suit under that Act, claiming their two-thirds as the uncles of Ibrahim Khan.

On the summary suit under Act, No. XIX. of 1841, being brought to a hearing, on the 30th of September, 1850, when the Appellant was put in possession, and Burkutoollah Khan and Wajed Ali Khan were put by the Court to a regular suit, and after an ineffectual appeal to the Sudder, a plaint was filed by them in the Zillah Court of Patna, on the 14th of February, 1852, against Alarukhee for herself, and as guardian of the Appellant, a minor, Khudijah Begum and Meer Ismael, as executor and Mutowallee of the late Fatimatoonnissa Begum, as Defendants. [499] The suit was brought to obtain possession from the Appellant of two-thirds out

of three-thirds of the property left by Ibrahim Khan, deceased, and to reverse the Order of the Judge of the City of Patna, of the 30th of September, 1850, and the Order made on appeal therefrom of the Sudder Dewanny Adawlut, affirming the same. The plaint stated, amongst other things, that the Plaintiffs claimed title as uncles and heirs of the deceased, and alleged, that Wuzeer Jan was by nature insane and impotent, and so continued up to his death, notwithstanding his father's endeavours, by the aid of doctors, to restore his powers of manhood; that he died without having ever been married, and without leaving any issue; and it was then further stated and the plaint charged, that Ibrahim Khan died, leaving the Plaintiffs, his uncles, and the late Fatimatoonnissa, his mother, his only heirs him surviving; his wife, Kudijah Begum, having been legally divorced in his lifetime. The plaint then stated the proceedings had under Act, No. XIX. of 1841, including the above-mentioned two Orders of the Zillah and Sudder Courts.

The answer of Alarukhee Begum set up the Appellant's title as her son by Wuzeer Jan, as displacing the alleged title of the Respondents; and insisted that Wuzeer Jan, her husband, was neither insane, nor impotent; alleging that Wuzeer Jan married her according to the forms of the Mahomedan law; that the marriage was consummated; and that the Appellant was his son by that marriage; she further alleged, that the Appellant was married to the daughter of a highly respectable person named Meer Suyd Ali, brother of the late Fatimatoonnissa; [500] and that the latter and Meer Ismael had admitted the Appellant's heritable rights in the former proceedings under Act, No. XIX. of 1841.

Khudijah Begum's answer simply raised the question, whether there had been cohabitation between her and Ibrahim Khan after the divorce.

Of the issues directed by the Court, the only material one was the fourth, namely: Was the Appellant the son of Wuzeer Jan?

The evidence upon this point was contradictory. The Appellant, in support of his claim, filed documentary evidence and examined witnesses. The documentary evidence consisted of proceedings subsequent to Ibrahim Khan's death, and to which Burkutoollah Khan and Wajed Ali Khan were not parties, in which the Appellant was treated as the nephew and heir of Ibrahim Khan. A vakalutnamah by Syud Ali, brother of Meer Ismael, dated the 10th of March, 1851, in which the Appellant was also so described. Pottahs, mortgages, and Kabooleats, executed by or to Alarukhee Begum in the years 1851 and 1852, as guardian of the Appellant, in which he was also treated as heir; also a declaration of the recognition of the Appellant as Wuzeer Jan's son by Fatimatoonnissa, and a conditional sale to the Appellant's wife. Four witnesses were examined to prove the fact, that he was the legitimate son of Wuzeer Jan by Alarukhee Begum, his wife, and of his having been as such recognized as the heir of Ibrahim Khan on his decease. On the other hand, Burkutoollah Khan and Wajed Ali Khan called several witnesses, who deposed to the alleged incapacity of Wuzeer Jan, and that the Appellant was Alarukhee Begum's son by one Lal Darogah.

[501] The hearing of the suit took place on the 31st of May, 1854, before Mr. William Travers, the Judge of the Civil Court of the City of Patna; when that Judge delivered judgment, the material part of which was in these terms:—"For trial of the fourth issue, there were adduced in evidence three papers filed before the Judge of Patna on occasion of his deciding the case under Act, No. XIX. of 1841, on account of which this action is laid. Two of these are copies of petitions presented by the Defendant, Meer Ismael, and the third is a petition from Khudijah Begum. All three are stated to afford proof of Alarukhee Begum being a concubine and not a married woman; but, in my opinion, no such inference is to be deduced from them. Both Meer Ismael and Khudijah Begum were at the time earnestly engaged in the endeavour to establish a title of their own; and, in doing this, certain unguarded expressions seem to have escaped them, to the effect, whether Alarukhee Begum was a married woman, or not, and her reputed son, Gouhur Ali, legitimate, or otherwise, still that neither contingency could affect the claim of the Defendants. Loose expressions of this kind convey nothing more than a spiteful imputation, and when cited as evidence are simply ridiculous. On this issue I decide against the Plaintiffs, for the same reason that I rejected their suit on the preceding one—namely, worthless evidence. It is unnecessary to consider the fifth point noted for trial, since, as concerning the merits, it would only become liable to adjudication in

the event of the third and fourth issues being decided for the Plaintiffs. This case is certainly nothing less than a conspiracy. Independent of the circumstances, almost unpre-[502]cedented in a high family holding large possessions, of two such contingencies occurring as a separation by divorce, and the impotence of the male heir, both of which are suddenly made public at the same time in a case of disputed succession, under Act, No. XIX. of 1841, notwithstanding that they are stated to have come about at a long interval of time one from the other, it is quite clear to me, from the evidence, both oral and documentary, filed by the Defendants, that they are the rightful and lineal heirs of Ibrahim Khan, and his brother, Wuzeer Jan. It is, however, unnecessary to consider the evidence in detail, since the claim is in itself so inherently weak and fallacious as to be incapable of standing alone, and needs no argument to disprove it."

The Plaintiffs appealed from this decree to the Sudder Dewanny Adawlut at Calcutta.

The hearing of the appeal in the Sudder Dewanny Adawlut took place on the 22nd of December, 1857, when the Court, consisting of Messrs. B. J. Colvin, A. Seonce, and J. S. Torrens, reversed the decree of the Judge of the Zillah Court, and pronounced the following judgment:—"We consider that the *onus probandi* in this case rests with Gouhur Ali, the Respondent, as he does not contest the position of the Appellants as uncles to deceased. They have, therefore, a clear right to share in his estate, unless Gouhur Ali can establish a valid marriage of his alleged father and mother, and his own birth as a son by that marriage. Now, the oral evidence adduced by him to prove these two facts is deficient in the requirements laid down in the decision of the 21st May, 1851. The witnesses were not, excepting one or two of them, members of the [503] family, or persons of consideration, and their depositions betray ignorance of circumstances which acquaintance with the family would have brought to their knowledge. Thus, they could not tell Alarukhee's connections, or her father's name or residence, and similar particulars usually known regarding family relationship. Nor is the documentary evidence more satisfactory, for it consists of proceedings of Court in which Gouhur Ali appears as one of the parties in succession to Ibrahim Khan, but these are of dates subsequent to the decision in the Act, No. XIX. of 1841 case, dated the 30th of September, 1850, by which he was virtually acknowledged by rejection of Appellants' claim. Therefore, and for being in possession of the estate, he could sue or be sued without risk of challenge as to title. He can, however, derive no benefit from them in support of his present allegations. The Judge has based his judgment upon the insufficiency of the Plaintiff's witnesses to prove their denial of Gouhur Ali's filial relationship to Wuzeer Jan; but, although they may have failed in this respect, it was for Gouhur Ali, who made the counter-assertion, to establish its truth. This he has not done; while the Appellants have advanced much to support their statement that Wuzeer Jan had not been married, and, in consequence, that Gouhur Ali could not be his legitimate son. Great weight is due to the fact that no Kabinnamah had been executed in the case of Wuzeer Jan, as in that of his brother, Ibrahim Khan, and no recognition of Gouhur Ali, in any way, previous to the Act, No. XIX. of 1841 case, is shown to have been made, although fitting occasions for it had occurred on the death of Wuzeer Jan, and when the Tukseemnamah [504] was executed after Aboo Mahomed's death in 1840. We, therefore, reverse that portion of the decision of the Judge which recognizes Gouhur Ali as entitled to share in the estate of the deceased, in virtue of being the issue of the marriage of Wuzeer Jan and Alarukhee. But we see no reason to interfere with it as respects the recognition of Khudijah Begum, alias Hosseinee Begum, as the undivorced wife of deceased, as whose widow she must, therefore, be regarded; for no objection to the Judge's finding on this point has been raised in appeal before us. The estate of deceased becomes divisible, therefore, by Mahomedan law, as assented to by the Pleaders of both parties, as follows:—Reckoning it to consist of twenty-four parts, Khudijah Begum, the widow, or her heirs, will receive six parts; Fatimatoonnissa, or her heirs, will receive eight parts; while Plaintiffs, the Appellants, will receive ten parts between them, or five parts each. We, therefore, in reversal of the Orders passed in the Act, No. XIX. of 1841 case, adjudge to Appellants ten of twenty-four parts of the real estate of Ibrahim Khan, deceased, as sued for. We find, from the pleadings, that there is a contention

between the parties relative to the value of the personalty left by deceased, and to the eight houses at Dholepore whether they belonged to the estate or had been purchased by the private funds of Fatimatoonnissa. No decision having been pronounced upon these points by the Judge, a remand of the case for their disposal might have been necessary; but Moonshree Amer Ali, for Appellants, has waived all claims to both items of property. This decree is, therefore, restricted to awarding Appellants ten shares of the real estate. [505] They will receive proportionate costs of both Courts from Gouhur Ali, and will pay to Khudijah Begum her costs."

A petition for review of judgment was afterwards presented and refused.

The present appeal was from the above judgment.

The Solicitor-General (Sir R. Palmer), and Mr. Leith, for the Appellant.—It is an admitted proposition, that the burthen of proving the case lies on a Plaintiff, and we insist that, in the present instance, the *onus* of proof lay upon the Respondents, as they sought by the suit to eject the Appellant from the land in which he was in actual possession, and they also sought to set aside the decree of the Zillah Judge, and of the Sudder Dewanny Adawlut affirming that decree on appeal, which decrees confirmed the possession of the Appellant in the Respondents' summary suit brought under the provisions of the Act, No. XIX. of 1841. In the view taken by the Sudder Court, contrary to the opinion of the Judge of the Zillah Court, that the *onus* of proof lay on the Appellant, the justice of the case, as well as the practice of that Court, required that the suit should have been remanded to the Zillah Court, to take fresh evidence and for a new trial. The evidence of the Respondents' witnesses is, moreover, so unsatisfactory, that this Court cannot but remit the case to India for further proof.

Mr. Field, for the Respondents, Khajah Wajed Hossein Khan, and Khajah Hooobeboollah Khan, insisted, that the Appellant had failed to prove his [506] alleged heirship, as legitimate son of Wuzeer Jan by Alarukhee, by satisfactory evidence. On the contrary, that the evidence established the fact, that Wuzeer Jan was a person of weak intellect from his birth, and moreover a cripple and impotent, and, notwithstanding efforts made to cure him, he remained so till his death; and that consequently he was never married, and died childless during his father's lifetime, and that there is not the slightest trace of any recognition of the Appellant by any of the members of the family, as the son of Wuzeer Jan.

Judgment was reserved and now delivered by

The Right Hon. Lord Kingsdown (July 29, 1863).—It is with great regret that their Lordships in this case find themselves unable to dispose of the case upon the evidence as it stands.

The facts on each side are such that they must, from their very nature, be capable of clear and distinct proof. If Adool Kadir Khan, alias Wuzeer Jan, was the miserable object which has been described by the Respondents, it must have been a fact known not only to all the members of the family, but to the medical men who attended him, and to all respectable people in the neighbourhood who were in the habit of associating with him. On the other hand, if he was a married man and contracted a legal marriage with Alarukhee Begum, as is alleged, and the son of that marriage lived in the family, and on the death of the father was acknowledged as his heir, that is a fact which must be equally capable of proof. Unfortunately the witnesses on both sides are of such a character that it is impossible for the Court to place any reliance upon their testimony.

[507] The Judge of the Zillah Court has pronounced in the strongest terms his opinion, that the Appellant in this case is entitled, and that the case against him is a conspiracy (*ante* [9 Moo. Ind. App.], p. 501). But instead of stating the grounds upon which he arrived at that conclusion, he confines himself to alleging that as his opinion, and that he has no doubt about it. He has not afforded to the Court that assistance which it is entitled to expect, and which I believe by the Regulations he is bound to afford. On the other hand, we cannot say that the Sudder Court has proceeded in a manner which is entirely satisfactory. They hardly seem to have allowed sufficient weight to the circumstance that the Respondents (who are the Plaintiffs) were the parties who had to make out the case. They have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the

illegitimacy of the Appellant; and they must give sufficient general evidence to throw upon him the *onus* proving his legitimacy.

Their Lordships, therefore, must advise Her Majesty to remit the case to India. Probably the proper Order will be, to affirm the decree of the Sudder Court, so far as it reversed the decree of the Zillah Judge, to reverse the Sudder decree in other respects, and to remit the cause to the Sudder Court, with directions that they shall send it back to the Zillah Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of the cause.

There will be no costs in this appeal.

[See next case.]

[508] KHAJAH MOHAMED GOUHUR ALI KHAN, —Appellant; KHAJAH AHMED KHAN, the heir-at-law of KHUDEJAH BEGUM, deceased, —Respondent *
[July 16, 1863].

For head note, see *ante*, p. 496.

This also was an appeal from a decree of the Sudder Dewanny Adawlut at Calcutta, dated the 22nd of December, 1857, affirming the decree of the Judge of the Court of the City of Patna, by which a suit brought on behalf of this Appellant, then a minor, by his mother and guardian, was dismissed, with costs. The suit was instituted under the 17th sec. of Act, No. XIX. of 1841, against Khudijah Begum, since deceased, for the reversal of two several Orders, the one an Order of the Judge of the City of Patna, made in a summary suit in which the Defendant was the Petitioner, and brought by her under the Act, and the other an Order of the Sudder Dewanny Adawlut affirming the same. These orders simply retained Khudijah Begum in the possession of certain property, both real and personal, forming part of the estate of the late Ibrahim Khan, deceased, the Appellant's paternal uncle, and in which property the Begum claimed to be entitled to a one-fourth share, as his widow, according to the Mahomedan law. [509] alleging herself to have continued the wife of the deceased up to the time of his death, which allegation was denied by the Appellant.

The case arose out of the previous appeal, and was heard at the same time, and involved a similar issue. As the Respondent did not appear, the appeal was heard *ex parte*.

The Solicitor-General (Sir R. Palmer), and Mr. Leith, appeared for the Appellant.—Their Lordships, after delivering judgment in the previous appeal (*ante*, [9 Moo. Ind. App.], p. 506), said, that with respect to the decision in this case, it must stand over until the result of the proceedings in the previous case was known, the Appellant being the same in both cases; and intimated that if the Appellant did not make out any title in the other case, he would have no interest in this.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessor,—The Right Hon. Sir Lawrence Peel.

[510] RAMALINGA PILLAI.—*Appellant*; SADASIVA PILLAI.—*Respondent* *
[Feb. 3 and 4, 1861].

On appeal from the Sudder Dewanny Adaulut, at Madras.

Adoption by a childless Hindoo of the Vaisyas, or third class of Hindoos, of his sister's son, upheld.

The sole question in this appeal was, whether the Respondent was the adopted son of one Shammuga Pillai. The Respondent was the son of Chengamalam, the sister of Shammuga Pillai.

The Respondent filed a plaint in the Civil Court of Cuddalore against Chedumbara Pillai and Tillai Pillai, his brother-in-law, and thereby claimed to recover the property pertaining to his one-half share, consisting of lands assessed at Rs. 3099. 3a. 9p. a year; houses, etc., valued at Rs. 6378. 2a. 3p.; cattle, valued at Rs. 740; jewels, etc., worth Rs. 4288. 4a.; and ready cash Rs. 26,500; with the right of recovering outstanding debts, estimated at Rs. 3850. 8a.; amounting in the whole to Rs. 49,881. 10a. The statements in the plaint were, in substance, as follows: that Shammuga Pillai was issueless, and that, having fallen sick [511] in Ani of Khara (July, 1831), he, in the presence of his two wives, adopted the Respondent and died a few days afterwards; that, as the family was undivided, the Respondent was maintained by Muruga Pillai, the elder brother of Chedumbara Pillai, and, after his death, by Chedumbara Pillai; that the funeral ceremonies of Shammuga Pillai were performed by the Respondent by proxy on account of his youth; that the Respondent had performed the annual funeral ceremonies of Shammuga Pillai and of other members of his family; that the Respondent and Chedumbara Pillai were equally entitled to the family property, and that the Respondent had been in the habit of joining in the management of the estate; and further stating that Chedumbara Pillai had refused to allow the Respondent his share of the property, and that he had been induced so to refuse by Tillai Pillai, the other Defendant.

Tillai Pillai, by his answer, disclaimed any interest in the property.

Chedumbara Pillai, by his answer alleged, that Shammuga Pillai never adopted the Respondent: that Shammuga Pillai died of cholera the day after he was attacked; that the Respondent's father died of cholera four days prior to the death of Shammuga Pillai, and could not have given the Respondent in adoption as alleged; that Shammuga Pillai was under pollution on account of the death of a relative at the time of the alleged adoption, and, therefore, could not have made any such adoption; that the Respondent was of a different gotram, and could not have been adopted consistently with Hindoo law; that the funeral ceremonies of Shammuga Pillai were performed by Chedumbara Pillai, and not by the Respondent; that Shammuga Pillai did not die in Ani of Khara (July 1831), but in Ani of Mandana (July, [512] 1832); that the Respondent, being the brother-in-law of Chedumbara Pillai, was employed by him in the management of the property, and was dismissed for improper conduct; that the Respondent had caused a false statement to be introduced in certain depositions made by Chedumbara Pillai, and had, by trickery, obtained a copy of the depositions; that Chedumbara Pillai had no ready cash, and that there were no family jewels as mentioned in the plaint.

A supplemental plaint was filed, correcting the date of the adoption and death of Shammuga Pillai, and Chedumbara Pillai filed a supplemental answer, in which he pleaded that the Respondent attained the age of discretion in September, 1845, and that twelve years and four months had intervened between that date and the date of plaint, and that, consequently, the suit was barred by the Regulation of limitations cl. 4, sec. XVII., Reg. II. of 1803.

A replication and a rejoinder upon the question of the bar by the Regulation of limitations were filed by the respective parties.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Witnesses were examined. Their testimony was contradictory. The Respondent's witnesses deposed to the actual adoption of the Respondent by Shanmuga Pillai. Seven of those witnesses, one of whom was the second wife of Shanmuga Pillai, declared that they were witnesses of the adoption, that all the ceremonies necessary to render the adoption valid were duly performed, that Sinevasa Pillai's death took place a month before such adoption, and that Shanmuga Pillai did not die until four or five days after the adoption. Other witnesses deposed to the fact that the Respondent, at first by proxy, and afterwards in person, performed the funeral ceremonies of Shanmuga Pillai and of his elder wife. The Respondent filed three [513] depositions of the Defendant, dated the 6th of April, 1853, the 5th of December, 1853, and the 25th of August, 1854, before the Sheristadar in respect of a security Bond, containing admissions by him of the fact of adoption of the Respondent. Five of the witnesses for Defendant, Chedumbara Pillai, declared that they were present at Neyvasal at the time when the adoption was stated to have taken place, and denied that there was any such adoption. Those witnesses and five others also declared that the funeral ceremonies of Shanmuga Pillai were performed by Chedumbara Pillai as the sole surviving relative. Several of his witnesses stated to the effect, that a relative named Ambalavana Pillai died two or three days before Shanmuga Pillai, and that the Respondent could not have been given in adoption by his father, and could not have been adopted, as he was under pollution, and that Shanmuga Pillai was also under pollution from some time previously to his death until his death, on account of the death of a relative, so as to prevent the exercise by him of the power of adoption.

On the 16th of June, 1859, the Civil Judge, Mr. George Ellis, decreed in favour of the Respondent, holding, first, that the Regulation of Limitations did not apply, on the ground that the cause of action only arose on the refusal of the Defendant to consent to a partition of the property, and that, supposing the parties to be members of an undivided family, the time did not run between co-parceners until the refusal of a demand for partition, which was only made one year before the suit, and finally held that the adoption of the Respondent by Shanmuga Pillai was proved; principally relying upon the before-mentioned three depositions of the Defendant, as containing a conclusive admission by him of such adoption.

[514] From this decree the Defendant, Chedumbara Pillai, appealed to the Sudder Dewanny Adawlut at Madras; and that Court, consisting of Messrs. H. D. Phillips and H. Frere, on the 29th of August, 1860, dismissed the appeal with costs, considering that (without entering into any of the objections to the alleged adoption) the Defendant, by express written admissions, had recognized the fact and validity of the adoption, the Court relying upon the three depositions on which the Civil Court had rested its judgment.

From this decree the present appeal was brought.

Pending the appeal the Defendant, Chedumbara Pillai, died leaving the Appellant, his heir.

The appeal was argued by the Attorney-General (Sir R. Palmer), and Mr. W. W. Makeson, for the Appellant. Mr. W. H. Melvill appeared for the Respondent, but was not called on.

The Appellant's case was, first, that the adoption of the Respondent by Shanmuga Pillai was not proved, the genuineness of the three depositions being impeached by him as fabricated documents; and it was contended, that even if they were established, the admissions of the adoption in those depositions were not conclusive. Mr. Justice Bayley's ruling in *Heane v. Rogers* (9 Barn. and Cress., p. 586) was referred to on this point, where it was laid down, that the express admissions of a party to the suit, though evidence against him, yet he was at liberty to prove that such admissions were mistaken, or were untrue, and was not estopped or concluded by such admissions. Lord Lonsborough's case (4 De. Gex., Mac. and Gor., 411), Taylor "On Evidence," Vol. I., § 741 [3rd edit.], was also [515] referred to. Secondly, that the adoption, if proved as a fact, was illegal; (1) from impurity, as Shanmuga Pillai was under pollution from his father's, Sinevasa Pillai's death, and then incapacitated from engaging in the religious rites necessary to an adoption. Strange's "Manual of Hindoo Law," § 63, p. 18 [2nd edit.], his death, it was alleged, having taken place only six or seven days previous to the adoption;

the custom in the family, as deposed to by the witnesses, being to observe pollution for fifteen or sixteen days; and (2) as the Respondent and Shanmuga Pillai were Vaisyas, among which class adoption of a sister's son was forbidden, 1 Strange's "Hindu Law," pp. 83-84 [2nd edit.], referring to Datt. Min. sec. ii., par. 32, and note on *Id.* § 102.

Their Lordships' judgment was delivered by

The Right Hon. Lord Chelmsford.—This is an appeal from the decree of the Sudder Court at Madras, affirming a decree of the Civil Court of Cuddalore, by which the Respondent was declared to be entitled, as the adopted son of Shanmuga Pillai, to a moiety of certain family property, both real and personal. The only question argued before us has been, whether there was a valid adoption of the Respondent. The Counsel for the Appellant not only questioned the fact of the adoption, but also contended, that no legal adoption could have taken place, as at the time it is alleged to have occurred, Shanmuga Pillai was under pollution in consequence of the recent death of a relative, Sinivassa Pillai; and they also alleged, that the adoption was illegal, as the Respondent was the adopter's sister's son,—but upon this latter objection very little was [516] said. Upon the fact of the adoption, it appears from the evidence, that Shanmuga Pillai having been attacked with cholera at Neyvasal, where he had gone a few days previously, the parents of the Respondent, hearing of the illness, took the Respondent, then an infant of a year and a half old, to Neyvasal, where on the day previous to the death of Shanmuga Pillai, certain ceremonies were proved to have taken place which were sufficient to constitute an actual adoption. Several witnesses, whose testimony is not directly impeached, deposed to these facts, but it was urged in argument, that many other persons were present on the occasion who ought to have been produced on the part of the Respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced. There is not only no impeachment of the credit of the witnesses who speak to the fact of the adoption, but the circumstances under which they allege it to have taken place are highly probable. It appears, that there had been some promise made by the parents of the Respondent that they would give their son to Shanmuga Pillai for adoption, and nothing is more natural than that hearing of the illness of Shanmuga Pillai, they should have taken the infant to him in order to secure the adoption, which had been previously proposed. There can be no fair ground, therefore, for discrediting the witnesses who prove the actual adoption.

But the Appellant's Counsel contended, that assuming the fact of an adoption of the Respondent, it could have no validity on account of his being the son of a sister of Shanmuga Pillai, and also because Shanmuga Pillai was under pollution in consequence of the death of his relative, Sinivassa Pillai. It [517] appears that the period of pollution, according to Hindoo law and custom, is sixteen days, and proof was given that the death of Sinivassa Pillai took place a month before the act of adoption of the Respondent. The Appellant, on the other hand, proved by several witnesses, that Sinivassa Pillai died only six or seven days before Shanmuga Pillai, and he produced to the same effect a copy of a leaf from a Book kept by the Brahmins for recording the time of the deaths of persons for whom annual ceremonies were to be performed. There was thus a conflict of evidence as to the time of Sinivassa Pillai's death, and it was for the Courts below to determine upon which set of witnesses they could best rely. There are, however, certain documents produced in evidence, which, if genuine, would appear to leave little doubt upon which side the balance ought to incline. These consisted of three depositions made by the Appellant's father upon the occasion of his becoming surety for persons appointed to the office of Sheristadar, in all of which, in answer to inquiries directed to ascertain the value and other particulars relating to the lands offered as security, he stated that "the Respondent was the adopted son of the deceased Shanmuga Pillai, and that there were no other co-parceners." The Appellant's father, however, upon being called as a witness by the Plaintiff (the Respondent), and these documents being shown to him, swore that the signatures to them were not his, and upon looking into the depositions themselves, said as to each, that "as to the depositions stated about adoption," it was not made by him. The learned Counsel for the

Appellant disputed the genuineness of the documents on another ground. In the course of the proceedings in the Courts in India, alleged copies of these documents were put in [518] evidence, which, though substantially agreeing with the supposed originals, yet varied in certain particulars as to the signatures and as to the names and number of the witnesses.

It should be observed that these discrepancies between the copies and the originals, which at present are inexplicable, were not pointed out to the Courts in India, where possibly a satisfactory explanation might have been given of them. It is difficult to understand, however, what bearing these variations in alleged copies can have upon the genuineness of the original documents, nor is it easy to discover when and how and by whom the alleged fraud upon the originals could have been committed. In the opinion of the Judge of the Civil Court, the documents bear no traces of having been tampered with or fabricated, and the Appellant's father swears that they were not signed by him, therefore, it must be supposed that the official persons who took the securities from the Appellant's father after he had signed the depositions substituted others for them, or that afterwards the Respondent, or some one on his behalf, induced the person who had the legal custody of them to give them up, and receive the fabricated ones in their stead. The Appellant's Counsel also contended, that the documents are shown not to have been genuine, from the fact of the securities having been taken from the Appellant's father alone; and they referred to a Circular Order containing instructions to the Collectors, as to the security to be given by public servants, in which they are required "to ascertain whether the property offered in security is free from mortgage, lien, etc., and whether the cousins (of the persons offering securities), if there be any, are willing to tender such securities and obtain from them Kara-[519]-namahs to the same effect," and urged, that as the depositions produced show that there was an adopted son who was a co-parcener with the Appellant's father, it was not likely that the Collectors would have so entirely disregarded their instructions as not to have obtained additional security. If, however, the Collectors were satisfied that the portion of the property belonged to the Appellant's father was an ample security, they might be a little remiss in this respect; but at all events if the choice as to the integrity of these documents lies between a slight dereliction of duty on the part of the Collectors, or a gross fraud committed by them, or by some other persons for the benefit of the Respondent, there is little difficulty as to the conclusion which ought to be adopted. If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the Appellant's father three times deliberately styles the Respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the Respondent would of course not be entitled to that designation. They amount, therefore, to a complete admission of the whole title of the Respondent, both in fact and in law, and show that the objections which have been urged to his claim, in the opinion of the Appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindoo laws and customs, had no foundation. Their Lordships, therefore, will recommend to Her Majesty to affirm the decree appealed from, and to dismiss the appeal, with costs.

[520] VENAYECK ANUNDROW and Others,—*Appellants*; LUXUMEEBAEE and Others,—*Respondents* * [Feb. 16, 17, 1864].

On Appeal from the Supreme Court at Bombay.

According to the law of inheritance prevailing in Bombay, sisters succeed to the estate of their deceased brother, if the estate has been separately acquired by their father, in preference to their father's brothers' sons.

The Appellants filed a Bill in the Supreme Court at Bombay against the Respondents. The Bill stated, in effect, first, that Bhugwantrao Vencajee was a Hindoo inhabitant of Bombay, and the possessor of large moveable and immoveable property, and died in May, 1851, leaving a widow, the Respondent, Luxumeebaee, and three daughters, Naneebaee, Soondrabaae, and Socabaae, the other Respondents, and also an infant son, Gujanon, who died in June, 1853, at the age of little more than two years; secondly, that Bhugwantrao Vencajee made a Will in the English language, by which he appointed the Respondent, Luxumeebaee, Executrix; the material part of the Will, so far as it related to the question raised by the Bill and the present appeal, was as follows:—"All the outstanding debts due to me must collect, [521] and, after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, etc., I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son, Gujanon an infant; the joys, etc., I have made for my wife and children, they belonging themselves respectively"; third, that the Executrix had proved the Will, and possessed herself of the property; fourth, that the Plaintiffs were the sons, sole heirs and legal personal representatives, according to the Hindoo law, of Anundrow Vencajee, the Testator's sole brother, who died in May, 1853, after the Testator, but a little before Gujanon; fifth, that as such, they were the ultimate sole heirs and legal personal representatives, both of the Testator and his infant son, and were, according to the Hindoo law, absolutely entitled to all his property, subject only to a life interest in his widow; and sixth, that the Executrix had been guilty of certain acts and omissions prejudicial to the estate, and of which the Plaintiffs had a right to complain, such as lending part of it without security to her father making improper investments, selling immoveables, and the like; and the Plaintiffs charged that the Respondent, Luxumeebaee, was only entitled to a life estate in the estate and effects of her deceased husband, either under the Will, or according to Hindoo law, and that the Will, if it purported to give the Respondent, Luxumeebaee, a larger estate than an estate for life, was inoperative and void as against the Plaintiffs, according to the Hindoo law; and the Plaintiffs further charged that they were the ultimate sole heirs and legal personal representatives of Bhugwantrao Vencajee [522] and his son, Gujanon, according to the Hindoo law, and that they, the Plaintiffs, were entitled upon the decease of the Respondent, Luxumeebaee, to take and enjoy the whole of the estate of Bhugwantrao and his son, in undivided shares, as and for an estate of inheritance; and the Bill further charged that whatever might be the quantity, or the quality of the estate vested in the Respondent, Luxumeebaee, and formerly belonging to her deceased husband, she had no power of disposing of the same, or, at least, of the immoveable part of the same, by Will, or otherwise, and that the same, after the decease of the Respondent Luxumeebaee, would devolve, according to the Hindoo law, upon the Plaintiffs, as remainder-men, for an estate of inheritance; and the Bill prayed for a declaration of the Plaintiffs' title, that the estate might be accounted for and secured, and the Executrix restrained from wasting it.

To this Bill a demurrer was filed by the Defendants. The grounds of demurrer were, first, that the Plaintiffs had not by their Bill shown that they were the heirs or legal personal representatives of the above-named Bhugwantrao Vencajee,

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or of his son, Gujanon, according to the Hindoo law; or that the Plaintiffs, or any of them, were entitled, upon the decease of the Respondent, Luxumeebaee, to take and enjoy the whole or any part of the estate of Bhugwantrao Vencajee, or his son, in undivided shares, or otherwise, as or for an estate of inheritance, or any other estate; or to take or enjoy any of the rents, profits, or proceeds thereof respectively; or that they the Plaintiffs, or any of them, were interested in the accounts of or in the premises, or any of them; secondly, that the husbands of the Re-[523]-spondents, Naneebaee, Sundrabaae, and Socabaae, were not parties to the suit; and lastly, for want of equity generally.

The demurrer was heard before the Supreme Court, consisting of Sir Matthew R. Sausse, Chief Justice, and Sir Joseph Arnould, on the 22nd of February, 1861. It appears that the Plaintiffs' claim as to the immoveable property was alone pressed in argument at the hearing, that as to the moveable property being tacitly abandoned. On the merits of the case, as distinguished from the point of pleading, it was contended on the part of the Respondents, first, that under the Will of the Testator, whose power to dispose of the estate was not questioned in argument by the Appellants, the Respondent, Luxumeebaee, and her infant son took an absolute interest in the entirety as joint tenants, and that, on the death of the son, the mother became absolutely entitled by survivorship; secondly, that the Respondent, Luxumeebaee, as the sole heir of her son, Gujanon, at the time of his death (which it was not denied that she was), became entitled to everything of which he was absolute owner, and that, consequently, if the Respondent, Luxumeebaee, and her son, took as tenants in common, and not as joint tenants, the result was the same as if it had been a joint tenancy; lastly, it was contended that the Respondents, Naneebaee, Soondrabaae, and Socabaae, the sisters of Gujanon, and not the Plaintiffs, his paternal first cousins, were his heirs according to the Hindoo law. The objection, for want of parties, was also pressed.

The judgment of the Court, allowing the demurrer, was delivered on the 21st of March, 1861, by the Chief Justice as follows:—"The case set up by [524] the Bill is as follows:—Bhugwantrao Vencajee (the deceased husband of the Defendant, Luxumeebaee, and the deceased father of the three other Defendants) and one Annundrow Vencajee (the deceased father of the Plaintiffs) were brothers, and, as the Bill alleges, the sons and sole heirs and legal personal representatives, according to the Hindoo law, of one Vencoba Mancojee. Vencoba Mancojee died intestate in 1832. Bhugwantrao Vencajee died in May, 1851, leaving, as the Bill, in the third paragraph, alleges, his brother, Annundrow Vencajee, the Defendant, Luxumeebaee, his widow, the other Defendants, Naneebaee, Soondrabaae, and Socabaae, his three daughters, and one son, Gujanon, then an infant of the age of about three months, him surviving. He left, also, considerable property, both moveable and immoveable, and a Will, to be more particularly noticed presently. Annundrow Vencajee, the brother of the Testator, and the father of the Plaintiffs, died in May, 1853, having made a Will (not set out), and leaving the Plaintiffs his sole heirs and legal personal representatives him surviving. Gujanon, the infant son of the Testator, died in June, 1853, leaving the Defendant, Luxumeebaee, his mother, the other Defendants, his sisters, and the Plaintiffs, his cousins, him surviving. The Will of Bhugwantrao Vencajee, which is very short, is set out in the sixth paragraph of the Bill. By this instrument, after making provision for the due celebration, according to Hindoo law, of his funeral rites and ceremonies, he directs his wife to get his three daughters, Naneebaee, Soondrabaae, and Socabaae, married at reasonable charges, to collect outstandings and pay debts, to defray the expenses of his funeral and other ceremonies during the first year [525] after his death. He then devises as follows:—'The remainder property, both moveable and immoveable, etc., I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son, Gujanon, an infant; the joys, etc., I have made for my wife and children, they belonging themselves respectively [meaning apparently they belong to them respectively]. I do hereby constitute and ordain Luxumeebaee sole Executrix of this my last Will and Testament. She will manage the whole affairs of my estate and property, but by the advice and consent of my father-in-law, Bhasker Shamjee, until my little son, Gujanon, attain to his proper age.' Such are the material portions of the Will. Luxumeebaee, the Bill alleges, immediately after her husband's death, took possession

of the whole of his moveable and immoveable estate, and in July, 1851, took out probate of his Will. It is alleged by the Bill that she has paid all her deceased husband's debts and funeral expenses, had got his three daughters (the co-Defendants) suitably married, and defrayed their marriage expenses out of his estate. The Bill charges that Luxumeebaee is not entitled, either under the Will, or by the Hindoo law, to more than a life estate in the estate and effects of her deceased husband; that the Will, if it purports to give her more than a life estate, is void as against the Plaintiffs, who, according to Hindoo law, are the ultimate sole heirs and legal personal representatives of their deceased uncle, and of his deceased son, Gujanon; and that, as such, they are entitled, on the decease of Luxumeebaee, to take and enjoy the whole estate of Bhugwantrao and his son, in undivided shares, as and for an estate of inheritance. The Bill then alleges against Luxumeebaee, in her management of the estate, various acts and [526] omissions in the nature of waste, and also charges her with attempting to adopt one of her brother's sons, as the son and heir of her deceased husband. The Bill then prays, amongst other things, that the Plaintiffs may be declared entitled to the estate and effects of which Bhugwantrao Vencajee died possessed, or at least of so much thereof as consist of immoveable estate, as the ultimate heirs thereof in remainder for an estate of inheritance. That the Defendant, Luxumeebaee, may be restrained by injunction from selling or disposing of any part of the estate, from committing waste, and from adopting one of her brother's sons. It further prays for an account, and for a receiver, if necessary. To this Bill the Defendants have demurred, on the grounds, that the Plaintiffs have not shown themselves to be, according to Hindoo law, heirs or legal personal representatives of Bhugwantrao Vencajee, or his son, Gujanon, or that they or any of them are or is entitled, on the decease of Luxumeebaee, to take and enjoy the whole or any part of the estate of Bhugwantrao, or his son, in undivided shares, or otherwise for an estate of inheritance or for any other estate; or that they or any of them are or is interested in the account as prayed. There is a further ground of demurrer for want of parties, in respect of the non-joinder of the husbands of the three daughters, which, on the view the Court takes of the case, it will not be material to consider, for, in our opinion, the Defendants are entitled to succeed on the other grounds on which they have relied. It was admitted that the property which was the subject of Bhugwantrao's bequest and the present suit must be taken upon the pleadings to have been (as in fact it was) separately acquired property by him. Although [527] alleged in the Bill, yet it was not contended before us in argument, that Bhugwantrao had not an absolute disposing power over his separate estate. No question was, in effect, raised as to Luxumeebaee's right to take the moveable property absolutely. It appears to us that the devise may be construed as giving to Luxumeebaee and Gujanon, first, either a joint tenancy for life; or second, a tenancy in common for life; or third, a joint tenancy in *quasi* fee; or fourth, a tenancy in common in *quasi* fee. If the first construction be adopted, Luxumeebaee takes a life interest in the entire estate by survivorship, and the reversion vests as an undisposed of residue in Bhugwantrao's heir, who was Gujanon, and upon the death of the latter it went to his, Gujanon's, next heir. On the second construction, Luxumeebaee would take her moiety for life, and Gujanon's share would, with the reversion in Luxumeebaee's moiety upon his death, descend upon his next heir. On the third construction, Luxumeebaee would take under the Will an absolute interest by survivorship in the residue. On the fourth construction (that of a tenancy in common in *quasi* fee), Luxumeebaee's share vested in her absolutely, and on Gujanon's death his moiety descended upon his next heir. The substantial question for decision is, in whom, upon the pleadings as they stand, is the absolute interest in the property of Bhugwantrao Vencajee now vested? According to all the authorities recognized at this side of India, Luxumeebaee, as mother of Gujanon, became his heir, and if she were to take an absolute estate in the property, the Plaintiffs could have no title. The *quantum* of estate which she is allowed to take in the character of heir to her son is not free from doubt; although [528] in the category of those who take as heirs to a separated brother, there is no distinction of difference made between the *quantum* of estate taken by a mother from that taken by a son, a father, a brother, or any other relative, who admittedly takes in such an inheritance the most absolute estate known to Hindoo law.—(See Menu, Yagnyavalkya, Mitacshara,

ch. II., sec. iii.; Mayucha, ch. iv., sec. 8, etc.). Where the *quantum*, of estate has been cut down to a life interest, when the inheritance descends upon a female, it must be ascribed to the influences of usage, as the restriction is not to be found in the early Canons of inheritance. In Dencooverbai's case (see *post* [9 Moo. Ind. App.], p. 321), this Court held that the widow of an intestate, childless, and separated brother, took the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favour of the widow. See Mitacshara, 'On Inheritance,' ch. II., sec. i., where the order of succession is declared; and par. 39, of that section where the Commentator, after discussing all the various opinions, sums up in conclusion, as follows:—'Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, having separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue.' However, in the view which we take of this case and for the purposes of this demurrer, it will not be necessary to decide whether a mother takes by inheritance from her son the absolute interest, or an estate for life only; that she is entitled to the latter may be taken to be conceded upon the pleadings, and [529] there cannot, in our opinion, be any doubt upon that point at this side of India. Supposing, then, Luxumeebaee to take a life estate only in the descended inheritance, the reversion vests in the next heir of Gujanon, and upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from Mayucha, ch. iv., p. 19, where, after enumerating the mother (see pp. 14 and 15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18), (and no paternal grandmother of Gujanon is shown to be in existence on the face of this Bill), the Commentator, in sec. 19, proceeds thus:—'In default of her (the paternal grandmother) comes the sister, under this text of Menu. To the nearest Sapinda (male or female) after him (or her) in the third degree, the inheritance next belongs, and thus of Bruhuspitia, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sisters), both from her being begotten under the brother's family name and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the Mayucha on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the Mitacshara, the sister comes next in order of inheritance after the brother. [530] The passage in the Mitacshara is contained in the first paragraph of ch. II., sec. iv.: 'On failure of the father, brethren share the estate.' Nanda Pandita and Balam-Bhatta, says Mr. Colebrooke in his note to this passage, consider that, as including 'brothers and sisters,' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar (Panini, sec. 12, 68). They observe, that the brother inherits first, and, in his default, the sister; this opinion, Mr. Colebrooke states, is controverted by Camalacara and the author of Vyavahara-Mayucha. It certainly is so in sec. 16 of chaps. iv. and viii. of the Mayucha, p. 105; but, it should be observed, that in p. 15 of the same commentary the doctrine of the Mitacshara, now generally regarded as established as to the words 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds. Sir Thomas Strange, vol. I., p. 146 [2nd edit.], after stating generally that the sister is excluded from succession, adds:—'Such appears to be the law of the Bengal Provinces; but is not to be taken as universal, opinions existing, that the term 'brethren' in the enumeration of heirs in the Mitacshara, includes 'sisters,' as 'parents' have been seen to do 'father and mother'; but, observes Sir Thomas Strange, 'they stand controverted.' For this position he refers to the Appendix in his 2nd vol., ch. vi., pp. 243, 244, and especially to the mark of Mr. Colebrooke there printed. In the passage thus referred to Mr. Colebrooke observes, 'Commentators on the Mitacshara allow the sister to come in, on failure of brothers. This opinion is, however, controverted,' and, to show that is so, [531] Mr. Colebrooke refers to the very passage already

cited from the Mitacshara, from Mr. Colebrooke's notes to which it appears that one of the two authorities cited as controverting the position is the Mayucha; and, on reference to the Mayucha, it further appears that the opinion as to the generic word 'brethren' including 'sisters,' is controverted there in precisely the same grammatical grounds on which the same authority had controverted the opinion, that the generic word 'parents' includes the mother; which latter opinion Sir Thomas Strange regarded as well established. The expression, therefore, in Sir Thomas Strange's first volume, that the opinion in question stands controverted (if by such an expression he meant, is conclusively or finally controverted), must be regarded as too strong. A similar construction should apparently be given to the words 'parents' and 'brethren.' He no doubt adds, on the authority of Mr. Colebrooke, that Jagannatha observes, it is now here seen that sisters inherit the property of their brothers; but Jagannatha, whatever the case may be on the other side of India, is not of binding authority on this. It would, on the whole, appear a safe proposition to lay down that, in this part of India, even if the opinion be not established, that the term 'brethren' includes 'sisters,' and, therefore, if sisters do not inherit on failure of brothers or brothers' sons, yet, at all events, that the doctrine of the Mayucha must be held to prevail, and that sisters come next in succession to the paternal grandmother. Either doctrine, however, will entitle the sisters to succeed to the inheritance of Gujanon upon the death of Luxumeebaee. As to the mode in which the sisters take, it [532] would appear, by analogy, that they take as 'daughters.' In a passage from the Commentary of Nanda Pandita, cited by Mr. Colebrooke in his annotations, in par. 5 of the 5th section of the second chapter of the Mitacshara (p. 351), occur these words: 'The daughters of the father and other ancestors must be admitted, like the daughter of the man himself, and for the same reason'; but the daughters of the man himself take absolutely, and so, therefore, do the sisters. In Deucooverbaee's case (a) [533] this Court in 1859, after lengthened

(a) The judgment of the Chief Justice Sausse in this case, *nom. Pranjeevandass Toolseeydass v. Deucooverbaee*, was transmitted with this appeal, and was, in its material parts, as follows:—"In this suit there are two ground of claim: first, that the Plaintiffs were entitled to property as members of an undivided family; second, that even if Ramdass was to be considered as having separate estate, yet that he willed it in such a way to charity that the bequest was void for vagueness and, therefore, they, the Plaintiffs, were entitled to come in as heirs with Bhagmandass. I have already decided and given reasons for thinking that the property was not undivided, but separate property, and, therefore, that Ramdass had power to will it away, and that his Will operated on it. So far the Plaintiffs' case failed, and they ought then to show they had a *locus standi* in Court as heirs under a void bequest. The first question remaining is, whether this devise is a good charitable devise.—[Here followed the reasons for holding that the devise was void, and that the property became undisposed of residue, according to the Hindoo law.]—The Testator left a widow and daughters, and we must consider first what estate the widow took, the husband dying leaving separate property. I have felt considerable difficulty in coming to any decision, as the schools are so conflicting, and it is difficult to follow the reports of the Adawlut. The Books that are of authority in this part of India are three—Menu, Mitacshara, and Mayucha. Mr. Colebrooke, the celebrated author of the Digest, speaks of the Mayucha in a letter set out in 1 Strange's 'Hindu Law,' p. 318 [2nd edit.]; the next in authority is the Mitacshara, which Mr. Borradaile mentions in his Reports, and he says there are three Books generally referred to in this part of the country. I also had inquiries made of the Shastrees here and at Poonah, and they say these three Books establish the usage, and have been referred to for the last eighty years at least as authorities here on the law of inheritance. The Daya-Bhaga referred to in Sir Thomas Strange's work is of the Bengal school. I was led to make these inquiries because Strange refers to Bengal Books—the Bengal law being different. Then, according to these three Books, what estate does the widow take? All the authorities, both in Bengal and here, are in unison as to the right of the widow to succeed where the property is separate, and in the former to undivided also, but her power over it is said to be limited on the Bengal side, and she is merely treated as tenant for life. But on this side there appears to be a different practice.

consideration of all the accessible authorities, and after consulting the [534] Shastrees, both in Poonah and in the Sudder Adawlut of Bombay, held that daughters, on this side of [535] India, taking by inheritance, takes an estate absolutely. This doctrine was mainly based on the authority of the Mayucha, ch. iv., sec. 8, para. 10, p. 103, and on that of the Mitaeshara, ch. II., sec. 2, paras. 1 and 2, p. 341. The passage from the Mayucha is as follows:—'In default of the wife, the daughters succeed, even as Menu says. The son of a man is even as himself, and the daughter is equal to the son: how, then, can any other inherit his property but a daughter, who is as himself?' In the case of Deuceoverbaee, each Shastree rested his opinion as to

which appears to be founded on the authority of the Books I have mentioned. In 1 Strange's 'Hindu Law,' p. 247, he says the restrictions on the widows' power is limited and concerns land only—but as to personal estate greater latitude is given. He cites the Bengal Reports, and Borradaile's Reports. I cannot get the Bengal Reports, but Borradaile does not bear him out. In Sp. Summery, published by the Bengal Government in 1825, it is stated, that the widow holds the moveable property absolutely; but of land is merely tenant for life. He then refers to the Mitaeshara, which says, therefore, it is a settled rule that the widow takes the whole estate when separate, if living chaste. The Mayucha lays down the proposition very much in the same way, and says the widow takes the moveable and immoveable property. On the question submitted to the Shastrees, it appears that the widow has power over the whole estate for proper purposes, and over the immoveable property she is limited to the use of it for life, but can mortgage or sell it for necessary purposes—but she is bound to exhaust the moveable before resorting to the immoveable property, the latter being an object of care to the Hindoo law, with a view to preserve it for the heirs. The cases are very conflicting, but I find over the moveable she has power, but that it is denied over the immoveable, and that a widow may give during her life personal property, but cannot will it (the learned Judge here referred to 2 Morley's Dig., p. 69). On the whole, I think the spirit and practice of the Hindoo law as existing in Western India, will be best construed by treating the widow as having uncontrolled power over the moveable estate, but not having more than a life use over the immoveable estate. The widow has by the text Books a number of duties thrown on her as to spending money, but they are of that character that it would be impossible for the Court to carry them out. In Bengal, dealings by a widow with the immoveable estate are legally but not morally good, but I am not aware that it has been so held here. I have, therefore, come to the conclusion, that in regard to immoveable property her estate is in the nature of that of a tenant for life. The widow, therefore, not having full power, we must see who are entitled. In this case there are daughters. Now, according to all the authorities, the daughters take next after the widow. But what is the nature of the estate they take? And here there are differences of opinion; but dealing with the question according to the three Books I have mentioned, it appears to me that the daughters take an absolute estate. That the separate property they take by inheritance from the father ranks as Stridhana, is asserted by the Mitaeshara; but this is denied by Strange. But the practice, so far as my search goes, does not agree with the Mitaeshara; therefore, I think it is not expedient or consonant with practice to hold that property coming to daughters by inheritance is Stridhana, but merely the immoveable part of it. Strange says, 'Neither does such property go as Stridhana, but, according to southern authorities, it classes as Stridhana;' but going to the fountain of law, Menu, as quoted in the Mayucha, p. 103, s. 10, we have laid it down that, in default of sons, the daughters are treated as sons, and take absolutely. With reference to this point, also, I consulted the Shastrees both here and at Poonah, the question being, whether daughters could alienate any and what portion of the property derived from their father, who died separate? The answer was, that daughters obtaining property could alienate it at their will and pleasure; and in this the Shastrees of both places agree. On reviewing the authorities, and 3 Colebrooke's Dig., p. 465, where it was held that daughters have a right to alienate property inherited, I have come to the conclusion that daughters take the immoveable property absolutely, when it comes to them after the death of the mother; and that the Plaintiffs have no *locus standi* in this Court. Therefore, in this cause, the Bill must be dismissed.

the inheritability of the daughters on this same passage of the Mayucha, referring to it as a work of high and generally received authority, not only in Guzerat, but in Bombay and the Deccan; that is to say, over the larger and more important portion of this Presidency. Of the general authority of the Mitashara on this side of India there can be, and, in fact, never has been, any doubt; and on this point the Mitashara is not less clear and explicit than the treatise already cited. The text of the Mitashara already referred to is in ch. II., sec. 2, on the 'right of the daughters and daughters' son.' In par. 1 it is laid down—'on failure of her (*i.e.* the widow) the daughters inherit.' Par. 2 is as follows:—Thus Catyayana says, 'Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried.' Also Vrihaspati, 'The wife is pronounced successor to the wealth of her husband, and in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How, then, should any other person take her father's wealth?' In the face of authorities so clear and explicit as these are, [536] and so generally regarded as binding on this side of India, it becomes immaterial to examine the case referred to in the argument as having been decided in Bengal, where a different school of doctrine prevails, as to some portions of the line of Hindoo inheritance. We will observe, that the above expression in Catyayana, 'let the daughters inherit, if unmarried,' is shown by the following sections in the Mitashara not to be restrictive, but preferential only as between married and unmarried daughters. It thus appears, that upon no construction of Bhugwantra's Will have the Plaintiffs, on the face of the Bill, shown that they are entitled, upon the decease of Luxumeebaee, to take the whole of the estate of Bhugwantrao for an estate of inheritance, or any other estate. They have of course equally failed in showing that they are interested in the account as prayed; and the demurrer must be allowed with costs."

The present appeal was from this judgment.

Mr. Rolt, Q.C., and Mr. G. Lake Russell, for the Appellants.—The question raised is one of inheritance and succession by the Hindoo law. The Appellants are the sole ultimate heirs and legal personal representatives of Bhugwantrao, and of his son, Gujanon, according to the Hindoo law, and entitled, as we insist, upon Gujanon's death to a moiety of his estate, subject to the life interest of the Respondent, Luxumeebaee, and upon her decease absolutely to the whole estate of Bhugwantrao and his son, in undivided shares. Luxumeebaee, as a Hindoo widow, is, by the Hindoo law, at the most, entitled only to a life estate in the moveable and immoveable estate of her husband, whether [537] she takes under the Will, or by inheritance. *Keerut Sing v Koolalul Sing* (2 Moore's Ind. App. Cases, 331), and cases cited in Morley's Dig., Vol. I., p. 614, pars. 8, 15. If the Will purports to give her a larger estate than an estate for life, the devise is inoperative and void in law as against the Appellants; but whatever be the quantity or quality of the estate now vested in Luxumeebaee, and formerly belonging to her deceased husband, whether as tenant for life, or as joint tenant, she has no power of disposing of the same, or at least of the immoveable part thereof, by Will, or otherwise, and the same, on Gujanon's death, descended to the Appellants, subject to Luxumeebaee's life estate, and at her decease, will devolve, according to the Hindoo law, upon the Appellants as remainder-men for an estate of inheritance. This view holds good whether the family be considered as undivided, or separate, or whether the property be considered as ancestral, or property separately acquired. In any event, the Appellants, the male cousins, as the male representatives of Bhugwantrao and Gujanon, succeed as heirs in preference to daughters. Strange's "Hindu Law," Vol. I., pp. 144-6, [2nd Edit.,] *ib.* vol. II., pp. 243-248. Mitashara, ch. II., sect. 4, par. 7, p. 348. Morley's Dig., Vol. I., pp. 321-2, pars. 125-7, 180-3. Deucooverbaee's case, referred to in the judgment of the Court below (*ante* [9 Moo. Ind. App.] p. 532), only decided that the widow had a life estate; and though it was there held that her daughters succeeded on her death, yet such holding is contrary to the authorities. Even in cases where females take by succession, or descent, from the parent or brother, they take life estates only, and not absolutely. Again, the daughters [538] being married, and their marriage portions paid, excluded them from participation.

Sir Hugh Cairns, Q.C., and Mr. Wickens, for the Respondents, were not called on.

Their Lordships' judgment was pronounced by

The Lord Justice Knight Bruce.—The question raised by the demurrer, the subject of this appeal, is, whether the Plaintiffs in the suit, the Appellants, have by the statements in their Bill shown any interest in the estate of Bhugwantrao, the Testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhugwantrao was a Hindoo, resident at Bombay. He died in the year 1851, having made his Will in the English language, in that year. He appointed his wife one of the Respondents, now his widow, sole Executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus:—"All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, etc., I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son, Gujanon, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression, "the joys, etc., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers [539] only to whatever may have been meant by "the joys, etc."

The Testator, as has been said, died in the same year, survived by his wife, the Executrix, one of the Respondents, and her three daughters by him, who are also Respondents, and by the infant son, Gujanon, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the residue—whether as giving, or not giving, an absolute interest, and whether as giving, or not giving, an interest in the nature of what English lawyers call a joint tenancy in common. In the circumstances that happened, their Lordships do not think it necessary to give an opinion upon that point or those points of construction, for whether the gift was absolute or not absolute, whether in common, as we call it, or in joint tenancy, upon the Testator's death, the widow and his son took the whole between them, at least in possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the Appellants.

Their claim is thus founded. They contend that upon the death of Gujanon the absolute interest in the whole, or a moiety, subject to a life interest in the widow, devolved upon his heirs, and that those heirs were the Appellants, and not the three daughters of the Testator, the co-Respondents with the widow. They make out, they say, proposition by the nature of their relationship, namely, that they were the sons of the brother of the Testator, and being so related in [540] the male line they excluded by law, they say, the sisters of Gujanon from the heirship to him, a proposition which the Respondents deny.

Now, upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts of India, and a general leaning in favour of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point upon which, probably, it may be said, that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice in giving his judgment in the present case, quotes a Book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says (*ante* [9 Moo. Ind. App.], p. 529), "Supposing, then, Luxumeebaee to take a life estate only in the descended inheritance, the reversion vests in the next heir of Gujanon, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from Mayucha, ch. iv., p. 19, where, after enumerating the mother (see pp. 14 and

15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18) and no paternal grandmother of Gujanon is shown to be in existence on the face of this Bill. The Commentator, in section 19, proceeds thus:—'In default of her (the paternal grandmother) comes [541] the sister, under this text of Menu. To the nearest Sapinda (male or female) after him or her in the third degree, the inheritance next belongs: and thus of Bruhospitia, where many claim the inheritance of a childless man, whether they may be maternal or paternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the Mayucha on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the Mitacshara, the sister comes next in order of inheritance after the brother. The passage in the Mitacshara is contained in the first paragraph of ch. II., sec. 4: 'On failure of the father, brethren share the estate.' Nanda Pundita and Balam-Bhatta, says Mr. Colebrooke, in his note to this passage, consider that as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformable with an express rule of grammar. They observe, that the brother inherits first, and in his default the sisters; this opinion, Mr. Colebrooke states, is controverted by Camalacara and the author of Mayucha. It certainly is so in sec. 16 of chapters iv. and viii. of the Mayucha, p. 105; but it should be observed, that in p. 15 of the same Commentary, the doctrine of the Mitacshara, now [542] generally regarded as established as to the word 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds.'

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction of the word "brethren," is wrong, but certainly neither are they satisfied that the construction put by the passage in the Mitacshara, which has been mentioned, and generally adopted as it seems in Bombay, is wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present Plaintiffs. Accordingly their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that in Bombay, at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the Appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which they have any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed, with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage por-[543]-tions excluded them from participation, that their Lordships think there is no ground for that argument either in principle or otherwise.

KATAMA NATCHIER.—*Appellant*: SRIMUT RAJAH MOOTTOO VIJAYA RAGANADHA BODHA GOOROO SAWMY PERIYA ODAYA TAVER.—*Respondent* * [April 27, 28, 29, and 30, May 30, and June 1, 1863].

On appeal from the Sudder Dewanny Adawlut at Madras.

The Zemindary of Shivagunga in Madras is in the nature of a Principality, impartible, and capable of enjoyment by only one member of the family at a time [9 Moo. Ind. App. 592].

By the law of inheritance prevailing in Madras and throughout the southern parts of India, separate acquired estate descends to a widow, in default of male issue of the deceased husband.

The interest of a Hindoo widow so succeeding to her husband's estate is similar to that of a tenant in tail by the English law, as representing the inheritance.

In a united Hindoo family where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all the rights of co-partners, inherit the self-acquired estate free from such rights.

Where property belonging in common to a united Hindoo family has been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property; but if there is a co-partnership between the different members of the united family survivorship follows.

Upon the principle of survivorship, the right of the co-partners in the undivided estate overrides the widow's right of succession; but with respect to self-acquired property of a member of the united family, the other members of the family have neither community of interest, nor unity of possession, therefore, the foundation of the right to take by survivorship fails.

A decree in a suit by A. against B., claiming as widow, to succeed to her husband's estate, in preference to B., his nephew, on the ground of the family being divided, held not to operate as *res judicata*, or capable of being pleaded in bar to a suit by C., a daughter, claiming to succeed to her father's estate on A.'s death, on the ground that the property was self-acquired by her father. Such judgment, though viewed otherwise by the Court below, determines only an issue raised concerning a particular person, and is not a judgment *in rem*, but simply a judgment *inter partes*.

In this case the appeal was brought from a decree of the Civil Court of Madura, dated the 27th of December, 1847, by which the Respondents' father, Gowery Taver, the son of Oya Taver, was held entitled to the Zemindary of Shivagunga, as heir to the Appellant's [544] father, Gowery Vallabha Taver, in preference to Anga Moottoo Natchiar, the surviving widow of the latter, on the ground that Appellant's father and his elder brother, Oya Taver, were undivided brothers. The appeal also embraced the decrees of the Sudder Adawlut Court at Madras, dated the 19th of April, 1852, the 5th of November, 1859, the 3rd of March, 1860, and the decree of the Civil Court of Madura of the 25th of August, 1859, in which it was held that the Appellant, claiming as heir in remainder after the death of the surviving widow, Anga Moottoo Natchiar, was not entitled either to appeal from the decree of the 27th of December, 1847, or to prosecute a new suit to recover the Zemindary.

The property claimed comprised the Zemindary of Shivagunga, a Zemindary of very great value, situate in the District of Madura in the Presidency of Madras, together with other property and mesne profits to a very large amount.

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The circumstances of the case, the history of the Zemindary of Shivagunga, and of the extensive litigation respecting the succession, were as follow:—

The Zemindary of Shivagunga was created by [545] Sadut Ally Khan, Nabob of the Carnatic, in the year 1730, and it was given as an hereditary fief by him to Shasavarna Odaya Taver, of the family of Nalcooty, of the Marawa caste, in reward for his military services. Shasavarna was on his death succeeded by his only son, Vadooganada, who was killed in battle. Vadooganada had an infant daughter by his wife, Ranee Velu, but no other child. It appeared that two persons named Vella Murdoo and Chinna Murdoo then usurped the actual government of the Zemindary, and ultimately wrested from the Nabob of the Carnatic his acquiescence in the nominal tenure of the Zemindarship by Ranee Velu. Velu gave her daughter by Vadooganada in marriage to one Vengam Odaya Taver. The daughter died in giving birth to her first child, and the child survived its mother but a short period. Both died in the lifetime of the Ranee Velu, who was thus left issueless. It also appeared that the Appellant's father lived at Shivagunga with the Ranee, who, it was alleged, had adopted him. The parties who then appeared to be entitled to the Zemindary were two brothers, Oya Taver and Gowery Vallabha Taver, collateral descendants from the progenitors of Shasavarna. Gowery Vallabha Taver was at this time about twenty-nine years of age. Oya Taver was his senior in years, but sickly and infirm. The two brothers were the nearest relations of Vadooganada, and also of Shasavarna. Vellu Murdoo and Chinna Murdoo, on the death of Ranee Velu, expelled Oya Taver and Gowery Vallabha Taver from the Zemindary, and joined a rebellion against the Government. This rebellion was put down by the East India Company.

By the Treaty of the 12th of July, 1792, all sovereign power over the Poligar countries, including the Zemindary of Shivagunga, was transferred in perpetuity by the then Nabob of the Carnatic to the East India Company.

[546] By a proclamation of Lord Clive, dated the 6th of July, 1801, the Government transferred the Zemindary, which, it appeared, was treated by the Government as an escheat for want of lineal heirs, to the Appellant's father, Gowery Vallabha Taver, otherwise called Permettoor Worria Taver, or Woya Taver, who was collaterally descended from the progenitors of the first Zemindar, and appointed him Zemindar of Shivagunga.

By a Sunned i Milkeat Istimrar, or deed of permanent settlement, dated the 22nd of April, 1803, the Zemindary was confirmed to the Appellant's father, to hold in perpetuity, with power to transfer the same by sale or gift, on payment to the Government of a permanent annual jumma. From the time of his investiture in 1801, until his death in 1829, Appellant's father continued the sole Zemindar.

The principal questions involved in the appeal were, first, whether the Appellant's father and his brother, Oya Taver, were divided brothers; and, secondly, if the Zemindary was the self-acquired estate of the Appellant's father. It was alleged by the present Appellant that her father, and his elder brother, Oya Taver, had divided their ancestral and other property at Padamattoor and elsewhere, which they held as principal Ryots under the former Zemindary of Shivagunga. This division it was said was effected by deeds executed in the year 1792, after which Appellant's father remained with Ranee Velu at Shivagunga, which was some distance from Padamattoor, where Oya Taver continued to reside, Padamattoor having fallen to his share on the division. It appeared that by a Moolchilka, or lease, dated the 17th of July, 1803, the elder brother, Oya Taver, leased from the Appellant's father eight villages, part of the Zemindary, in permanent lease, at a fixed teerva (rent) of [547] Pons 3157. These villages were held under the Moolchilka by Oya Taver until his death on the 17th of April, 1815, he having paid the teerva to his brother, with the exception of some arrears due at his death. By a Moolchilka, dated the 24th of July, 1815, Moottoo Vadooga Taver, also called Woya Taver, the eldest son of Oya Taver, rented the same villages at the same rent in a similar manner from the Zemindar, at the same time binding himself to pay the arrears due from his father. In the year 1820, Moottoo Vadooga made claim to the eight villages as Zemindar of a separate Paliaput, at Padamattoor and created some disturbance, refusing to pay the rent to his uncle, the Appellant's father.

This gave rise to a suit being instituted on the 21st of March, 1823, by the Appellant's father against Moottoo Vadooga and his two brothers, Gowery Vallabha and Bodha Gooroo Swamy Taver, the three sons of Oya Taver, to recover the eight villages as forfeited for non-payment of *teerava*, founding his right upon the gift of the Zemindary to him by the Government in 1801, and the two Moochilkas in 1803 and 1815. Moottoo Vadooga and his two brothers filed their answer and thereby set up, by way of defence, first, that they were entitled to the whole Zemindary of Shivagunga as the elder branch of the family, and that the Proclamation of Lord Clive in 1801 was in favour of their father, and that it treated the Appellant's father as a mere manager for his elder brother; secondly, that the eight villages of Padamattoo formed a sub-Paliaput attached to Shivagunga, which had been enjoyed by Oya Taver and his ancestors as their own property; thirdly, that the Moochilkas were fabrications of the Appellant's father; and lastly, that the Zemindary was [548] not the self-acquisition of the Appellant's father, but had been enjoyed by him and his brother as undivided brothers. The Appellant's father, by his replication, denied that the eight villages formed a separate Paliaput, and rested his case upon his self-acquisition of the Zemindary, and upon the Moochilkas.

This suit was compromised by a Razinamah, dated the 5th of January, 1826, to the effect, that the Defendants had no right whatever to the Shivagunga Zemindary, or to the other estate thereto belonging, as stated in the answer; and it was agreed that the Defendants should enjoy the eight villages under the Appellant's father, paying to him a kist, of 1000 pagodas annually, and that the Defendants should also pay a part of the arrears of kist, the rest being remitted by the Appellant's father.

Under this arrangement Moottoo Vadooga and his brothers held the eight villages, paying the kist to the Appellant's father, until his death, which event took place in the year 1829.

On the death of the Appellant's father, Moottoo Vadooga produced an alleged Will of the Appellant's father, dated the 17th of June, 1829, the day of his death, which purported to give him the Zemindary, in case the child of which the Zemindar's fifth wife was then *enceinte* should prove not to be a male.

The Appellant's father during his lifetime had seven wives. He died without leaving any male issue, but left three widows, one of whom, Purvata Natchiar, was *enceinte*. Parvata Natchiar, the sixth wife and second widow, was, after the death of her husband, delivered of a female child, whereupon the Government made over the Zemindary to Moottoo Vadooga. Claims were, [549] however, preferred to the Zemindary by the three surviving widows, Anga Moottoo Natchiar, Purvata Natchiar, and Moottoo Veray Natchiar; and a claim was also set up by the son of Cota Natchiar, a daughter of the late Zemindar, as having been adopted by Parvata Natchiar. The claims of Moottoo Vadooga being supported by many of the family, the three widows were induced to give up their claims and that of the alleged adopted son of Cota Natchiar, and on the 29th of July, 1830, to execute a Razinamah admitting the right of Moottoo Vadooga as Zemindar, upon having certain lands made over to them for their maintenance. Moottoo Vadooga was then installed as Zemindar of Shivagunga by the Government, acting upon the Razinamah of the widows. On the 21st of June, 1831, Moottoo Vadooga died, and was succeeded, and possession of the Zemindary taken, by his son, Bodha Gooroo Sawmy Taver.

On the 23rd of March, 1832, Velli Natchiar, a daughter of the Appellant's father, on behalf of her infant son, Moottoo Vadooga Taver, filed a plaint, No. 4, of 1832, in the Provincial Court of the Southern division of Madras against Bodha Gooroo Sawmy Taver to recover the Zemindary, on the ground that her son was the senior grandson of the first wife of the Appellant's father, and as such his heir, according, as alleged by her, to an answer of the Appellant's father to Government touching the succession, dated the 11th of April, 1822, by which grandsons through daughters were to be preferred to widows, and she insisted that the Appellant's father and his brother constituted a divided family, and that the alleged Will was a fabrication.

Bodha Gooroo Sawmy Taver by his answer to this suit insisted, that the Appellant's father had only acted as [550] Zemindar by sufferance of his elder brother, Oya Taver; that the Appellant's father, by an order of succession dated 22nd of September, 1806, had pointed out his nephews as his heirs in case of failure of sons; that the Will of the Appellant's father was a valid Will: and that in case of partible

estates, nephews were preferred to daughters' sons, and widows; and in his rejoinder to the Plaintiff's reply he urged in addition, that the self-acquisitions of an undivided brother descend, on his death without male issue, to his brothers and nephews in preference to widows and daughters and daughters' sons.

Points were recorded by the Court, but the point of division, or no division, was not included, and the opinion of Pundits of the Sudder Court was taken on the following case:—"A Zemindary was held by a certain person, after whom it was enjoyed by his son, his son's widow, and his son's daughter. The daughter having been married, produced a daughter, who died without issue. All of the above parties being dead, the Government published a proclamation, that the hereditary right of succession to the Zemindary was extinct, and that the Zemindary had escheated to the State. The Government therefore conferred the Zemindary on A., who was collaterally descended from the original Zemindar, and granted him the usual Sunnud of permanent property for it.

A. married seven wives, of whom three were living at the time of his death. The first wife had a daughter, who bore three sons and a daughter. The second wife had a daughter who bore a daughter. The third wife had three daughters, the first of whom bore a son and two daughters, the second a [551] son, and the third was not married. The fourth, fifth, and seventh wives had no issue. The sixth wife had a daughter, who was not married.

A. had an elder undivided brother, B., who died before A., but some years after the Zemindary had been granted to A., leaving three sons, the eldest of whom, C., on the death of A., took possession of the Zemindary, and continued to hold it, until his death, after which he was succeeded by his son, D., who is now in possession of the Zemindary.

Question first.—The Zemindary having escheated to the Government, and having by them been granted anew to A., and being therefore in the light of self-acquired property, to whom ought it, after his death, under the principles of Hindoo law, to have descended—to the widows of A. and their descendants, or to C., the son of the elder brother, B.?

"Question second.—Supposing the line of descent to be in the widows and their descendants, who should be considered the heir—the eldest surviving widow, or the eldest son of the daughter of the first widow deceased?

"Question third.—Would it have been consonant with Hindoo law for A. to have adopted one of his grandsons (daughter's son) as his son?

"Question fourth.—Supposing A. to have left a Will in favour of his elder brother's son, C., constituting him heir to the Zemindary and to the rest of his property, to the exclusion of his wives, daughters, and grandchildren, would such Will be valid under the principles of Hindoo law?"

To this case the Pundits on the 28th of October, 1833, returned the following answers:—"To the first Query.—The Zemindary granted by Government [552] to A. should descend, after his death, to the son of his eldest undivided brother.

"To the second Query.—As the Zemindary should so descend, the widows of A. and their offspring are not entitled to it.

"To the third Query.—A. should have adopted one of his daughter's sons, 'Dowhittras,' and it would have been agreeable to the Hindoo law.

"To the fourth Query.—If A. had left a Will entitling his nephew, C., to the Zemindary and other property, to the prejudice of his widows, his daughters, and to his grandsons, such a Will will be consonant to the Hindoo law; but the nephew is, however, bound to allow maintenance to the widows of A. Such are the texts propounded in Vignyaneswara, Smriti Chandrika, and so forth."

Witnesses were examined to prove the alleged fact of the division between the Appellant's father and his brother, Oya Taver; the self-acquisition, the forging of the Will, and the opinion of the Appellant's father on the order of succession in 1822, whereupon the Provincial Court, acting on the opinion of the Pundits, passed a decree in favour of the Defendant.

Anga Moottoo Natchiar then asserted her claim, as eldest widow of the late Gowery Vallabha Taver, as heir to the Zemindary, and in the year 1833, filed a plaint *in forma pauperis*, No. 3 of 1833, in the Provincial Court of the Southern division of Madras against Bodha Gooroo Sawmy Taver, claiming the Zemindary as

heir to her husband, and stating that the last Rancee had adopted her husband, to whom the Government confirmed the Zemindary by sunnud: that the Defendant had taken forcible possession of her husband's property and deeds: that he had forged a Will; and [553] that advantage had been taken of her to execute the Razmanah in ignorance of her rights, as being a Hindoo widow she was not allowed to appear in public.

The Defendant by his answer denied the alleged adoption, and stated that the management of the Zemindary was conceded by Oya Taver, the rightful heir, to his younger brother: he denied also that the Will was a forgery, and set up the order of succession in the arzee of 1806, and relied also on the Razmanah executed in July, 1830, by the widows.

The issue of division or non-division, of the brothers, was not raised in this suit.

The Provincial Court, by a decree made on the 5th of September, 1834, in this suit, decided in favour of the Defendant, on grounds that no adoption of Appellant's father by the Rancee had been proved: that his claim to the Zemindary was from the free choice of the Government: and (assuming that the brothers were undivided) that the self-acquired estate of an undivided brother, dying without male issue, descended to his nephew in preference to his widow.

The Provincial Court also, by a decree dated the 5th of December, 1834, decided against the Plaintiff in the suit, No. 4, of 1832.

The Plaintiffs in the two suits of 1832 and 1833 appealed to the Sudder Dewanny Court at Madras.

Upon the appeals coming on for hearing, the Sudder Court submitted to the Pundits attached to that Court the following questions:—First, is the succession to the separate self-acquired property of a member of an undivided family governed by the same rules as the succession to the joint property of such family? Second, the self-acquired property of an individual [554] not being liable to division, according to the Hindoo law, how can it be maintained that such property can be inherited by the brother in preference to the widow of the possessor?

The answer of the Pundits, dated the 16th of January, 1837, to the first question was, "By saying that the separate self-acquired property of a member of an undivided family is not liable to division, is meant nothing more particular than that, at the time of partition of the common things, the acquirer of the said property, or his son, son's son, or grandson, need not give a share to the cousins out of the said property. Consequently, the succession to the separate self-acquired property of a member of an undivided family who died leaving no son, son's son, or son's grandson, is governed by the same rules as the succession to the joint property of such family." And to the second question, "The Dharma Sastras declare, as sanctioned by the established usage, that among the undivided brothers if one die without male issue the rest of his undivided brothers, etc., shall take the whole of his wealth and support his widows; but they do not declare, nor is it customary, that the separate self-acquired property of an undivided brother dying without male offspring should be given away to his widows. As it is, therefore, settled that the widow of an undivided brother who died leaving no son is entitled only to receive a maintenance, but not to succeed to any kind of property to which her husband had possessed a right, it cannot be properly maintained that such self-acquired property can be inherited by the undivided brother of the possessor in preference to his widow." Authorities: "The text of Vrihaspaty and its commentary, clearly show [555] that the widow shall take the whole estate of a man who, being separated from his co-heirs, dies leaving no male issue, and that the whole property of her husband who lived in a united family and died leaving no male offspring shall devolve on his father, brothers, etc., who were not separated from him. The text of Narada propounds that, among the undivided brothers if one die without male offspring or enter a religious order, the rest of the brethren shall divide his wealth, except the wife's separate property. Consequently, the texts of Vrihaspaty and Narada, and the commentaries thereof, and the text of Yajñawalkya, declaratory of the right of the widow, daughters, etc., and the commentary thereof (contained in the law Book Mitacshara), furnish an authority to maintain that the self-acquired property of an undivided brother can devolve on his undivided brothers after his death."

On the 17th of April, 1837, the Sudder Court pronounced a decree in the two ap-

peals, dismissing the appeal on behalf of Moottoo Vadooga Taver, and deciding in favour of Anga Moottoo Natchiar's appeal, on the grounds, that no adoption had been made by the Appellant's father; that a widow was preferred to a daughter's son; that the Appellant's father and his brother were divided; that the self-acquired property of a divided brother descended to his widow in preference to his brother's son; that the Will was a forgery; and, lastly, that the Razinamah of 1830, was not binding on Anga Moottoo Natchiar.

The decree of the Sudder Court being founded on the assumption that the two brothers were divided, Bodha Gooroo Sawmy Taver applied for a review of judgment, on the ground, that the Appellant's father had, in three suits, in the year 1804, [556] pleaded that he and his brother Oya Taver were undivided, but the Sudder Court refused such review. Bodha Gooroo Sawmy Taver then appealed to Her Majesty in Council from the decree of the Sudder Court, and, having died pending the appeal, the appeal was, on the 15th of January, 1842, revived by Gowery Taver, his brother, the Respondent's father. On this appeal a decree was made by the Judicial Committee, and confirmed by an Order in Council, dated the 18th of June, 1844, by which the decree of the Sudder Court of the 17th of April, 1837, was reversed, on the ground that no points had been recorded in the Court below, as required by Mad. Reg. XV., of 1816, on the question of division or no division of the family; but leave was given to the widow to bring a new suit within three years, their Lordships stating that the question of division was a most substantial question, and, without making any order on the subject, intimated that the question of division or no division appeared to be the only point on which the title would ultimately depend (see case reported, 3 Moore's Ind. App. Cases, p. 278).

On the 2nd of September, 1844, Gowery Taver was put into possession of the Zemindary by Order of the Sudder Court.

In consequence of the leave given in the above appeal by the Judicial Committee of the Privy Council, Anga Moottoo Natchiar filed a plaint *in forma pauperis*, No. 2, of 1845, in the Civil Court of Madura, against Gowery Taver and his younger brother, Namasivaya Taver, to recover the Zemindary. The plaint set forth the facts hereinbefore detailed, and the Plaintiff claimed to be heir of her deceased husband, shaping her case in [557] a twofold manner; first, on the assumption that it was incumbent on her to prove that her husband and his brother, Oya Taver, were divided; that the divided character of the family was established by the division and deeds which it was alleged had been taken possession of with the other documents by Moottoo Vadooga, on the death of her husband; by the adoption of her husband by the Rane, and his separate residence with the Rane for many years; by the self-acquisition of the Zemindary from the Government, and the homage paid to him by his elder brother; by the Mochilkas and leases of Padamattoor and the eight villages by her husband to Oya Taver and his sons; by the separate residence of the latter at Padamattoor, a long distance from Shivagunga; and by the Razinamah in 1826 of Bodha Gooroo Swamy Taver, admitting that the Zemindary was the self-acquired and separate estate of her husband, and that his elder brother had no right to it. Secondly, she alleged that the question of division or no division, was really immaterial, on the ground that, according to the Hindoo law, undivided brothers had no right to share in the self-acquired and separate estate of their brother, either in his lifetime or by descent, and she set out in detail the alleged forgeries of Bodha Gooroo Sawmy Taver to prove the undivided character of the family, and claimed the Zemindary and the mesne profits thereof, with other personal property.

Gowery Taver, the first Defendant, by his answer, set up the answer of the Appellant's father of 1806 as to succession; the alleged Will; the Razinamah of the widows, and the Pundits' opinion in the Sudder Court in 1837; he contended, moreover, that the Plaintiff ought, in the suit, to have confined [558] herself to the question of division or no division; that the acquisition of Appellant's father was by right of cousinship and by consent of the elder brother, and he denied the adoption and division, contending that the division ought to have been set up by Plaintiff in her former suit, and in the appeal before the Sudder Court, and he further denied the Hindoo law set up by the Plaintiff, as to the descent of self-

acquisitions of an undivided brother; he also denied that the forgeries were the work of his brother.

Witnesses were called by the Plaintiff to prove the deeds of division and the actual division between Appellant's father and his brother in 1792, of the Padamattoor lands, and all their property, consisting of Nunja and Punja lands, Ulava and Kaval lands, cows, sheep, some ornaments, coins, and debts; that the house at Padamattoor was taken by the elder brother, and the house at Scruvagal by the Appellant's father; that the brothers always lived separate, the Appellant's father living with Rancee Velu, at Shivagunga.

On the other hand, the Defendants called witnesses to prove the brothers were undivided; that the brothers enjoyed the house and Padamattoor lands in common till the year 1794 (most of the witnesses spoke to this period, which was only two years' difference from the Plaintiff's witnesses; that they performed religious ceremonies jointly, as well before as after the year 1794. Some of the witnesses deposed that the Padamattoor lands were enjoyed in common, though when pressed they admitted that kist was paid for the eight villages by Oya Taver to his brother, Gowery Vallabha Taver, as the Zemindar. The witnesses accounted for the separate residence of Oya Taver at Padamattoor, by reason that the water [559] of Shivagunga did not agree with him, and on an alleged admission by the Appellant's father, whilst the suit of 1823 was pending, that he did not then set up a division.

On the 27th of December, 1847, the Civil Judge, Mr. Baynes, passed his decree, which was, in substance, to this effect, that the only point was the division of the brothers in the year 1792; and he was of opinion that the oral evidence on either side was equally worthless, but, if anything, that the Defendant's witnesses were least credible; that the Moochilkas proved no division; that the Razinamah, in suit, No. 4, of 1823, though by it the Defendant's father renounced "the right to compel Appellant's father to divide the Zemindary in his lifetime," did not prejudice his right as undivided heir; that the opinion of the Appellant's father, on the succession in 1806 and 1822 was more consistent with the fact of no division having taken place. That the depositions in the suit, No. 4 of 1832, on the point of division, though bearing the probability of truth on them as having been given on an incidental point, were not to be implicitly relied on, and, therefore, they were rejected by the Court altogether; that the Razinamah of the widows in 1830 was binding on them, though given when they were ignorant of their rights; that the forgery of the Will by the Defendant's father ought not to be pushed against him as betraying any consciousness of a want of title; and the decree concluded by deciding that the brothers were undivided, and dismissed the suit with costs. At the same time the Court held that the Plaintiff as widow was entitled to an adequate maintenance.

This was the first of the appeals now brought before the Judicial Committee of the Privy Council.

[560] From this decree Anga Moottoo Natchiar appealed, *in forma pauperis*, to the Sudder Dewanny Court at Madras: the appeal being entitled, No. 7, of 1849.

Pending the appeal Gowery Taver died, and left the Respondent, his eldest son and heir, then an infant, who revived the appeal.

The appeal, No. 7, of 1849, having been heard, the Sudder Court reserved its judgment; but, in the meantime, on the 23rd of June, 1850, Anga Moottoo Natchiar died childless, and the appeal was held by the Sudder Court to have abated; and the Court issued a notice to the heirs of Anga Moottoo Natchiar to come forward within six weeks and continue the suit.

The sixth and seventh widows having pre-deceased Anga Moottoo Natchiar, several claimants presented themselves as heirs in remainder to the Zemindary, as being the separate estate of Appellant's father, but these claimants were afterwards reduced to two. First, the Appellant as the younger daughter of the Zemindar by his third wife, who had died in his lifetime, the Appellant then having a husband and sons, and joining with her two sisters, Bootakha Natchiar and Kota Natchiar, both of whom were since deceased. Secondly, Sowmea Natchiar, a daughter of the Zemindar by his sixth wife, the second widow.

On the 24th of August, 1850, the Appellant and her two sisters filed their petition in the Sudder Court, claiming to carry on the appeal, as heirs in remainder to the Appellant's father, in succession to Anga Moottoo Natchiar deceased, as agreeing between themselves for the enjoyment successively, by Bootakha Natchiar and Kota

Natchiar, for their successive lives, with ultimate remainder to the Appellant; and Sowmea Natchiar filed her petition, claiming to [561] carry on the appeal as heiress, niece and devisee of Anga Moottoo Natchiar.

Vadooga Taver, on the 26th of September, 1850, the Plaintiff in the original suit of the 23rd of March, 1832, No. 4 of that year, filed a petition claiming as heir also, as being descended from the senior wife of the Appellant's father, but his claim was not prosecuted.

On the 26th of September and the 17th of October, 1850, the Respondent by his guardian filed counter petitions praying the Court to refuse the Appellant, and the other alleged heirs in remainder, leave to carry on such appeal, and also praying the Court to refer them to the institution of a new suit, on the ground, that in such new suit he might be able to set forth particular objections to their claims from their individual acts, such as accepting maintenance from his father and other members of his family.

An Order was passed by the Sudder Court, on the 21st of October, 1850, declaring that none of the claimants could be accepted as the heir of the deceased Appellant, as she was a childless widow, but that they might simply plead a right of succession on her death as the daughters of the Zemindar, and that, although the decision of the appeal might materially affect such right of succession, still that would not vest in them the right to continue it, but the Court at the same time, observed that their order would form no bar to the institution by any of the claimants of a new action for the recognition of their alleged claims, if instituted on or before the 30th of April, 1851, and that at the expiration of that period the decree of the Civil Court would be considered final.

[562] On the 25th of November, 1850, the Appellant and her sisters filed their petition for a review of the Order of the 21st of October, 1850, stating that Anga Moottoo Natchiar, as widow, had a life interest only in the Zemindary, and that it was only at her death that a title accrued to them as the heirs in remainder, and that during her lifetime they could not have instituted a suit, and they claimed to be entitled to a term of twelve years from the death of Anga Moottoo Natchiar to prosecute their claim.

Upon the presentation of these petitions the Sudder Court, on the 7th of March, 1851, submitted the following question to the Pundits of that Court, for their opinion as to what person should supply the place of Anga Moottoo Natchiar in the appeal:—"A Zemindar, A., who had married seven wives during his lifetime, died, leaving behind him his fifth wife, B.; his second wife's daughter, C.; his third wife's daughters, D. and E.; his sixth wife's daughter, F.; and his wife's grandson, G., by her daughter. B. instituted a suit claiming the succession to the Zemindary, on the ground that a family division had taken place before the death of A. Supposing the suit of B. grounded on family division to be just, you will explain who of the above mentioned individuals are entitled, under the Hindoo law, to supply the place of B., and carry on the suit?"

The Pundits give to this question the following answer:—"Neither of the parties marked C., etc., in the question, as being the offspring of B.'s husband by his other wives, is legally entitled to conduct the appeal referred to; neither the daughters of rival wives, nor their sons, being authorized by the Hindoo law Books, *Vijnaneswara*, etc., prevailing in this [563] part of the country to perform funeral rights or inherit property. In prescribing the order of succession the law Book, entitled '*Vijnaneswara*,' draws no distinction between a woman's peculiar property called '*Stridhana*' and that which devolved upon her by inheritance; it on the contrary treats them jointly in propounding heirs to succeed to the property of a childless woman; further, the said law Book makes no mention of the daughter, or of the son of the daughter of a rival wife equal in class, although it speaks of the daughter of a rival wife being superior by class. The said authority likewise, in propounding the distribution of the property of a childless woman, declares that the property of a childless woman, who had been married in any of the forms denominated '*Brahma*,' etc., shall (after her demise) devolve upon her husband, and on failure of him upon his nearest kinsmen *sapindas*; but who these *sapindas* are the work does not describe (in the particular place where the said succession is mentioned); it, however, in treating upon the succession to the property of a sonless man, adverts to the text which says, 'The relation of the

sapindas, or kindred connected by the funeral oblation, ceases with the seventh person.' From this is to be gathered that all the kindred sprung from the same family, or from the same primitive stock, and reaching the seventh degree in direct descending line, are 'sapinda,' kinsmen of each other; such sapindaship cannot by any possibility exist in step-daughters or their sons mentioned in the question. It is further observable, that the right of succession to the property of a deceased person is generally dependent upon the successor's competency to confer benefits [564] on the deceased by the performance, as it is stated by the Hindoo law-givers, of the deceased's funeral rites, but in the compact series of heirs competent to perform such executorial rights step-daughters and their sons are nowhere mentioned. It is for these reasons that we have stated in our answer of the 13th instant, 'that the daughters of a rival wife or their sons, are no heirs.' 18th of March, 1851. The head Translator of the Court having in returning this paper conveyed to us the Registrar's requisition that we should set forth the particulars of sapindas, and specify whether or not a maiden daughter is a sapinda, and as such entitled to succeed to property, we beg to submit the required particulars as follows. — 1. The law Books 'Vijnyaneswara,' etc., declare that of a woman dying without issue, and who had become a wife by any of the four modes of marriage denominated 'Brahma,' 'Daiva,' 'Arisha,' and 'Prajapatya,' the whole property belongs in the first place to her husband, and on failure of him to his nearest kinsmen 'sapindas,' who are his mother, father, uterine brother, step-brother, uterine brother's son, step-brother's son, paternal grandmother, paternal grandfather, sons of ditto, grandsons of ditto, paternal great-grandfather, sons of ditto, and their issue, these persons being in the chapter 'on succession to the estate of a sonless man,' declared to be the nearest 'sapinda' kinsmen of the man destitute of male issue. 2. In the Book called, 'Varadarajeyum,' chapter 'on succession to the estate of a sonless man,' section 'on daughters' succession,' the author declares a maiden daughter to be 'sapinda' of her father to enable her to inherit his property in preference to his married daughter; [565] but in the chapter 'on succession to the property of a childless woman,' the said author does not declare a daughter entitled to inherit the property of her step-mother. The sapindaship of an unmarried daughter is but temporary, inasmuch as it ceases with her marriage. It only tends to invest her with inheritance in preference to married daughters who are not 'sapindas,' but it cannot give her any right to succeed to the property of her step-mother who leaves no issue behind her. Impressed with this opinion, we have stated that daughters of rival wives are in general not entitled to inherit the property of their step-mothers."

On the 28th of April, 1851, the Sudder Court put to the Pundits this further question—"Your attention is requested to the annexed genealogical trees, and you will be pleased to state whether anything thereon leads you to modify the opinions expressed by you on the 18th and 20th of March, 1851, and to that question the Pundits made the following reply:—We have perused the four genealogical trees annexed to the foregoing question, and observe that all the parties therein referred to are B.'s step-daughters, and their sons and daughters, who by the Hindoo law Books, 'Vijnyaneswara,' etc., which prevail in this part of India, are not entitled either to perform funeral rites or to inherit property. We, therefore, see nothing to induce us to modify the opinion already expressed by us that the said parties have no right at all."

On the 1st of May, 1851, the Sudder Court revoked their Order of the 21st of October, 1850, and directed the appeal to be replaced upon the file and the present Appellant and the other [566] claimants to be made supplemental Appellants, and the Court resolved at once to hear the appeal, and that if it should be sustained, the Court would then determine (in order that the rights of Appellant and the other supplemental Appellants as against each other and as against the Respondent might be tried) whether the record should be remanded to the Court of original jurisdiction, or whether any other more appropriate course could be pursued in regard to the same.

Accordingly the Appellant and the other heirs in remainder prosecuted the appeal suit, No. 7 of 1849, as supplemental Appellants, and several proceedings were had therein.

On the 22nd of March, 1852, the Sudder Court put the following question to its

Pundits in reference to the appeal suit, No. 7 of 1849:—"A Zemindar, A., married during his life seven wives, and died, leaving behind him B., his fifth wife; C., his daughter by his second wife; D. and E., his daughters by his third wife; and F., his daughter by his first wife; and G., the son of his daughter by his first wife. The fifth wife also died subsequently. Supposing the family to be divided, can the above-mentioned individuals be admitted to be the heir, or heirs, of the deceased Zemindar, A.? If such admission is made, who are his heirs? You will explain this subject."

On the same day the Pundits returned the following answer:—"According to the passage in the section on the right of inheritance to the estate of a man dying without male issue, B., the fifth wife of A., succeeded to the whole of his estate on his death. Neither the daughters of A., nor the descendants of such daughters, have a right to the said estate during [567] the lifetime of the said B. Therefore, the estate having devolved on B. by the death of her husband, her daughters and others must be her heirs. Neither the daughters of A., nor the descendants of such daughters who belong to a line different from that of B., can be recognized as heirs to the said estate."

The Sudder Court afterwards put the following further question to the Pundits, in reference to the suit, No. 7 of 1849:—"A., a Zemindar who had married seven wives during his lifetime, died leaving behind him B., C., and D., the fifth, sixth, and seventh wives; E. his daughter by the sixth wife, C.; F., his daughter by the first wife; I., J., and K., daughters by the third wife, and nine individuals his grandsons, by his daughters by the first and second wives who died before him. Subsequently C. and D. died, and B., the fifth wife, a few years after them. Supposing the family of A. to be divided, can any of the above mentioned individuals be admitted as heir, or heirs, to the Zemindary, and if such admission is made, who shall be considered as heir? You will explain this."

The Pundits gave to that question the following answer:—"Although the fifth, sixth, and seventh wives, who survived the Zemindar, A., possessed the power of wives, yet the Hindoo law, entitled *Smriti Chandrika*, confers the right of the Zemindary upon the sixth wife, because she has a daughter. The daughter of the sixth wife is, therefore, entitled to the Zemindary after her mother's death."

When the supplemental appeal came on to be heard, the Sudder Court, by an Order dated the 19th of April, 1852, reversed their Order of the 1st May, 1851, on the ground that, as the Appellant and the other parties [568] claiming as heirs did not claim as representatives to the late Appellant, the widow, but on their own distinct rights as descendants of Appellant's father, they could not be substituted for her, and carry on her appeal, but the Court informed the Appellant and the other parties claiming as heirs in remainder, that they could pursue their rights in the Zillah Court in the first instance, and the Court struck the appeal suit, No. 7 of 1849, off the file, as having abated on the death of the Appellant, Anga Mootoo Natchiar.

This was the first decretal Order now appealed from.

The Respondent, by his guardian, being dissatisfied with this Order, filed a petition in the Sudder Court, insisting that though upon the abatement of the appeal suit by the death of the widow, the next heir after her claiming under the same title might be entitled to revive such appeal, yet she could not institute a new suit in the Zillah Court, after a judgment by such Court in the suit by the widow claiming as previous heir, and submitted, that it was competent for the Sudder Court to admit the party next in descent, claiming under the same title, as a supplemental Appellant, and in his petition he entered at great length into the hardship of being obliged again to litigate the question of division or no division of the family, and finally prayed for a review of the Order of the 19th of April, 1852.

By an Order of the 16th of September, 1852, the Sudder Court adhered to their previous Order of the 19th of April, 1852.

The Appellant then, in the first instance, applied to the Civil Court of Madura for leave to issue *in forma pauperis*, and that Court, by an Order of the 16th of June, 1854, referred certain questions upon points of [569] Hindoo law raised in the case to the law officers of the Court, and after receiving the Futwah of the Pundits, rejected the Appellant's application, by an Order of the 6th of November, 1854; and after several other Orders made by the Civil Judge, and appeals to the

Sudder Court, the latter Court ultimately by a further Order, dated the 10th of March, 1856, declared that the Order of the Civil Judge disposed simply of Appellant's application to sue *in forma pauperis*, and that it was no bar to her prosecuting her claim in the usual form.

Accordingly, on the 5th of December, 1856, the Appellant filed her plaint in a suit, No. 10 of 1856, in the Civil Court of Madura, against the guardian of Respondent, then a minor, and the Collector of Madura, as agent of the Court of Wards, for the recovery of the Zemindary and also of the profits thereof for six years; claiming the Zemindary as having been the divided and self-acquired estate of her father; contending that, even if the brothers were undivided, the self-acquired property of an undivided brother descended to his widows and daughters in preference to his nephews; and that she was entitled as the next heiress in remainder of the Zemindary, after the death of Anga Moottoo Natchiar.

The guardian of the Respondent (the minor Zemindar) by his answer objected to the competency of the suit, as the cause of action had arisen upwards of twelve years previous to the institution thereof, and was barred, under cl. 4, sec. 18, Mad. Reg. II. of 1802, as the Appellant's father had died in June, 1829; and he set up the Orders of the Sudder Court of the 21st of October, 1850, the 1st of May, 1851, the 19th of April and 16th of September, 1852, as a bar to the [570] suit. The answer also denied the Appellant's title as next heiress, and challenged the fact that the Zemindary had been the divided estate of Appellant's father, entering at great length into the merits to prove that the estate was undivided.

The other Defendant, the Collector of Madura, by his answer disclaimed any right in the Zemindary.

Sowmea Natchiar, claiming to be the sole heiress of Gowery Vallabha Taver, as his only daughter by his sixth wife, then commenced a suit, No. 4 of 1857, against the Respondent to recover the Zemindary. The Respondent, among other things, pleaded the decree of the 27th of December, 1847, in bar to that suit.

No evidence was allowed to be entered into by the Appellant in the suit, No. 10 of 1856, nor were any points recorded therein.

On the 25th of August, 1859, the Judge of the Civil Court, Mr. R. Cotton, dismissed the suit of the Appellant, and of her sister, Sowmea Natchiar, in the suit No. 4 of 1857. The material part of the decree made in both suits was as follows:—
“The Plaintiffs in both the suits sue the guardian of the present minor Zemindar, and the Collector of Madura, as the agent for the Court of Wards, for the recovery of the Shivagunga Zemindary, each averring herself to be the sole heiress of the deceased Zemindar, Gowery Vallabha Taver, who died in 1829. The Plaintiff in the original suit, No. 10 of 1856, as his only surviving daughter having male issue; the Plaintiff in the original suit, No. 4 of 1857, as the only daughter of the widow (sixth) who survived her husband—both assert their father was divided from his brother, Oya Taver. The Plaintiff in the suit, No. 10 of 1856, states, that she sues [571] for the estate solely as the only surviving daughter of her father the late Zemindar, having male issue, not as heir or successor to Anga Moottoo Natchiar; that her suit is based on the pleaded division between her father and his brother, and that if they were undivided she has no claim to the ancestral property, but still claimed the Zemindary, as the self-acquired property of her father, under the law contained in pages 33, 152, 153, and 155 of Macnaghten's “Hindu Law,” Vol. II. If the brothers were divided, she asserts that the law, as propounded by the Madras Pundits in appeal, No. 20 of 1838, and by the Bengal Pundits in their Futwah of the 23rd of February, 1837, and enumerated in a paper put in, establishes her right. The Plaintiff in the original suit, No. 4 of 1857, states, that she sues as the daughter of the Zemindar's surviving widow—the other two widows (fifth and seventh) who survived the Zemindar having died childless; she avers, however, that had they been living now they would have no right to the estate: thus admitting that her right to the estate commenced on the death of her mother in 1832, when she was in her sixth year, and that her present plaint was presented only on the 24th of June, 1856, or twenty-three and a half years after the death of her mother; that if her father and his brothers were divided, as she pleads, her right is clear by the Futwahs of the Madras and Bengal Pundits; if undivided, by that of the latter only. The Court proceeds to determine—first, whether it is competent to allow the plea of division to be advanced. The facts of the case are

briefly as follows:—Anga Moottoo Natchiar, the mother of the Plaintiff in the original suit, No. 4 of 1857, instituted a suit, No. 3 of 1833, before the Southern Provincial Court; her suit [572] was dismissed; the Judges considering that as the late Zemindar and his brother were undivided, the Pundits' Futwahs clearly showed she had no right to succeed her husband. In appeal, the Judges of the Sudder Court were of opinion, that the evidence adduced was sufficient to show that a division had taken place; and the law officers of their Court having, under these circumstances, declared the widow was the heir of her husband, they reversed the lower Court's decision, awarding the estate to Anga Moottoo Natchiar. On appeal to Her Majesty in Council, it was discovered that the very material question of division or non-division, on which the case hinged, had never been made a point, nor had evidence been cited to prove it; the Judicial Committee, therefore, dismissed the appeal, but, for certain reasons given, they declared that the Plaintiff, Anga Moottoo Natchiar, might bring a fresh action for the estate, if she did so within three years. She accordingly instituted the original suit, No. 2 of 1845, when the point of division or non-division, to which the Judicial Committee of the Privy Council had restricted further investigation, was tried, and the late Judge, Mr. Baynes, on a full and careful consideration of all the evidence, oral and documentary, decreed that division had not been proved: on the contrary, he conceived that the Defendant had, as clearly as the circumstances would admit of, shown that the Brothers were undivided, and he, therefore, dismissed the suit, as might have been expected. The Plaintiff appealed (No. 7 of 1849), but before the case was determined, she died: on which several parties petitioned to be allowed to carry on the appeal. Their petitions were first rejected, but the Court, apparently considering that justice required [573] that the lower Court's award should not become immediately final, gave permission to the Petitioners (the Plaintiffs) to bring regular actions for recovery of the estate, provided they did so before the 30th of April, 1851. Instead of taking advantage of the Court's period of grace allowed them, the Plaintiffs petitioned the Court for review of their proceedings, the result of which was, that the Court overruled their former proceedings, and adjudged that the Plaintiff's petitions could be admitted to carry on the appeal, No. 7 of 1849. Subsequently, on a petition from the Defendant, the Sudder Court again took up the case, and finally revoked their proceeding of the 1st of May, confirming the principle laid down in those of the 21st of October, 1850, namely, that the Plaintiffs could not be allowed to carry on the appeal, which, having abated on the death of the Appellant, the Sudder Court struck off their file, referring the Plaintiffs to the regular Court of original jurisdiction as those in which they should prefer, in the first instance, any claims they might have to the estate. It will be observed that the period originally allowed them for bringing an action had then expired, and no second period of grace was given. Upwards of four years after this final Order of the Sudder had been passed, the Plaintiff in No. 10 of 1856 brings the present action, and a year later the original suit, No. 4 of 1857, is likewise filed. The original suit, No. 2 of 1845, was specially brought to determine the *status* of the late Zemindar, and for no other purpose: the evidence was restricted to that point, and, consequently, if ever there was a judgment *in rem*, the decree in that suit, No. 2 of 1845, is one: in that decision it was clearly [574] determined that the late Zemindar and his brother were undivided. This judgment the Court is not competent now to question, still less to overrule; as a judgment *in rem*, it is conclusive against all the world, and no evidence can be admitted against it, unless it can be shown it was collusively or fraudulently given (Norton's 'Law of Evidence,' § 470; Taylor, 'On Evidence,' Vol. II., § 1489). Taylor, in the section quoted, says, 'This rule appears to rest partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society that the social relations of every member of the community should not be left doubtful, but that, after having been clearly defined by one solemn adjudication, they should conclusively be set at rest.' And in the following section, 1490, it is further stated, that 'the decision cannot be impeached in the same or another Court, by showing that the facts on which it immediately rests are false.' The Court is not aware on what grounds permission was granted by the Sudder Adawlut to the Plaintiffs to bring the suits, the avowed object of which was to impeach this judgment *in rem*; but the period of grace passed without any suit being brought, and no further period

was allowed. Possibly the Sudder Court, in reconsidering the matter, discovered that they were not competent to grant it; or the omission may have been an oversight. As, however, on the former occasion, the Court gave only eighteen months, it is to be presumed further grace, if it had been given, would not have exceeded a like period. Be this, however, as it may, in the absence of any precedent warranting such impeachment of a judgment *in rem*, and being of opinion 'that nothing can [575] be more inconvenient or dangerous than a conflict of decisions in different Courts; and that if judgments *in rem* are not regarded as binding upon all Courts alike the most startling anomalies may occur' (Taylor 'On Evidence,' § 1493), this Court is unable to accept the pleadings of the Plaintiffs on the *status* of the late Zemindar, save as an undivided brother. This *status* being thus determined, it only remains to see if the Plaintiffs have by law any claim to the estate. The Plaintiff, in original suit, No. 10 of 1856, admits she has none, save on the ground that it was self-acquired, and pleads the law as laid down in Vol. II. of Macnaghten's 'Hindu Law,' pp. 33, 152, 153, and 155, as establishing her right. A reference to which by the Plaintiff's Vakeel would have shown him that the law therein propounded has reference solely to 'partition of property,' not 'succession,' and that it is clearly laid down in the preceding para., in p. 33, that, after the death of the widow, the property becomes 'vested in the heirs of her husband,' but here she is, not a widow, but a daughter; the law, therefore, which treats of widows is of no avail to her, but rather the contrary. The Pundits of the Madras and Bengal Sudder Courts are unanimous that the estate of the late Zemindar would descend to his widow only if he was of a divided family. Under the above circumstances, this Court is of opinion, that the Plaintiff in the original suit, No. 10 of 1856, has no claim in law to the estate sued for, and, therefore, directs that the suit be struck off the file without going into the other objections raised by the Defendant in his answer, the Plaintiff paying all costs. The Court's reasons for refusing to allow the Plaintiff, in suit, No. 10 of 1856, to plead that the brothers [576] were divided, are equally applicable to the case of the Plaintiff in the suit, No. 4 of 1857. She bases her claim to the estate on the law propounded in the Futwahs of the Pundits filed in this and the suits referred to above; these, however, all refer to widows, and not daughters, and declare widows only entitled to succeed to their husband's ancestral and self-acquired estate when he is one of a divided family. The Court, therefore, is of opinion, that she also has failed to show that she has any claim at law to the estate sued for (*vide* Strange's "Manual," pars. 346, 337, 339, 340, and 342); and, without going into the other objections raised in the answer to her right to sue, resolves to strike off her suit likewise from the file, she paying all costs. The Court, in continuance, would observe, that though it has taken the late Judge's decision in suit, No. 2 of 1845, as a judgment *in rem*, and, therefore, not to be impeached, yet that, after a careful study of the whole case (which has occupied it almost incessantly for a period of six weeks), it fully concurs with the late Judge in all he has urged in that decree and the judgment awarded by him. The Judicial Committee of the Privy Council, in their judgment (3 Moore's Ind. App. Cases, p. 294), distinctly declare 'it exceedingly desirable that it should be known (not by the parties to the suit alone, but) to all those who are interested in this property, that the question of fact as to division or no division appears to be the only point on which the main question of title to the property will ultimately depend.' By thus declaring, this Court understands that the question of *status* being about to be [577] decided, all interested were then invited to come forward to prove their assertions to division or non-division, as the decision given would be final. There cannot be a doubt that the Plaintiffs in the above suits were thoroughly acquainted with the decree of the Judicial Committee of the Privy Council; and it was for their interest to have assisted Anga Moottoo Natchiar to prove division, and see that all the evidence procurable was then advanced, and that the decision passed on the merits by the Civil Court (unless such decision is ruled to be only equivalent to an adjudication of settlement by order of Justice) is conclusive against all the world as regards the *status* of the late Zemindar; but allowing that the decree in the suit, No. 2 of 1845, was not final when it was passed, because appealed from, it appears to this Court that it is undoubtedly so now, inasmuch as it cannot be affected by any other suit, and there are no parties competent now to question it in appeal. It is laid down in the

Sudder Adawlut decrees, No. 58 of 1851, No. 66 of 1855, No. 10 of 1852, No. 5 of 1857, and Sudder Adawlut decrees, No. 86 of 1854, par. 19, that non-division is to be presumed until division is proved; non-division was the alleged state of the family when the suit was brought; non-division was the decision passed after a prolonged and patient investigation in the suit, No. 2 of 1845, and non-division was the *status* when the Plaintiff (Appellant) died. Such being the case, how can the Plaintiffs' claims, which are based and only sustainable on the ground that division had taken place, be admitted? If they can be, where is the limit, and what becomes of the rule, that judgments *in rem* are conclusive against all the world?"

[578] The Appellant appealed to the Sudder Court at Madras against this decree, praying that the suit might be remanded for adjudication on the merits.

On the 5th of November, 1859, the Sudder Court, by its decree, affirmed the decree of the Civil Judge of Madura of the 25th of August, 1859, on the ground that the question of division had been finally set at rest by the decree in the suit, No. 2 of 1845; that although that decree had been appealed from by the then Plaintiff, Anga Mootoo Natchiar, on her death without heirs the appeal had dropped; and that the appeal could not be opened, because the title of the Appellant had not at the time of that decree come into existence.

This was the second decretal Order appealed from to the Privy Council.

The Appellant petitioned the Sudder Court for leave to appeal to Her Majesty in Council against the last-mentioned Order, which that Court on the 3rd of March, 1860, refused, on the ground, that the decree of the Civil Judge of the 25th of August, 1859, was final under sec. 10, Reg. II. of 1802, and cl. 2 and 10, sec. 5 of Reg. XV. of 1816.

This was the third decretal Order appealed from.

Leave was afterwards granted by their Lordships, upon special petition to Her Majesty in Council, to the Appellant to appeal from the decree of the Civil Court of Madura, dated the 27th of December, 1847, which, with the decrees of the Sudder Court of the 19th of April, 1852, the 5th of November, 1859, and the 3rd of March, 1860, and the decree of the Civil Court of Madura, dated the 25th of August, 1859, were those now appealed from.

The Appellant's two sisters, Bootaka Natchiar and [579] Kota Natchiar having died, the Appellant succeeded to their rights, and all the other legal heirs in remainder, after the death of Anga Mootoo Natchiar, withdrew their claims, except Sowmea Natchiar, who, however, died pending the appeal in England.

The Solicitor-General (Sir R. Palmer) and Mr. W. W. Mackeson, for the Appellant.—Our first proposition is, that the Zemindary in question, which constitutes a Raj, or principality, and impartible, was the separate and self-acquired estate of the Appellant's father, Gowery Vallabha Taver, and, secondly, that the family property had been divided in his lifetime. He and his eldest brother, Oya Taver, were, we contend, by the Hindoo law divided brothers, and the real point now in issue lies between the Appellant, as representing one line of heirs, the lineal female descendants of Gowery Vallabha Taver on the one hand, and the Respondent, the lineal descendant of his elder brother, Oya Taver, on the other, and is narrowed to the validity of the decree of the Civil Court of Madura of the 27th of December, 1847, which decree, we submit, was manifestly erroneous. If the sole question to be tried in that suit was division, or no division; the evidence was all one way, and in favour of the Appellant's father and his elder brother Oya Taver, being divided brothers. The fact of the division was established by the deeds of division, and the actual division in the year 1792 was fully proved by the witnesses in the suit, No. 2 of 1845, as well as by other witnesses incidentally in the suit, No. 4 of 1832. The division was also proved by the fact of the residence of the Appellant's father with the Ranees at Shivagunga, and his livings separate from his [580] divided brother at Padamattoor, previous to and until his installation as the Zemindar under the grant from the Government. The adoption of the Appellant's father by the Ranees, which, whether regular or not, was inconsistent with the Respondent's contention of his continuance as part of an undivided family. Then there is the further fact of his installation as Zemindar, and his living alone at Shivagunga, from the year 1801 until his death in the year 1829, separate from his brother and his family, who resided at Padamattoor. These are all circumstances inconsistent with the supposition that

he was a member of an undivided family. Again, the leases granted by him as Zemindar to his brother and nephews, and the payment by them of kist, are all acts which by the Hindoo law are considered the strongest evidence of division. So again, by the Razinamah made in the suit, No. 4 of 1823, after a claim to the division of the Zemindary as co-heirs, in which the nephew, Moottoo Vadooga, and his brothers, admitted that they had no such right. Separation of interest, or division, is a sole question of fact, which the evidence here fully establishes. In W. H. Macnaghten's "Hindu Law," Vol. I. p. 51, he says, the criterion of division seems to consist of members of the family entering into distinct contracts, and other similar acts, which tend to show that they have no dependence on or connection with each other. Coleb. Dig. Vol. III. pp. 415; Strange's "Hindu Law," Vol. I. pp. 225-7 [2nd Edit.], *ib.* Vol. II. p. 397, are authorities which establish the same proposition. A partition is presumed if they have separate possession of property. *Than Sing v. Mussumant Jeettoo* (2 Ben. Sud. Dew. Rep., 324). The only evidence in support of [581] the theory of the family being an undivided family is, that some of the religious ceremonies were jointly performed by both brothers. But such circumstance, even if proved, is held by the Hindoo law to be but slight evidence in favour of the family being undivided, the religious ceremonies being constantly performed by divided brothers. Strange's "Manual of Hindoo Law," sec. 296 [edit. 1863]. But we take a higher ground; we contend that even if part of the ancestral estate was at one time common property, yet that the Zemindary was self-acquired by the Appellant's father. The grant by the East India Company to Gowery Vallabha Taver was an act of sovereignty, the Zemindary having escheated for want of lineal heirs. Being by Sunnud the grantee takes as purchaser, and the Zemindary must, therefore, be considered as self-acquired property, as in the case of confiscation. *The East India Company v. Syed Ally* (7 Moore's Ind. App. Cases, 578), *Ellavambadoo Mootiah Moodeliar v. Ellavambadoo Nincapah Moodeliar* (2 Strange's Mad Cases, 333), *Keonour Budh Singh v. Seonath Singh* (2 Ben. Sud. Dew. Rep. 92), *Mulapat Singh v. The Collector of Benares* (5 Ben. Sud. Dew. Rep., 32). Again it is an established principle of Hindoo law that property acquired without using the patrimony by one another living in partnership belongs to him exclusively. W. H. Macnaghten's "Hindu Law," vol. II. pp. 33-152-3-5. It belongs at his death to the acquirer's individual heir. Strange's "Manual of Hindoo Law," sec. 238.

This brings us to the first point, who by the Hindoo law prevailing at Madras is to succeed to the Zemindary on Gowery Vallabha Taver's death? If held in severalty, after his death it undoubtedly goes to his widow, who has, however, no right [582] to dispose of it. W. H. Macnaghten's "Hindu Law," Vol. I. p. 19, *ib.* Vol. II. p. 33; Strange's "Hindu Law," Vol. I. pp. 121-137 [2nd edit.]; *Mohun Lal Khan v. Rancee Sirmomunnee* (2 Ben. Sud. Dew. Rep., 32), *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331; S.C. 4 Ben. Sud. Dew. Rep., 9), *Nund Koowur v. Tootter Sing* note to *Mussumant Gyan Koowur v. Dookhurn Singh* (4 Ben. Sud. Dew. Rep., 330), *Musst Lalchee Koowur v. Sheopershad Sing* (7 Ben. Sud. Dew. Rep., 22), *Cossinauth Bysack v. Hurrosoondery Dossee* (Morton's Cal. Rep., 86). The widow's right in Madras, to inherit her deceased husband's property, he dying without issue male, and the family divided, is fully discussed in the Mitacshara on Inheritance, ch. II. sec. 1, pl. 39; and in the *Daya-Bhaga*, ch. XI. sec. 1, pl. 3, 4, 14; Coleb. Dig. Vol. III. ch. CCCXCIX.; Strange's "Manual of Hindoo Law," secs. 315, 326 [edit. 1863]; Strange's "Hindu Law," Vol. I. pp. 134-5 [2nd edit.]; *ib.* Vol. II. p. 231, and the opinion of Sir William Jones, cited in Strange's "Hindu Law," Vol. II. p. 250. The Sandayar case (a) [583] is on all fours with the present case and strongly in our favour. And in a work called "The Principles of Hindu and Mohammadan Law," by W. H. Macnaghten, edited by H. H. Wilson, it is laid down at pp. 21, 24, 5 [2nd edit., 1862], that according to the doctrine of the Smriti Chandrika, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, when the family is divided, and in default of the widow the daughter inherits, *ib.* p. 22. Therefore, on the widow's death the Appellant, as daughter having male issue, succeeded to her father's estate. Strange's "Hindu Law," p. 137 [2nd edit.]; Mitacshara, ch. II. sec. 2, p. 341, *ib.* sec. 4, p. 346; Strange's "Manual of Hindoo Law," sec. 353 [2nd edit.]

(a) The decree of the Provincial Court for the Southern division, in the suit

Secondly, we are not bound by the decree of the Civil Court of Madura, in 1847, which does not preclude our right to ask this Court, to determine the question of descent to the Zemindary, which, we contend, was self-acquired property by Gowery Vallabha Taver. It never could have been the intention of this Tribunal when the case came before it in the year 1844 (see *Srinut Moottoo Vijaya Rayhanadha Gowery Vallabha Perria Woodia Taver v. Rang Anga Moottoo Natchier*, 3 Moore's Ind. App. Cases, p. 294), while observing, that the point of division was the substantial question, to shut out altogether the other material points at issue, [584] raised in that case. We contend, therefore, that even if the brothers were undivided as to their ancestral property, the self-acquisition of one undivided brother dying without male issue, descended to the widow; and after her death to daughters, in preference to his brother and nephews. This rule of succession in Madras, is clear law, according to the authorities already cited.

Thirdly, the opinion of Pundits taken in the suits, as to the right of succession, cannot be relied on. The opinions which appear to have governed the Court below proceed on the assumption that the Text Books they cite apply to the case they were called to report upon, but the opinions unaccountably neglect to say if such authorities are applicable to the particular facts stated. The daughter's right to succeed not being mentioned in the texts cited, the Pundits seem to consider that the Appellant is not entitled. The cases of *Myna Boyee v. Oottaram* (8 Moore's Ind. App. Cases, 400) and *Abraham v. Abraham* (*ante*, p. 199) are authorities showing the value to be attached to the Pundits' opinions, and the necessity of the appellate Court testing their accuracy, as well as that the questions put by the Court correctly state the point at issue.

Fourthly, as to the effect of the Razinamah executed by the widows in 1830, being binding on them, we submit, that a native woman can never be deemed sufficiently *sur juris* to be bound by her personal acts. Error and ignorance of their rights as widows rendered the agreement invalid. *Narummal v. Lutchmana Naic* (2 Strange's Mad. Cases, 16), *Chellummal v. Garrow* (*ib.*, 159), *Rajunder Narain Rae v. Bijai Govind Sing* (2 Moore's Ind. App. Cases, 181).

[585] Lastly, we insist, that the refusal of the Sudder Court to allow the Appellant to revive the appeal from the decree of the Civil Court of Madura of the 27th of December, 1847, was arbitrary and contrary to equity. Notwithstanding the proceedings by her in the suit, No. 10 of 1856, the Appellant was entitled to appeal from that decree. She, as daughter, having male issue, was heir to her father's estate, and like a remainder-man in England the proper party to revive the suit. *Lloyd v. Johnes* (9 Ves., 57), *Osborne v. Usher* (6 Bro. P.C. Cases, 20) Macqueen's "Prac. of the House of Lords," pp. 242-250. It must not be forgotten that her title only accrued on the widow, Anga Moottoo Natchiar's death, *Roopchund Tilukchund v. Phoolchund Dhurmchund* (2 Borr. Bom. Rep., 616), *Loll Munnee Koonwaree v. Rajah Nemiyerem* (6 Ben. Sud. Dew. Rep., 255-7). The interest of a daughter in the estate of her deceased father is similar to that of a widow, *Hurrydoss Dutt v. Sreemutty Uppagornah Dossee* (6 Moore's Ind. App. Cases, 433); but even if it

Coopasawmy Coolapa Naik v. Yatakamaul, dated the 13th of October 1826, was filed in this case.

The question there raised was, who was entitled to succeed to the Zemindary of Sandayar. From the statements laid before the Pundits of the Sudder Court for their opinion, it appeared, that the Zemindary was an undivided estate, and it was the property of a common ancestor, A.; that it was inherited in regular succession By B., C., and D.; that D., having no issue, transferred it in his lifetime to his uncle, E., who was the next male heir entitled to inherit, in satisfaction of a claim for money preferred by the latter.

The Provincial Court's questions to the Pundits were, first, whether such transfer could be held to constitute the estate the separate acquisition of E.; and, secondly, if such transfer to the exclusion of co-heirs was illegal, whether the widows of F., who succeeded the father E., and died without issue, were entitled to the Zemindary, or whether the Plaintiff's title as grandson of the common ancestor was preferable?

The Pundits' opinion was, first, the gift by D. to E. of the Zemindary was good, and that it descended to his son F., and, secondly, that as F. died without issue the Zemindary devolved upon his widows.

should be held that she was not entitled to appeal from the decree of the 27th of December, 1847 she certainly was not bound by it, *The Zemindar of Ramnad v. The Zemindar of Yettiappooram* (7 Moore's Ind. App. Cases, 454-5), and in that view that decree could not be pleaded as *res judicata*, or held to be a bar to her original suit, No. 10 of 1856, which was instituted in due time after the death of Anga Moottoo Natchiar.

Sir Hugh Cairns, Q.C., Mr. Hobhouse, Q.C., and Mr. C. P. Phillips, for the Respondent.—First, we insist, that Oya Taver and Gowery Vallabha Taver were undivided brothers, and that from Gowery [586] Vallabha Taver the Zemindary has come by lawful descent to the Respondent, his nephew. The testamentary disposition in his favour by the Appellant's father is not material to our title. We deny the alleged fact of the self-acquisition of the Zemindary by Gowery Vallabha Taver. It is true that there may be self-acquisition by a member of an undivided family, but the Hindoo law presumes such acquisition for the joint benefit of himself and his co-heirs. Strange's "Hindu Law," Vol. I., pp. 199-225, and the *onus* lies on a member of a joint family claiming exclusive right to prove that it was separately acquired, *Dhurn Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229), *Gour Chunder Raj v. Hurish Chunder Raj* (1 Ben. Sud. Dew. Rep., 162), *Naragunty Lutchmedarmah v. Vengama Naidoo* (*ante*, p. 66), W. H. Macnaghten's "Hindu Law," Vol. I., p. 54, and such presumption of joint partnership must be rebutted by clear evidence of a division of the joint family. What is considered as evidence of division is fully treated by the text writers. Strange's "Hindu Law," Vol. I., pp. 225-7 [2nd edit.]; *ib.*, Vol. II., p. 333. Mitaeshara, ch. II., sec. 12, pl. 3 and 4; and the cases collected in Morley's Dig., Vol. I., p. 483. Here the division is alleged to have taken place in the year 1792, but the evidence only proves separate residence after the year 1804. The different stations and duties and the health of the elder brother explain their separation, and the distance between their residences was as little as was compatible with those causes. The fact of the impartibility of the Zemindary and Polyaput of Padamattoor, coupled with the fact of the infirmity of Oya Taver, satisfactorily account for their separate residences. It has been decided that a [587] grant to A., because he is the descendant of B., does not create a self-acquisition in A. Strange's "Hindu Law," Vol. I., p. 216 [2nd edit.]. Here the lineage of Gowery Vallabha Taver to the common ancestor, Shasavarna, was the cause of the grant by Government of the Zemindary to him. Oya Taver's personal incapacity alone prevented his installation as Zemindar. The deed of settlement did not limit the succession to the heirs of Gowery Vallabha Taver, or do more than confirm the previous grant by Government to him. Now, self-acquisition cannot be the property of one divided in family. It is never mentioned in the text books, except as to property of an undivided member, and as part of the common stock. Strange's "Hindu Law," Vol. I., pp. 120, 213, 215 [2nd edit.]. The Zemindary, it is admitted, is a Raj and impartible, and held by a single person; if it had been otherwise, the co-heirs would have shared in the Zemindary. Strange's "Hindu Law," Vol. I., p. 218 [2nd edit.]. And they must have been parties to any alienation of it. Strange's "Hindu Law," Vol. II., pp. 439, 441, 450 [2nd edit.]. It certainly was not divisible from them, Strange's "Hindu Law," Vol. I., p. 260 [2nd edit.], where it is laid down that the issue of self-acquired property inherits as far as great-grandson. *ib.*, pp. 209, 210. Failing male issue, it goes to his undivided brothers and their issue. Strange's "Manual of Hindu Law," sec. 351, p. 84 [2nd edit.]. If the descent of self-acquired property differs from descent of the property of an undivided man, the Appellant should prove that to be the law. The silence of the Books and authorities on any such difference is strongly in the Respondent's favour. The Pundits in the case submitted to them in 1837 have laid it down that there is no such difference. The Sandayar [588] case (*ante* [9 Moo. Ind. App.], p. 582), relied upon by the Appellant to show the descent to self-acquired property, does not apply, as that case related to a divided family and ancestral estate. Transactions between co-parceners, in order to raise a rebuttal of the presumption of non-division, must be in relation to the property enjoyable by them in common. Strange's "Hindu Law," Vol. I., pp. 227, 8, 9, 230 [2nd edit.]. Families living together, and carrying on their transactions in common, constitute co-parcenary to which survivorship attaches, *ib.*, Vol. I., p. 120. Living separately does not *per se* constitute division.

The next point is the title of Anga Moottoo Natchiar as a Hindoo widow to succeed. Women are generally incompetent to inherit. It could only be to property of a man divided in family. Strange's "Hindu Law," Vol. I. p. 134; Mitacschara, ch. II., sec. I., pl. 39. A Hindoo widow has only the right of enjoyment in her deceased husband's property. It is laid down that with respect to property derived by inheritance from her husband, a widow is little more than tenant for life, and trustee for the ulterior heirs. Strange's "Manual of Hindu Law," sec. 159, p. 38 [2nd edit.]. A Hindoo widow must, in a suit by her for her late husband's realty, wherein she claims under his character as a divided member of a Hindoo family, represent the whole series of his heirs, and a decree in that suit against her negating such division is *res judicata*, and must bind them, because a contrary conclusion would, so long as the descent passed through females, invoke the possibility of endless litigation of such fact of division.

Next, we contend, that the death of Anga Moottoo Natchiar in 1850, operated as an abatement of the suit, subject to revivor by the next of kin of Gowery [589] Vallabha Taver, and we insist, that this Tribunal cannot now entertain an appeal from the decree of the Civil Judge of Madura made in 1847, or enter into any question of division or self-acquisition. First, as to the question of division. The suit of 1845, and 1849, were wholly abated. The Appellant was not a party thereto, and her claim to immediate heirship to her father on the death of Anga Moottoo Natchiar had never been established, and has always been denied by the Respondent; secondly, as to the question of self-acquisition, that fact was clearly not in issue in the suit, No. 2 of 1845, nor dealt with by the decree of 1847. Further, with respect to the decree of the Sudder Court refusing the Appellant to revive the appeal, we submit it was perfectly regular, as the Sudder Court could not decide the question of heirship. That was a question for the Provincial Court, and thither the Appellant should have, in the first instance, gone. The Appellant's proper course was pointed out to her in the year 1850. The suit that the Appellant ought to have brought, and which it was plain the Sudder Court intended her to bring, was one in the nature of a Bill of revivor, or a Bill of supplement, limited to the object of obtaining from the Provincial Court a declaration that she, as the daughter of Gowery Vallabha Taver, had established her right to stand in the place of Anga Moottoo Natchiar, but she perversely disregarded it, and filed the suit, No. 10 of 1856, to establish her right and to which suit she did not make the other claimant's parties Defendants. In *Giffard v. Hart* (1 Sch. and Lef., 386), it was held that a decree made in a suit, without making parties whose rights were affected thereby, [590] was fraudulent and void as against those parties. Here she attempted to deceive the Provincial Court, by alleging an Order from the Sudder Court, directing the suit, and by concealing her previous claim as third daughter, and the agreement with her sisters, and thereby only raised the issue of division, and did not properly raise the issue of heirship.

Having previously disregarded her proper course pointed out in the year 1850, and twelve years having elapsed since that date, the Respondent ought not to be restrained from setting up the Mad. Reg. of Limitations II., of 1802, sec. 18, cl. 4, in bar to any proceedings the Appellant might hereafter take to revive the appeal from the decree of 1847. She was barred by laches and lapse of time from maintaining any original proceeding for the recovery of the Zemindary.

As to the appeal from the decree of 1859, we submit that that decree was right, because the decree of 1847, on the fact of division, could not in fact be appealed by the heirs of Gowery Vallabha Taver claiming after Anga Moottoo Natchiar, and as to any claim under the alleged self-acquisition of the Zemindary, that was disposed of in the suit of 1833, and by this Tribunal in 1844, or if not, it was raised in suit of 1845.

Lastly, we insist, that the Appellant not having taken the proper proceedings, is not entitled to revive or continue the litigation commenced by Anga Moottoo Natchiar. Assuming, however, that the decree of the Zillah Court in December, 1847, bound the party succeeding at the death of the widow, Anga Moottoo Natchiar, the only remedy the Appellant, claiming as a remainder-man, now has, is for this Court to remit the case to the Sudder Court to determine the ori-[591]-ginal appeal against the decree of the Civil Court of Madura. This Tribunal, as a Court of

final appeal, will not adjudicate upon that point until a decree has been made by the Court below, which alone can give it jurisdiction.

The Solicitor-General, in reply.—Admitting that a Hindoo widow has only a right of enjoyment in her husband's property, Strange's "Hindu Law," Vol. I. p. 124, *ib.* Vol. II. pp. 251-3 [2nd edit.], Daya-bhaga, ch. XI. sec. 1, pl. 56, and that the widow's litigation was ill conducted, yet her husband's heirs, who succeed on her death, are not bound by her miscarriage. A remainder-man may rectify error, or supply omissions, *Lloyd v. Jones* (9 Ves., 60), where the point is carefully considered by Lord Eldon. Here the Appellant, as daughter, was the heir of her deceased father, Coleb. Dig. Vol. III. pp. 186, 489, 491, 498, Daya-bhaga, ch. XI. sec. 2, pl. 1, the *Sandayar* case (*ante*, p. 582), and had a right to bring a new suit, and raise the proper question relating to the succession of the Zemindary, namely, the separate acquisition of the Zemindary by her father, which fact was established in evidence, and, consequently by the Hindoo law, even if they were an undivided family, neither his brother nor his nephew, could succeed to the Zemindary, Macnaghten's "Hindu Law," Vol. II. p. 156.

Judgment was reserved, and now delivered by

The Right Hon. the Lord Justice Turner (Nov. 30, 1863).—The subject of this appeal, and of the long litigation which has preceded it, is the Zemindary of Shiva-gunga, in the District of Madura and Presidency of Madras.

This Zemindary is said to have been created in the year 1730, by the then Nabob of the Carnatic, in favour of one Shasavarna, on the extinction of whose lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabob of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names, as flowery Vallabha Taver. He had an elder brother named Oya Taver, who predeceased him, dying in 1815. The Zemindar himself died on the 19th of July, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named Vadooga Taver; the second had a daughter named Bootaka Natchiar; the third had two daughters, Kota Natchiar and Katina Natchiar, the present Appellant; and the fourth was childless. The three surviving widows were Anga Moottoo Natchiar, Purvata Natchiar, and Moottoo Veray Natchiar. Of these Purvata Natchiar was *enceinte* at the time of her husband's death, and afterwards gave birth to a daughter named Sowmia Natchiar. The two others were childless.

Oya Taver, the brother, left three sons, of whom the eldest was named Moottoo Vadooga.

The Zemindary is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to [593] it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence if the Zemindar, at the time of his death, and his nephews were members of an undivided Hindoo family, and the Zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar, at the time of his death, was separate in estate from his brother's family, the Zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but Gowery Vallabha Taver's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late Zemindar continued to be generally undivided in estate with his brother's family, this Zemindary was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material

question of fact would be whether the Zemindary was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gowery Vallabha Taver, at least on the failure of his [594] male issue, being demonstrated by the birth of his posthumous daughter, his nephew, Moottoo Vadooga, obtained possession of the Zemindary. He seems to have set up an instrument which in the proceedings is called a Will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may, therefore, be dismissed from consideration. Moottoo Vadooga obtained possession with the concurrence of various members of the family, and of Government and its officers. He afterwards obtained from the then three surviving widows the Razinamah, or agreement. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, Bodha Gooroo Sawmy Taver.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of suit, No. 4, of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, Anga Moottoo Natchiar, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since Anga Moottoo Natchiar died.

The suit, No. 4 of 1832, was brought by Velli Natchiar, the daughter of Gowery Vallabha Taver by his first wife, on behalf of her infant son, Moottoo Vadooga. It claimed the Zemindary for the infant by virtue of an Arze said to have been sent by the Collector to Gowery Vallabha Taver in 1822, according to which the succession would be to the son of a daughter in preference [595] to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the Zemindary had been granted to Gowery Vallabha Taver solely in consequence of his relationship to the former Zemindars, and was, therefore, to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from Gowery Vallabha Taver. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the Zemindary was to be regarded as the self-acquired and separate property of Gowery Vallabha Taver, and ought to pass by virtue of the Arze to the Plaintiff.

In 1833, two other suits were instituted against the Zemindar in possession. Of these, that distinguished as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by Gowery Vallabha Taver, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

Suit 3, of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by Anga Moottoo Natchiar, the fifth wife, and the elder of the three widows of Gowery Vallabha Taver. She set up an adoption, or *quasi* adoption, of Gowery Vallabha Taver, by the widow of the last Zemindar of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the Zemindary made to him by the East India Company, and she insisted that Moottoo Vadooga Taver, on her husband's death, got possession of the Zemindary, of which she was [596] the legal heiress, by means of the forged Will. The defence to this suit, so far as it related to the title of the Zemindar in possession, was substantially the same as that made to the suit, No. 4 of 1832; but it also denied the alleged forgery of the Will, and insisted on the Razinamah executed by Anga Moottoo Natchiar and the other widows to Moottoo Vadooga Taver. In her reply, Anga Moottoo Natchiar did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the Zemindary had been acquired by the sole exertions and merits of her husband; and as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the

decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gowery Vallabha Taver and his nephews were or were not an undivided Hindoo family, some evidence was given in the suit, No. 4 of 1832, to show that he and his brother were separate in estate. There was an appeal in each of the three suits, and these were heard together, and disposed of by the decree of the Sudder Court. That decree dismissed No. 4 of 1833, on the ground that the Plaintiff had failed to prove his alleged adoption by Gowery Vallabha Taver, and it dismissed No. 4 of 1832 on the ground that the succession to the Zemindary was governed by the general Hindoo law, and not by [597] any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gowery Vallabha Taver in preference of a grandson by a daughter. In the suit, No. 3, of 1832, it was decided, first, that as a matter of fact the Zemindary was the self-acquired and separate property of Gowery Vallabha Taver: secondly, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the Zemindary, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew: thirdly, that upon the whole evidence the brothers must be taken to have divided their ancestral property; and lastly, that the Plaintiff, Anga Moottoo Natchiar, was entitled to recover the Zemindary, not having forfeited her rights by the execution of the Razinamah.

Against this decree the Zemindar then in possession appealed to Her Majesty in Council. The Order made on that appeal on the 19th of June, 1844, was that the decree of the Sudder Court should be reversed, with liberty to the Respondent, Anga Moottoo Taver, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that Order in the Sudder Dewanny Adawlut. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the judgment delivered by Dr. Lushington, that the Sudder Court had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the [598] omission in a new suit. And their Lordships added, that though they could make no Order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August, 1845, Anga Moottoo Natchiar commenced her second suit *in forma pauperis*. In the interim Bodha Gooroo Swamy Taver had died, and the Zemindary had passed to his brother, Gowery Vallabha Taver, the father of the Respondent, and he with a younger brother were the Defendants to the new suit. In her plaint the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of Velu Natchiar, the widow of the last Zemindar of the elder line, to make Gowery Vallabha Taver, the first of that name whom we have mentioned, her successor, proceeds to allege, that with that object she had caused him and his elder brother, Oya Taver, to make a partition of their ancestral property as early as the year 1792. The Plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adopted by Velu Natchiar, and that the Zemindary was his self-acquisition. She then proceeds to allege, that on the death of Velu Natchiar, he actually became Zemindar until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company, he was again put into possession under their grant. She also in this suit makes the alternative case, that even if no partition of their ancestral [599] property took place between Gowery Vallabha Taver and his brother Oya Taver, she, as the eldest widow, was entitled to the Zemindary, as a separate acquisition, in preference to that brother's descendants, and pleads the decision, in what is called the Sandayar case, to prove that such is the Hindoo law, and that the opinion given in the former case by the Pundits to the contrary was erroneous.

In his answer, the first and principal Defendant recapitulated the several facts relied upon by Bodha Gooroo in the former suit as constituting his title. He insisted that by the decision of the Judicial Committee of the Privy Council the contest

was narrowed to the issue whether the brothers were undivided in estate or not, and that the Plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit are thus somewhat vaguely stated :—" The Plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the Defendant cannot be called upon to establish the negative side by direct proof. But the Defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the Plaintiff."

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Civil Judge, Mr. Baynes, whose decree is dated the 27th of December, 1847. The effect of it was, that the only question really open between the parties was that of division or non-division; that the Plaintiff had failed to prove the partition between Gowery Vallabha Taver and his [600] brother, Oya Taver; and that her suit must be dismissed with costs.

Against this decree, on the 6th of April, 1848, Anga Moottoo Natchiar appealed to the Sudder Court. The Defendant, Gowery Vallabha, then died, and his infant son, the present Respondent, came in, and on the 5th of November, 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of June, 1850, Anga Moottoo Natchiar also died, and with her death ended the second stage of this long litigation.

On the death of Anga Moottoo Natchiar the Court seems to have issued a notice in the form ordinarily used on the abatement of an appeal by the death of an Appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindoo widow, the right of action formerly vested in her devolves not upon her heirs; but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Bootaka Natchiar, the daughter of Gowery Vallabha Taver by his second wife, and Kota Natchiar and the present Appellant, his daughters by his third wife. They claimed as the rightful heirs of the Zemindary, if it passed as separate property, next in succession to the widow, Anga Moottoo Natchiar; but considering its impartible nature, they expressed their willingness that it should be enjoyed first by Bootaka Natchiar for her life, next by Kota Natchiar for her life, and lastly by the Appellant. They treated Sowmia Natchiar, the daughter by the [601] sixth wife, as excluded from the succession by reason of her marriage with Bodha Gooroo, and of her being then a childless widow.

Sowmia Natchiar, however, came forward by a separate petition, claiming to be heiress both to Anga Moottoo Natchiar and the Zemindary, by virtue of an instrument alleged to have been executed by Anga Moottoo Natchiar in her lifetime.

A third claimant was Moottoo Vadooga, the Plaintiff in the dismissed suit of 1832. His contention was, that though the decree in that suit may have been right in preferring to his claim that of Anga Moottoo Natchiar, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the Zemindary.

Counter-petitions were filed on behalf of the Respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Anga Moottoo Natchiar.

The Sudder Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders.

By the first, dated 21st of October, 1850, it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April, 1851.

They all petitioned for a review of this Order; counter-petitions were filed on behalf of the Re-[602]-spondent; and the Court, by its Order of the 1st of May, 1851, notwithstanding an adverse opinion given by its Pundits on the 7th of March, pre-

ceding, reversed its former Order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental Appellants; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which the rights as against each other and the Defendant should be tried.

On the 19th of April, 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this Order of the 1st of May, 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the Respondent shifted his ground, and by a petition dated the 30th of June, 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to Anga Moottoo Natchiar, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceedings of the 16th of September, 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gowery Vallabha Taver who joined in the first of the above-mentioned applications to the Sudder Court, the Appellant alone brought a fresh suit. The plaint was not filed until the 5th of December, 1856, but there seem to have been various intermediate proceedings before both the Zillah and [603] Sudder Courts. These are referred to in the Appellant's petition of appeal, but are nowhere stated in detail. Her plaint stated, that her father and his brother, Oya Taver, were divided in estate prior to 1801, and were then living separately; that the Zemindary was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The Appellant's title in succession to Anga Moottoo Natchiar is thus stated:—"The Zemindary, which is the self-acquisition of the Plaintiff's father after his division with Oya Taver, belongs on the death of his widow, Anga Moottoo Natchiar, to his second daughter, the Plaintiff, who has male and female issue: whilst his first daughter, Bootaka, has no issue, and the third daughter, Sowmia, is a widow." In the seventh paragraph (though the point is not taken so distinctly as in the suit of Anga Moottoo Natchiar) she claims the Zemindary as her father's self-acquisition, irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, namely, that it was brought against the guardian of the infant Zemindar, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 27th of December, 1847, as bars to the Appellant's claim. It further impeached her title as the heir next in succession to Anga Moottoo Natchiar in that line of succession, alleging that there were descendants of Gowery Vallabha Taver through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845, as constituting the title of infant Zemindar.

The estate being then in the custody of the [604] Court of Wards, the Collector was made a Defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause. The Zillah Judge, Mr. Cotton, on the 25th of August, 1859, dismissed the suit, together with the suit, No. 4 of 1857, which had been instituted by Sowmia Natchiar, but with which we have no concern. His reasons for dismissing the Appellant's suit were:—first, that upon the question of division she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, secondly, that it was clear upon the opinions of the Pundits, that the Zemindary, whether self-acquired or not, could not descend to the widow, nor, *a fortiori*, to a daughter, except in the event of the Zemindar having been of a divided family.

The Appellant appealed from this decision to the Sudder Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree, dated the 5th of November, 1859. The Sudder Court seems also to have considered that by the dropping of the appeal on Anga Moottoo Natchiar's death the decree of 1847 had become final, and, as such, was an effectual bar to the Appellant's claim. On the 3rd of March, 1860, the Sudder Court refused to give the Appellant

leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of this Committee.

The present appeal is against the decree of the Sudder Court of the 5th of November, 1859, and its Order of the 3rd of March, 1860, and the decree of the 25th of August, 1859. It is also against the Order of the Sudder Court of 1852, and the decree of the Civil Court of Madura of the 27th of December, [605] 1847. If, therefore, the latter decree is in truth a bar to the Appellant's obtaining effectual relief in her original suit, the appeal seeks by reopening that decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was propounded by the Zillah Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the Sudder Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because in a suit by A. for the recovery of an estate from B. it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the Appellant.

Their Lordships also feel constrained to observe that the various proceedings which have taken place since Anga Moottoo Natchiar's death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Anga Moottoo Natchiar died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the Zemindary, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindoo law, [606] which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The Sudder Court, however, after making two other and inconsistent Orders, referred the parties to an original suit; and yet a suit of that nature when brought by the Appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore, she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the Appellant is herself solely responsible; that the suit which she ought to have brought, and which the Sudder Court intended her to bring, was one in the nature of a Bill of revivor, or a Bill of revivor and supplement, limited to the object of obtaining from the Zillah Court a declaration that she had established her title to stand in the place of Anga Moottoo Natchiar, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sudder Court had in its contemplation [607] when it made its Order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the Respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of September, 1852, is hardly inconsistent with this, though it seem to contemplate that the decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the Sudder Court placed

the claimants? It had denied to them the power of prosecuting the appeal: it had thereby made final that which was not in its nature final: and having thus tied their hands it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the Sudder Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the Sudder Court which is appealed against, viz. that of the 19th of April, 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the [608] decree of 1847, if it had become final in Anga Moottoo Natchiar's lifetime, would have bound those claiming the Zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Moottoo Natchiar. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow: and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the Respondent that this Committee can do no more than remit the cause, with directions to the Sudder Court to hear and determine the appeal against the decree of 1847: that it cannot itself deal with the merits of a decree of the Civil Court, until they have been determined by the appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the Sudder Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully [609] argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order which the Sudder Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the Appellant and the Respondent is, as it was between Anga Moottoo Natchiar and the Respondent's predecessors, whether the Zemindary ought to have descended in the male and collateral line: and the determination of this issue depends on the answers to be given to one or more of the following questions:—

First. Were Gowery Vallabha Taver and his brother, Oya Taver, undivided in estate, or had a partition taken place between them.

Second. If they were undivided, was the Zemindary the self-acquired and separate property of Gowery Vallabha Taver? And if so—

Third. What is the course of succession according to the Hindoo law of the south of India of such an acquisition, where the family is in other respects an undivided family?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the decree of 1847. There are undoubtedly strong reasons for concluding that Gowery Vallabha Taver and his brother, after the acquisition by the former of the Zemindary, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very considerable in comparison of the separately enjoyed Zemindary. And Anga Moottoo Natchiar, having admitted that the brothers had been joint in estate, and alleged a partition [610] at a particular place and time, took upon herself the burden of proving that partition; a burden from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presump-

tion which arises from the lateness of the period at which the allegation of division was first made; and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the Zemindary as the self-acquired property of Gowery Vallabha Taver. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the Zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindu Law," by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Pundits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to [611] be found in the Mitacshara, and in ch. II., sec. 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The Mitacshara purports to be a commentary upon the earlier institutes of Yajnyawalkya; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitacshara refers to various authorities which are apparently in conflict with the doctrines of Yajnyawalkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in [612] part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the Respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of the co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law

that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain [613] on a part division of joint property, is apparent from a passage in W. H. Macnaghten's "Hindu Law," title "Partition," vol. I, p. 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences: the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindoo law, there need not be unity of heirship.

But to look more closely into the Hindoo law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the [614] same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindu Law," that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindoo law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange's "Hindu Law," p. 135). But some ancient authorities also invoke the other principle. Vrihaspati (3 Coleb. Dig. 458, tit. cccxcix; see also Sir William Jones' paper cited in 2 Strange's "Hindu Law," p. 250) says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession [615] to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widows' right of succession, whether based upon the spiritual doctrine, or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the Mitacshara, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the doubts for it. According to the principles of Hindoo law, there is no co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a

united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended [616] together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe, that the view which we have thus indicated of the Hindoo law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindoo being a member of a united family having common property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the Zillah Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of October in that year. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

The fuller statements were made by the same Pundits in answer to references directed by the Sudder Court before making the decree of the 17th of April, 1837 (see questions and answers, 3 Moore's Ind. App. Cases, 282). The answers are dated the 28th of December, 1836, and the 16th of January, 1837.

On examining the reasons on which the Pundits [617] rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitacshara to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from Mitacshara, and what we shall presently say as to the passages from Vrihaspati is, we think, a sufficient answer to this part of the reasons on which the Pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the Mitacshara contained in clauses 2 and 3 of section 1, chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pundits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then to consider the authorities on which the Pundits rely in support of their opinions. They consist of the text from the Mitacshara, to which we have already so frequently referred, and of passages from Vrihaspati and several other commentators on the Hindoo law. We have already intimated our opinion that the text from the Mitacshara [618] does not apply to this case, and as to the passages from the Commentators they are all of equivocal import. They may, or may not, have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pundits have founded upon them; but these passages seem to be the same passages, or passages similar to those, which were brought

forward before the time of the Mitacshara, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Nareda. These authorities failed when contrasted with conflicting passages in the works of other Commentators, of which the Pundits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the Sandayar case (*ante* [9 Moo. Ind. App.], p. 580) — a decision also founded on the opinion of the Pundits of the Sudder Court — is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion, that the Zemindary became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the Zemindary to have become the separate [619] property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the Sandayar case, by assuming that the Pundits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinion of the Pundits in this case, which seem never to have been acted upon by any final decree. On the other hand we have the decision in the Sandayar case, and the other authorities cited for the Appellant at the Bar, particularly the passage from Menu, in Sir William Jones's paper, given at Strange's "Hindu Law," Vol. II., p. 250 [2nd Edit.], and the opinion of the Pundit, Kistnamachary, (2 Strange's "Hindu Law," p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the Appellant's contention.

We proceed, then, to consider how the Sudder Court ought to have dealt with this case after Anga Mootoo Natchiar's death, and we are of opinion that [620] that Court ought upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion, that Sowmia Natchiar and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismissed. The claims of the Appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given, that the Appellant and her sisters were well entitled to the Zemindary, as against the Respondent. We have, of course, not failed to consider the judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindoo Law of Inheritance, Mr. Strange, one of the Judges of the Sudder Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844, as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the Appellant bound by the opinion which was then expressed; which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And, as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pundits, and the proceedings of the Courts which we have now been called upon to review. [621] If that opinion had been

supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal: to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sudder Court, ought to have been and ought to be dismissed; and in the suit of 1845 to declare that Sowmia Natchiar and Mootoo Vadooga were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the appeal, and to recover the Zemindary—this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*; and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the Zemindary received by the Respondent, or by his order, or for his use, since the death of Anga Moottoo Natchiar, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the Zemindary ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the Appellant and her sisters, or any of them, to apply at the Court as they may be advised. We shall further recommend that the case be remitted to the Sudder Court, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the Appellant has been subjected must be refunded.

[See *Jouala Buksh v. Dharum Singh*, 1866, 10 Moo. Ind. App. 534; *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee, The Hunsapore case*, 1867, 12 Moo. Ind. App. 1; *Neelkisto Deb Burnomo v. Beerchunder Thackoor*, 1869, 12 Moo. Ind. App. 541; *Rajah Suraneni Venkata Gopala Narismha Row, Bahadoor v. Rajah Suraneni Lakshma Vencama Row*, 1869, 13 Moo. Ind. App. 113; *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*, 1870, 13 Moo. Ind. App. 333; *Ramalakshmi Ammal v. Sivuanantha Perumal Sethurayar*, 1872, 14 Moo. Ind. App. 589; *Chowdhry Chintamun Singh v. Mussamut Nowlukho Konwari*, 1875, L.R. 2 Ind. App. 263; *Periasami v. Periasami*, 1878, L.R. 5 Ind. App. 61; *Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari*, 1878, L.R. 5 Ind. App. 160; *Jugol Kishore v. Maharajah Jotindro Mohun Tagore*, 1884, L.R. 11 Ind. App. 73; *Rani Sartaj Kuari v. Rani Deoraj Kuari*, 1888, L.R. 15 Ind. App. 62; *Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswami*, 1893, L.R. 20 Ind. App. 191, 192. Commonly called the *Shivagunga Case*. For other proceedings, see 3 Moo. Ind. App. 278; 11 Moo. Ind. App. 50; L.R. 2 Ind. App. 169.]

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1863-65. By EDMUND F.
MOORE, Barrister-at-Law. Vol. X.

MOHUN LALL SOOKOOL,—*Appellant*; GOLUCK CHUNDER DUTT, Son of
DABEE DOSS, deceased, and Others,—*Respondents* * [Nov. 30, 1863].

On Appeal from the Sudder Dewanny Adawlut of Bengal.

The provisions of Ben. Reg. XXVI. of 1814, sec. 10, cl. 3, directing the Court to record the points at issue, are imperative and must be strictly observed.

Where, therefore, in a suit to recover lands in possession, as the Plaintiff alleged, of the usufructuary Mortgagees under a conditional sale, the substantial question raised by the answer was, whether certain foreclosure proceedings under Ben. Reg. XVII. of 1806, sec. 8, taken by the Mortgagees effectually barred the equity of redemption, but the Judge of the Court of First Instance did not record that point; upon appeal the case was remitted by the Judicial Committee to India with directions that the question of foreclosure should be tried upon an issue regularly settled [11 Moo. Ind. App. 14].

Held further, that as the account of the mesne profits and expenditure by the mortgagees in possession was unsatisfactory, an account, whether as incidental to the question of foreclosure, or redemption, was to be taken, as provided by Ben. Regs. XV. of 1793, sec. 11, and I. of 1798, sec. 3.

If the interest of the Mortgagor in the mortgage estate has been sold under a decree, and the sale takes place before the notice to foreclose was filed, such notice, to be effectual, must be served on the purchaser, or decree holder.

This suit was brought by the Appellant, a decree-holder under a sale of a Mortgagor's equity of redemption, to recover possession of lands held, as he contended, by the Respondents, as usufructuary Mortgagees, and who had repaid themselves the [2] principal money and interest out of the perception of the mesne profits. The Respondents' case was, that by certain foreclosure proceedings taken by them under Ben. Reg. XVII. of 1806, sec. 8, the equity of redemption was barred.

The facts of the case were as follow:—

In the year 1828, one Lalla Tiluck Chunder, deceased, mortgaged a Zemindary

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

called Seetadulput (with the exception only of droons 33, 3, 15, 1 of land belonging to Mouzah Jafferabad, one of the villages), by way of conditional sale, to Chuttro Narain, Ram Doss and Nilmoney Dutt, to secure the repayment to them of the principal sum of Rs. 4900, advanced to Lalla Tiluck Chunder.

This mortgage was effected through means of two written instruments, one being a Bilawuz Heba, or deed of sale, dated the 12th Phalgun 1889 (1828 A.D.) which was executed by Lalla Tiluck Chunder, and by which he purported to sell to Chuttro Narain, Ram Doss and Nilmoney Dutt, for the consideration aforesaid, the entire Zemindary, with the exception of the 33 droons, etc., of Mouzah Jafferabad, in order that they might possess the same and enjoy the profits thereof. The other instrument, called an Ikrar, or deed of agreement, bore the same date, having been executed contemporaneously by the last mentioned [3] persons, who then delivered it in exchange for the deed of sale to Lalla Tiluck Chunder. This agreement, after reciting the before-mentioned deed, provided, that if the Mortgagor paid off the principal money at the termination of seven years, then the Mortgagees would return to him the deed, and deliver up the possession of the estate; and that if such money was not then repaid the agreement would be deemed of no effect, and the deed of sale remain valid.

It appeared that the Mortgagees in the first instance got possession of only a portion of the lands, and were driven to a suit to obtain possession of the remainder. The Mortgagees under a decree made in that suit entered into possession of the whole of the mortgage premises, and continued to receive the mesne profits thereof until the death of Chutter Narain, one of the Mortgagees, who died, leaving Dabee Doss, since deceased, and Traheeram Dutt, his sons and heirs-at-law, him surviving, who, together with the surviving Mortgagees, continued in possession.

Afterwards one Bridreenath Bajpae, the representative of a person who had obtained a decree in the Civil Court against Lalla Tiluck Chunder, the Mortgagor, and one Augustine Penheiro, who had become by purchase the decree-holder, issued out an attachment in execution of the same, and seized and attached the Zemindary in order to sell the lands and realize the amount due under that decree.

The usual proceedings in a summary suit were taken in the Zillah Court by the Mortgagees, who objected to such intended sale on the ground of their conditional purchase of the Zemindary. The Principal Sudder Ameen overruled their objection, and, by his proceeding of the 17th of July, 1850, ordered the [4] sale to take place, giving notice at the time of the existence of the mortgage.

In the month of September, 1850, the Mortgagees served notice of foreclosure on the widow and heirress of the Mortgagor, insisting that as the principal money and interest was not paid the mortgage had become absolute.

On the 8th of January, 1851, an Order was made in the appeal by the Mortgagees in the summary suit, affirming the Order of the Principal Sudder Ameen. The estate was accordingly sold, in execution of the said decree, to the Appellant and one Lalla Prosunno Lall (since deceased) in equal undivided moieties, for the sum of Rs. 4300, which was paid by them in equal proportions.

After some proceedings before the Foudary Court respecting the Mortgagees' possession, the suit out of which the present appeal arose was brought by the Appellant and Lalla Prosunno Lall, in the Zillah Court of Chittagong, against Ram Doss, since deceased, the Respondent, Nilmoney Dutt, Dabee Doss, and Traheeram Dutt, Ranoo Debia, as widow of the late Lalla Tiluck Chunder, and others. The plaint set forth the principal facts before-mentioned, and charged that such of the Defendants as were the Mortgagees, or their representatives, had been paid out of the mesne profits of the mortgage lands in their possession, the whole of the mortgage money and interest, and that accordingly the Plaintiffs were entitled to have possession of the estate as such purchasers under the decree as aforesaid; and prayed that an account might be taken by the Court, and that if it should then appear that the Mortgagees had received the principal and interest, the Plaintiffs should be decreed possession of the estate.

[5] The answer of the Mortgagees stated, that they had not realized the amount of the mortgage money, and that up to that time the principal with interest due to them remained still unpaid; and admitting possession of the estate to have been obtained under the suit instituted by them, they alleged that, after allowing for ex-

penditure, the interest of which was stated to amount to Rs. 588, per annum, on the mortgage debt, which had not been discharged, there was due to them Rs. 11,976. 9. 0. 2. The answer also stated, that the lands of Mouzah Jufferabad had not been attached and sold in execution of the aforesaid decree, and that portions of the other lands had been since washed away by the river. The Mortgagees also insisted that, having presented a petition to foreclose the mortgage, according to sec. 8 of Ben. Reg. XVII. of 1806, neither Ronoo Debia nor her representatives, the Plaintiffs, having paid off the mortgage debt, after the expiration of the one year of grace the foreclosure had become absolute, and that the suit was barred.

The answer of the Defendant, Ronoo Debia, after admitting the mortgage, denied the validity of the sale in execution and purchase under it, and asserted her claim, as widow representing the Mortgagor, to the mortgaged lands, and also submitted that no suit would lie until the principal and interest should be realized by the Mortgagees, which was not the case, and which she alleged would appear on taking the account.

The other Defendants filed formal answers.

On the 5th of August, 1853, the proceeding to record the issues in the suit, under Ben. Reg. XXVI. of 1814, section 10, was held by the Principal Sudder Ameen of Zillah Chittagong, when he recorded for trial the following issues: First, what quantity of [6] land of Turruf Seetadulput, after excluding the Kharijah of Seetudan, was purchased by the Plaintiffs in execution of the decree; and what quantity of land of the aforesaid Turruf in the survey was measured as being in the possession of the Mortgagees; and of what quantity of land, in accordance with the decision of the Civil Court, the Mortgagees obtained possession. Secondly, whether or no the lands of Mouzah Jufferabad were attached by the Plaintiffs and had come under their purchase. Thirdly, whether or no, the principal and interest due to the Mortgagees having been liquidated from the collections of the disputed land, the disputed land was entitled to release; and whether or no, objection having been raised by Ronoo Debia to the purchase of the Plaintiffs in reference to the sale made to Augustine Penheiro, the purchaser, having been made on the back of the decree, the said purchase was correct.

Evidence was entered into and an account filed by Plaintiffs, and another prepared by the Ameen of the Court, but it was urged that no true account of the mesne profits was filed by the Defendants, the Mortgagees. The Defendants, the Mortgagees, filed a copy of a notice to Ronoo Debia, purporting to have been issued and addressed to her from the office of the Civil Court of Chittagong, and to bear date the 26th of September, 1850, requiring her to pay the mortgage-money, or be foreclosed. This document was not proved, nor was the service of it either admitted on the pleadings or proved. No issue was recorded by the Principal Sudder Ameen to try either the authenticity of this document, or the fact or legal effect of the foreclosure.

On the 5th of February, 1855, the hearing took [7] place before the Principal Sudder Ameen, who made a decree on that date, dismissing the suit, on the ground that the debt due to the Mortgagees had not been discharged.

The Plaintiffs appealed against that decree to the additional Judge of the Zillah Court, and on the 21st of April, 1855, that Judge, by his decree, remanded the case for trial, upon certain directions which are not material to state.

On the 31st of December, 1855, the re-hearing of the suit came on before another Principal Sudder Ameen, and it was ordered that the Plaintiffs were entitled to recover possession of the Mouzahs specified in their deed of sale by cancellation of Defendant's Mortgage.

The Defendants, the Mortgagees, appealed against that order to the additional Judge of the Zillah of Chittagong. In the grounds of appeal they urged that the Plaintiffs could not sue for possession until they were proved to be the legal representatives of the Mortgagor; and that they, the Defendants, having presented a petition of foreclosure, agreeably to sec. 8, Ben. Reg. XVII. of 1806, the conditional sale had become absolute, and that they became the rightful owners of the lands in dispute.

On the 9th of December, 1857, the hearing of the appeal came on before E. Radcliffe, Esq., the additional Judge of the Zillah Court, who by his decree held that

the mortgage was liable to cancellation, and the Plaintiffs entitled to the possession of the Zemindary.

The Defendants, the Mortgagees, presented a petition to the Sudder Dewanny Adawlut, praying for special leave to appeal, which Messrs. Patton and Sconce, two of the Judges of that Court, admitted. [8] The hearing of the special appeal took place on the 11th of February, 1859, before Messrs. Colvin, Trevor, and Loch, three of the Judges of the Sudder Dewanny Adawlut, who reversed the decrees of the Lower Courts. The material part of their decree was in these terms:—"The appeal was admitted to try two points: first, that inasmuch as the Plaintiffs, within one year from the issue of the notice, did not discharge the debt, whether they did not, by such failure, lose their right to redeem? And, secondly, whether the Lower Courts have erred in extending the account of collections beyond the year of notice down to the date of decision? There can be no doubt, as stated in the remarks of the Judges who admitted the special appeal, that the Court below has erred in ruling that the Defendants have no right to foreclosure, inasmuch as their case was struck off the file on the 4th of January, 1851, previous to the expiry of the year of grace. The Appellants issued notice of foreclosure on the 24th of September, 1850; and after everything necessary to be done by them had been done, the case was struck off the file on the 4th of January, 1851. This formal act has no effect upon the rights of the Mortgagor and Mortgagees. The Mortgagor, or his representative by purchase, must, within one year from the 24th of September, 1850, have paid every pice due under the mortgage, or on that date the sale became absolute; and looking to the second point, on which the special appeal has been admitted, we would observe that the account must be made up to that date only, and not to any subsequent period. Macpherson, on Mortgages in the Mofussil, pp. 213-214. With a view, however, of altogether getting rid of the effect of the notice, and non-pay[9]-ment under it, it has been urged that the decision of the Judge of Chittagong, dated the 30th of September, 1831, converted a transaction which was in the nature of a usufructuary conditional sale into a pure usufructuary mortgage. We have attentively perused that decision, and we find that there is not the slightest ground for this allegation, which is now mentioned for the first time. The Plaintiff in that case, the Defendant in this, sued for possession of the estate which had been mortgaged to him, to which he was, under the terms of the deed, entitled. The Court accepted the interpretation for which the Plaintiff contended, and declared him entitled to possession during the remainder of the term mentioned in the mortgage deed, or until the debt was paid, with interest. To this extent the Court acted; but as to the Court's converting a transaction of one nature into one of another, it neither had the power to do, nor did it, in fact, so act. It remains, then, for us to inquire whether, on the expiry of the year of grace, any sum remained due to the Mortgagees. It is, of course, quite competent to the Mortgagor or his representative, in a mortgage like that before us, to omit to make any payment during the year of grace; but this omission is at his own risk, and if one pice be on that date found to be due, the mortgage becomes irredeemably foreclosed and the conditional sale has become absolute. Now, looking to the accounts which have been accepted by the Courts below, and which we cannot now question on a special appeal, we find that on the last day of the year of grace a considerable sum, viz. Rs. 2419, was due to the Mortgagees. Such being the case, we hold that the Plaintiffs have lost their equity of redemption and that the special appeal [10] must be decreed, and the decisions of the Lower Courts be reversed, with costs; and that the Appellants, according to the account prepared by the Khurchanuvees, must receive from the Respondents the costs of this Court, together with interest from this date up to date of realization; and that for the costs of the Zillah Court they must prefer an application in the Zillah Court, from whence, in conformity with the Circular Order of the 4th of March, 1836, the necessary Order will be passed in regard to their payment."

The Sudder Court refused to admit an appeal to England, but special leave to appeal was granted by their Lordships, upon evidence that the real or market value of the subject-matter in dispute was of the value of Rs. 10,000 (see case reported upon this point, 8 Moore's Ind. App. Cases, pp. 193, 492).

As the Respondents did not appear, the appeal was heard *ex parte*.

The Attorney-General (Sir R. Palmer) and Mr. Leith, for the Appellant, Mohun Lall Sookool, contended, that the Sudder Court's decree was erroneous:—First, as it was founded upon the alleged foreclosure proceedings, concerning which, though set forth in the pleadings, no issue had been recorded in the Court of the Principal Sudder Ameen, as required by Ben. Reg. XXVI. of 1844, sec. 10, *Maharajah Koonwar Baboo Nitrasur Singh v. Baboo Nund Lall Singh* (8 Moore's Ind. App. Cases, 199), the provisions of which were similar to the Mad. Reg. XV. of 1846, sec. 10, *Srimut Mootoo Vijaya Raganadha v. Rang Anya Mootoo* [11] *Vatchiar* (3 Moore's Ind. App. Cases, 278); and upon which point it was not competent for either party to go into evidence.

Secondly, that the two former decrees of the Principal Sudder Ameen and additional Zillah Judge ought to have been affirmed; or the case remanded to the lower Court, with directions that the Defendants in the suit should, under Ben. Regs. I. of 1798, sec. 3, and XV. of 1793, sec. 11, deliver in a true and correct account, on oath or solemn declaration, of their receipts and expenditure as Mortgagees in possession; and that an account should then be taken by the Lower Court in order to ascertain whether anything, and what, was due and owing to the Defendants in respect of the mortgage money and interest at the date when it is alleged the foreclosure proceedings, if valid, took effect. And

Thirdly, that the Defendants failed to prove either that they were entitled to foreclose the mortgage, or that, if so, the same was duly foreclosed in such manner as required by Ben. Reg. XVII. of 1806, sec. 8, as to operate as a bar to the Plaintiffs' right.

Judgment was delivered by

The Lord Justice Knight Bruce (Dec. 1, 1863).—This appeal arises on a litigation which commenced, at the latest, in the year 1852, but in a sense earlier, on the question whether a mortgage continued subject to redemption; and if it did, what, if anything, was due upon it: a litigation that might and ought to have been less complex, less prolix, and less tedious than it has unhappily been. That there was a mortgage is plain; it may be taken also as equally plain [12] that if it is redeemable, the present Appellants (for it may be considered that there are two Appellants) are the persons entitled to redeem, and that the Respondents are the actual Mortgagees in possession, who, if the mortgage is redeemable, are liable to be redeemed.

By two decrees, dated respectively the 31st of December, 1855, and the 9th of December, 1857, the latter being made on the appeal of the Mortgagees from the former, the Mortgagors' representatives (the Appellants) were not only declared entitled to redeem the mortgage, but were also declared entitled to do so without making any payment; and this on the ground that, as then decided, the Mortgagees in possession had fully paid themselves by receipt of rents and profits.

These Zillah decisions, the Mortgagees having been dissatisfied with them, led to a special appeal on their part to the Sudder Dewanny Adawlut at Calcutta, which Court in 1859 reversed them, upon the ground (which was in fact the only question before the Court on the special appeal) that certain proceedings taken by the Mortgagees with a view to foreclosure had effectually barred the equity of redemption, and, consequently, that the Appellants' suit ought to be dismissed with costs.

That led to the present appeal, in which the Appellants contend for the relief given to them by the decrees of 1855 and 1857, or at least for something less advantageous to them than the decree of 1859.

Upon the materials before their Lordships, their opinion is not in favour of the decrees of 1855 and 1857, or either of them, nor is it in favour of the decree of 1859. They conceive that the materials before the [13] Court which pronounced the decree of 1855, or before the Court which pronounced the decree of 1857, were not nor are sufficient, as to the matter of debt, to support either of those decrees; and that, on the other hand, the Court which pronounced the decree of 1859 was not, by the state of things then before it, enabled to make that decree

Their Lordships consider that it did not appear sufficiently before the Court in 1855, or before the Court in 1857, that, on the assumption of the redeemable condition of the mortgage, there was not anything then due to the Mortgagees on their security.

The Zillah Courts, in coming to this conclusion as to the state of the accounts, seem to have proceeded not upon proof of the actual collections which were or ought to have been made by the Mortgagees, but upon materials which were in a great measure speculative and conjectural. And this objection to the mode of taking the accounts has in fact been taken by the Appellants' Counsel at their Lordships' Bar, when contending against the application by the Sudder Court of the account so taken to the question of foreclosure.

The other objections taken to the decree of 1859 are—first, that the Sudder Court ought not to have decided the cause on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of First Instance, where alone evidence could be taken; and, secondly, that the Court came to an erroneous conclusion in treating the proceedings of which there was any evidence as an effectual bar to the Appellants' right of redemption. Their Lordships consider both these objections to be well [14] founded. It is clear that there has been no such trial of the question of foreclosure as the Regulation which prescribes the statement of formal issues, and indeed substantial justice, require. And in dealing with this question the Sudder Court seems to have directed its attention to the erroneous reasons assigned by the Zillah Judge for holding that no right of foreclosure existed rather than to the effect of the proceedings proved.

In September, 1850, when they filed their notice of foreclosure, the Mortgagees not only had notice that the interest of the original Mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the decree-holder to put up that interest for sale. There had been a decision against their objection, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, 1851, and the equity of redemption was sold to the Appellants on the 7th of April, 1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser; and, in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original Mortgagor.

Their Lordships, therefore, think that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled; and that the mortgage account, whether as incidental to the question of foreclosure or to the question of redemption, ought to be properly taken. They desire, however, [15] to leave undisturbed the findings of the Zillah Courts upon the title of the Appellants to sue as the representatives of the Mortgagor, and upon the extent and nature of the lands which are the subject of litigation.

Their Lordships are of opinion, that each of the three decrees of 1855, 1857, and 1859 should be discharged, and that the cause should be remitted to India, and that the High Court at Calcutta, or, under its direction, the proper Zillah Court, should inquire whether the Appellants' right, or equity of redemption, as concerning the mortgaged estates in question, or any and what part of them, has become foreclosed or barred; and if it has not become so as to the whole of the estates, then to take an account of what, if anything, is due to the Respondents, or any of them, on the security, and for that purpose to take the usual accounts as to rents and profits and disbursements, with just allowances, and upon the result of that account to deal with the matters in dispute accordingly. The parties respectively to be at liberty to adduce evidence, in addition to that now before us, upon these issues, upon the determination of which the final decision of the cause must depend. The costs of the trial, including those of this appeal, to abide the event.

[16] JOYKISHEN MOOKERJEE.—*Appellant*: THE COLLECTOR OF EAST BURDWAN AND BRIJO ROY, *Phareedar*.—*Respondents* * [Feb. 15 and 16, 1864].

On appeal from the Sudder Dewanny Adaulut at Calcutta.

Chakeran lands in Bengal, held anterior to the Decennial Statement, under the Zemindar of Burdwan, not merely in lieu of wages for personal services to the Zemindar, but also for the performance of the duties of village watchman, are not resumable as Tannahdary lands by the Government, under sec. 8, cl. 4 of Ben. Reg. I. of 1793, but are, by sec. 4 of Ben. Reg. VIII. of 1793, annexed to the Malguzary lands, and responsible for the public revenue assessed on the Zemindary.

Chowkeedars, or village watchmen, are liable to services to the Talookdar, but Chakeran lands held by them for such services are not liable to be resumed by the Talookdar for his own use discharged of the obligation to which they are subject. So held by the Judicial Committee, affirming the judgments of the Zillah and Sudder Courts, in a suit for resumption by the Appellant as Talookdar, under a purchase of certain lands from the Zemindar of Burdwan, which he alleged to be Gram Surunjamee (rent-free village lands), but which were proved to be Chakeran lands, appropriated to the maintenance of Chowkeedars in the Talook in which the lands were situate.

The right of appointing Chowkeedars belongs to the Talookdar, such officers being liable to the performance of services to the Talookdar: and as by usage in the Zemindary of Burdwan, Chowkeedars had been accustomed to render such services to the Zemindar, the Chowkeedar was held entitled to possession of the Chakeran lands under such tenure.

The question raised in this appeal was the right of the Appellant, the Talookdar of Mouzah Gobindopore, to the possession of certain land within the limits of his Talookdary, included in the Decennial Settlement, which the Collector of East Burdwan insisted were, previously to and at the time of that Settlement, [17] Chakeran lands (lands set apart and appropriated as a remuneration for services), and had so continued up to the institution of the suit.

The Appellant's case was, that these lands were Gram Surunjamee Chakeran, or lands appropriated in lieu of wages as a remuneration for personal services rendered to the Zemindar, and that upon the cesser of such services he was entitled to take possession of such lands; while the contention on the part of the Respondent, the Collector of East Burdwan, was, that the lands were Tannahdary, or Chowkeedary Chakeran, or lands appropriated as remuneration for Police services, and that as such they were not resumable by the Appellant, as Talookdar, at all events, while the holder of the lands continued to perform the Police services.

The circumstances of the case and the nature of the tenure, were as follows:—

Prior to the Decennial Settlement the landholders, and Sudder Farmers of land, were bound by a clause in their engagements (see Harington's Analysis, p. 459), to keep the peace, to prevent robberies, and arrest offenders; and for these purposes they retained in their service an establishment of Tannahdars (Police officers) and Pykes or Chowkeedars (village watchmen).

Mouzah Gobindopore, to which the lands in dispute belonged, was at the time of the Decennial Settlement a part of the large Zemindary of the Rajah of Burdwan: and the nature of the Police establishment of the Zemindar of Burdwan, in the year 1788, is referred to in the 5th Report of the Select Committee on the affairs of India in the following terms:—"His Police [18] establishment, as described in a letter from the Magistrate of the 12th of October, 1788, consisted of Tannahdars, acting as chiefs of Police divisions, and guardians of the peace; under whose orders were stationed in the different villages, for the protection of the inhabitants, and to

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

convey information to the Tannahdars, about 2400 Pykes, or armed constables. But, exclusive of these guards, who were for the express purpose of Police, the principal dependence for the protection of the people probably rested on the Zemindary Pykes: for these are stated by the Magistrate to have been in number no less than 19,000, who were at all times liable to be called out in aid of the Police " (5th Report, 1812, p. 71). The Tannahdars and Pykes were remunerated by the Zemindar, either by an appropriation of Chakeran lands or by money payment, and in the calculation of the jumma of the Zemindary to be assessed, with a view to the Decennial Settlement, the profits of the Chakeran lands were not brought into account, and deductions were allowed in favour of the Zemindar for the charges for such Pykes as were paid in money, and the Decennial Settlement was carried into effect upon such a calculation (Mr. Shore's minute, 1789, 5th Report, p. 198).

Ben. Reg. I. of 1793, which declared the assessment of the Decennial Settlement fixed for ever, in the 4th cl., sec. 8, provided as follows:—"The jumma of those Zemindars, independent Talookdars, and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of, any allowances which have been made to them in the adjust-[19]-ment of their jumma, for keeping up Tannahs, or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances, or produce of such lands, according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the Police of the country. The Governor-General in Council, however, declares that the allowances or produce of lands which may be resumed, will be appropriated to no other purpose but that of defraying the expense of the Police; and that instructions will be sent to the Collectors, not to add such allowances, or the produce of such lands, to the jumma of the proprietors of land, but to collect the amount from them separately."

By Ben. Reg. VIII. of 1793, which amended and enacted the rules for the Decennial Settlement, after declaring, in section 36, that the assessment was to be fixed, exclusive and independent of all existing Lakhiraj lands, it was, in section 41, provided as follows:—"The Chakeran lands, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36. The whole of these lands in each Province are to be annexed to the Malguzary lands, and declared responsible for the public revenue assessed on the Zemindaries, independent Talooks, or other estates in which they are included, in common with all other Malguzary lands therein."

[20] In order to correct abuses arising from the Zemindary police establishments, and to afford more effectual protection to person and property, a new system of Police was established by the Government on the 7th of December, 1792, the rules of which, with amendments, were re-enacted in Ben. Reg. XXII. of 1793. That Regulation provided, that the Police of the country should thenceforward be considered under the exclusive charge of officers appointed by the Government, and that each Zillah should be divided into Police jurisdictions of a certain extent, each superintendent by a Darogah; and by sec. 12 all the village watchmen were thereby declared subject to the orders of the Darogah; and, amongst other duties, by section 13, the Police Darogahs were directed to keep a register of the village watchmen declared subject to their orders; and, upon the death or removal of any of them, the landowners or others to whom the filling up of the vacancies might belong, were required to send the names of the persons whom they might appoint to the Darogah of the jurisdiction that they might be registered by him.

For the more complete formation of the register of village watchmen, and to enable the Zillah and City Magistrates at all times to ascertain what number and descriptions of watchmen and guards were maintained in aid of the Police throughout their respective jurisdictions (see Harington's Analysis, p. 513), it was enacted by section 21 of Ben. Reg. XII. of 1807, that "every landholder, farmer, merchant, or other person employing Pykes, Chokeedars, Pasbans, Nigabans, Burkundazes, or any other description of watchmen or guards, shall, within three [21] months after the promulgation of this Regulation, transmit a list thereof, specifying the names,

occupations, places of residence, and allowances in land or money, of the several persons entertained by them, to the Magistrate of the Zillah or City in which they were employed. They shall also transmit to the Magistrate a similar list in the first month of each succeeding Bengal, Fusily, or Willaity year (according to the era current in the district), made up to the last day of the preceding year. Any neglect to furnish such lists (especially after being called upon by the Magistrate), as well as any wilful omission to include in them persons actually employed as guards or watchmen, of whatever denomination, shall be liable to a fine to Government not exceeding Rs. 200, to be determined by the Magistrate, according to the situation of the party and circumstances of the case." The object of the above-stated section was subsequently further provided for by Ben. Reg. XX. of 1817, sec. 21.

It appeared that at about the time of the Decennial Settlement one Srishteedhur had possession of the lands in dispute as a remuneration for his services as Tannaladar in the establishment of the Zemindar of Burdwan, and, subsequently to the alterations in the Police system before referred to, he continued to hold the lands in the capacity of Pyke, or Chowkeedar, under the Talookdar of Gobindopore, who held that Talook in putnee (in perpetuity) of the Zemindar, and, as appeared from the Records of the Foujdary Court of Zillah Burdwan, he was returned as so holding in the lists transmitted to the Zillah Magistrate in conformity with section 21, of Ben. Reg. XII. of 1807. Srishteedhur died about the year [22] 1836, and Nundololl Roy, who was appointed to succeed him, entered into possession of the lands in dispute, and his name was entered in the Records of the Zillah Magistrate, as holding the lands in the capacity of Phareedar (village station policeman) of Gobindopore. Upon the death of Nundololl Roy, Krishto Nayek was appointed Phareedar, and entered into possession of the lands accordingly; and, upon the death of Krishto Nayek, in the year 1850, Ahmed Buksh was appointed, and entered into possession of the lands, and held the same in the year 1852, when the Talook of Gobindopore was purchased by the Appellant.

Shortly after the appointment of Ahmed Buksh as Phareedar of Gobindopore he was appointed by the Magistrate to discharge the duties of Phareedar at a neighbouring station, Doloybazar; and the Appellant having ascertained this circumstance when he entered into possession of the Talookdary, insisted that he had a right to dispossess Ahmed Buksh, and to take possession of the lands in dispute for his own purposes. Upon proceeding to take possession, however, the Appellant was resisted by Ahmed Buksh, and eventually, in 1855, he instituted a suit to enforce his alleged right, by filing his plaint in the Moonsiff's Court of East Burdwan against Ahmed Buksh, and the Respondent, the Collector. The material statements in the plaint were to the effect, that Ahmed Buksh from the time of Appellant's purchase had not been present to take care of the Zemindary Office of Gobindopore village, or to keep a watch, or do any other business, although he continued to hold the lands in dispute as Chakeran lands, and forcibly retained possession; that the lands were never held at any time as service lands [23] for Tannahdary (Police duties), and that it was not laid down by any Regulation that service lands for the village Chowkeedars must be given by the Talookdars or Zemindars; that the lands were Gram Surunjamee lands, of which the Appellant was owner, and that, by sec. 41 of Ben. Reg. VIII. of 1793, as such lands had been included in the settlement with the Zemindar's rent-paying lands, the Appellant was entitled to the lands as liable to pay rent to him; and the plaint prayed, that upon the Zemindary rights being established, he might be put in possession of the disputed land, containing 19 beegahs 1 cottah and 13 chutacks, of the estimated value of Rs. 200, together with mesne profits, pendente lite, and interest until the time the amount of decree should be realized.

The Respondent, the Collector of East Burdwan, insisted that, by the records of the Criminal Court, it was manifest that Srishteedhur had possession of the land in dispute as Phareedar in the year 1813, and that his successors in that capacity had also held the land; that the land was never Gram Surunjamee, but Chakeran land for the performance of Police Chowkeedary duties, and had been held as Chowkeedary Chakeran land for forty-two years at the least, and was probably so held before the commencement of the Decennial Settlement.

The Appellant in his replication repeated his claim to the land as Gram Surunjamee land, and his title thereto, under Ben. Reg. VIII. of 1793, sec. 41, and con-

tended that, inasmuch as the powers of the Zemindar of Burdwan, the original proprietor, with respect to the land, were then vested in him, the Chakeran land which the Defendant and his prede-[24]cessors obtained for attending the Zemindary duties in lieu of salary, were then, since he did not perform the Zemindary business, liable to resumption by the Appellant. The replication also stated that Deedar Buksh had been appointed in the room of the Defendant, Ahmed Buksh, as Phareedar of Doleybazar, but that he did not attend to the Chowkeedary of the Pharee Gobindopore, nor look after the Zemindary duties in any way.

In consequence of the appointment of Deedar Buksh he was made a Defendant to the suit in the place of Ahmed Buksh.

Issues were prepared on the part of the Appellant, and of the Respondent, the Collector, and after the same were settled by the Moonsiff, the parties proceeded to produce evidence in relation thereto. The Appellant gave in evidence a document purporting to be a copy of statement taken from the records of the Criminal Court of the year 1813, under the title of "A statement of the village of Gobindopore, in Pergunnah Shahabad, under the jurisdiction of Tharra Koochut," in which the Tannah was stated to be distant four miles from the village, and Srishteedhur Tannahdar was stated to hold 19 beegahs 17 cottahs (the land in dispute) as service land, and also certain other documents, which were principally copies of, or extracts from, correspondence between the Collector of Burdwan and other officers of the Government in relation to service lands within the district of Burdwan. Three witnesses were called by him to prove that Srishteedhur Tannahdar and his successors had never performed police services, but had transacted Zemindary business solely, and on that account held the land in dispute.

[25] The Respondent gave in evidence certain documents in relation to the Decennial Settlement concluded with the Zemindar of Burdwan in the year 1789, comprising the engagement of the Zemindar, and the Dowl Bundobusts, or particular statement of the jumma of the Zemindary, and of the net jumma payable in conformity with the settlement; and also other documents, consisting of copies of correspondence between the officers of the Government in relation to matters connected with the question in dispute.

On the 30th of April, 1856, the Moonsiff, relying upon the witnesses for the Appellant, found that the land entered in the statement, from the Criminal records of the year 1813, as in the possession of Srishteedhur, had been granted to him for Zemindary services solely, and that such land, being included in the Decennial Settlement, was rent-paying land; and after declaring his opinion, that as the Zemindary services were no longer performed the holder could not retain the land, he pronounced a decree, giving to the Appellant possession of the land, together with mesne profits, interest and costs.

The Respondent, the Collector, appealed to the Court of the Principal Sudder Ameen of Burdwan, and on the 7th of December, 1857, the Principal Sudder Ameen made a decree dismissing the appeal, with costs.

Application was made to the Sudder Dewanny Adawlut at Calcutta, for the admission of a Special appeal from the decision of the Principal Sudder Ameen in this suit and in other similar suits raising the same question; and on the 28th of June, 1858, such application was granted by the Sudder Court on the following grounds:—"These suits were instituted [26] under the provisions of sec. 41, Reg. VIII., 1793, to resume certain lands held by the Defendant as Chakeran, on the plea that they were Malguzary lands assigned to the parties in possession for the performance of certain duties connected with the Zemindary, and that as these duties had ceased to be performed, the Zemindar was entitled to resume them. It is, however, admitted by the Zemindar, that the Defendants performed both Zemindary and Police duties, but for what period is not distinctly stated. The Government (one of the Defendants in these cases) pleaded that the lands were Tannahdary lands, assigned to the Chowkeedars for the performance of Police duties which they still continue to execute. It is not denied by the Defendant (special Appellant) that sec. 41, Reg. VIII., 1793, applies to these lands, but the lower Courts, without determining the issue which arises out of the Defendants' pleadings, viz. whether the lands were or were not assigned for Police duties, have declared that the Plaintiff had authority to resume the land under the section quoted above. As this point has not been de-

terminated, the decisions are consequently imperfect; and as the Zemindar (the real Respondent in these suits) has appeared in this Court, we remand them for the trial of the following issues, which arise out of the pleadings:—First, what were the duties performed by the party in possession of these lands at, or antecedent to, the Decennial Settlement, or for a long series of years? Secondly, if the duties were wholly Zemindary, has it been proved that these duties have ceased, so as to entitle the Zemindar to resume? Thirdly, if the duties performed were partly Zemindary and partly Police, whether, on proof of the cessation of the Zemindary [27] duties, though the Police duties continue to be performed, the Zemindar can resume the lands?"

The suit accordingly came before the Zillah Court for trial upon the issues directed by the Sudder Court; and on the 17th of November, 1858, the Appellant presented a petition to the Zillah Court, stating that the Police station at Doloybazar had been abolished, and the Defendant, Deedar Buksh, discharged from his situation, and that Brij Roy had been appointed Phareedar at the Police station at Gobindopore, and had taken possession of the disputed land, and praying that Brij Roy might be made a Defendant.

The Respondent, Brij Roy, was then made a Defendant by order of the Zillah Court, and put in an answer in the suit.

Additional evidence, both documentary and oral, was adduced by the parties. The evidence was contradictory. Two witnesses were examined on the part of the Appellant, who proved special services performed to the Talookdar, and that the land was held on condition of performing these services since the time of Srish-teedhur. Amongst other documents given in evidence by the Appellant, was a copy of a statement of service land in Tannah Koochut for the year 1792, which purported to state that there were 104 beegahs of such land in Pergunnah Shahabad belonging to that Tannah. The Collector filed Reports of Officers of Government and lists of the names of Pykes and of the Chakeran land held by them, including the name of Srish-teedhur. Two other witnesses deposed that no service had ever been rendered to the Zemindar by the persons who successively held the lands in question.

[28] On the 29th of July, 1859, Mr. C. Hobhouse, the Judge of the Zillah Court, pronounced his judgment; and, as to the first issue, said:—"On a careful consideration of all the documents and papers, and of the *riwâz* evidence produced, and the laws quoted, Reg. XXII., 1793, and sec. 21 of Reg. XX. of 1817, by both parties, I am of opinion, that it has not been substantiated on the part of the Plaintiff, that the duties performed by the servants in occupation of the lands in dispute have been chiefly Zemindary, and only partly Police; nor, on the part of the Defendants, that the duties have been wholly Police; but that the duties, both before, at the time, and since the Decennial Settlement, have been partly Police and partly Zemindary, as follow:—Zemindary, first (personal to the Zemindar), to collect or enforce collections of rents; to guard Mofussil treasuries; and, perhaps, to escort Mofussil treasure. Second (common to the village community), to keep watch at night, to secure the harvests. Police—to maintain the peace; to apprehend offenders under orders of the Tannahdars; to report criminal occurrences; to convey public money to the Sudder treasury (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. I may add, that it is notorious, and in my personal knowledge, that most of these duties are at this present time performed by the village watchmen in Burdwan." As to the second issue, the Zillah Judge referred to his opinion upon the first issue; and as to the third issue, the Judge stated his conclusion as follows:—"On the whole argument on this third issue my judgment is as follows: that the duties performed by the servants in possession of the lands in dispute have been proved [29] to be partly personal to the Zemindar, partly common to the village community and to the public generally, and partly special to the State; and that although the Zemindar's personal duties have ceased to be performed, yet that he has not thereby acquired any right to resume the lands. First, because of the fact that although the lands are included in the Mal estate, yet they are excluded from the rental paid under the permanent settlement, and the principle of equity which follows upon this fact, that the Zemindar cannot claim a something for which he has not given any equivalent; and, secondly, because of the fact that the conditions on which the lands were held were not wholly personal to the Zemindar, but were

common to him, the village community, the public, and the State, and enjoyable by all *pro tempore* Zemindars, and because of the equity following on this fact, that he, the one of several parties having interests, present or possible, in the lands, should not have the power to resume and dispose of the lands at his own pleasure only." In accordance with the above-mentioned judgment, the Zillah Judge made a decree dismissing the suit with costs.

The Appellant appealed to the Sudder Dewanny Adawlut. The appeal came on for hearing before Messrs. Raikes, Trever, and Samuells, three of the Judges of that Court; and on the 17th of April, 1860, the decree of the Zillah Court was affirmed by the judgment of the majority of the Judges, Messrs. Trever and Samuells (the other Judge, Mr. Raikes, being dissentient), and a decree passed dismissing the appeal with costs.

Mr. Trever (Mr. Samuells concurring) delivered the judgment of the Sudder Court, and declared, as [30] to the first issue, that from the earliest periods there were Tannaludary, or Chowkedary Chakeran, but that with that description of service land the Court had no concern in the case before them; and that another and distinct species of service lands was called "Zemindary Chakeran," held by village watchmen, under the names of Paiks and Pasbans, and upon this issue expressed his opinion, that from a period antecedent to the Decennial Settlement, the lands in dispute had been held by parties on the condition of performing services both to the village community and to the Zemindar; and, as to the second issue, declared that, on the finding that the lands in dispute had been before, at, and since the Decennial Settlement, held on the condition of the performance of double service, viz. as village watch and Zemindary Pykes, it was competent to the Zemindars to resume the land on the tenant refusing to perform the duties of Zemindary Pykes. The decree then, amongst other things, dealing with the Decennial Settlement, declared as follows:—"The ownership of the soil was at the same time declared to be with the Zemindars, and it became necessary for Government to determine to whom the land held by the Chowkedars and Zemindary Pykes belonged; with that object, by sec. 41 of Reg. VIII. of 1793, it was declared that 'the Chakeran land, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36,' which declares the assessment fixed, exclusive and independent of all existing Lakhiraj lands. The whole of these lands in each Province is to be annexed to the Malguzary lands, and declared responsible for the [31] public revenue assessed on the Zemindary, independent Talooks, or other estates in which they are included in common with all other Malguzary lands therein. The question then arises as to the meaning of this law. Does it at once absolutely transfer the lands to the Zemindar, and with the lands the right of doing with them as he pleases, and at once assessing them? or does it only transfer them to the Zemindar subject to all those burdens with which the Common law or custom has burdened them, so long as the public service or private convenience requires that they should be burdened? Unfortunately the law is silent on the point. It appears to me, however, that this important section only declares that the right of ownership in these lands is with the Zemindar; that though they are not a portion of lands on which the assessment was actually based, still they are to be annexed to those lands; and that when public service or private convenience no longer requires that they should be devoted to the purpose which, under the customary law, they have hitherto been devoted to, the right of resuming and assessing them is with the Zemindar, as owner of the estate in which they are settled. In carrying out this law in the case of Zemindary Pykes, no question could ever arise in the Courts. The Zemindar is alone the judge of the necessity of the retention of the services of his own servants, and he may dismiss them or retain them at his pleasure; but the case of village watchmen is different: their services are not personal to the Zemindar, but they are performed, first and mainly, for the village community; and consequently, as long as that community exists, the lands are liable to the charge of keeping up [32] the watch. A letter of the Board, dated 13th October, 1700, has been cited by the Appellant, but that letter leaves the meaning of sec. 41, Reg. VIII. of 1793, just where it was." And, after other observations, the judgment concluded in these terms:—"Allusion has been made by the Judge, and also in this Court, to the deduction of Rs. 50,000, allowed to the Rajah of Burdwan at the Decennial Settlement, on account

of Nugdea Pykes. Those Pykes were of a semi-military nature: were commanded by a European Officer, and kept up to guard the frontier from the incursions of the Mahrattas. The force is totally unconnected with the subject before the Court, and it consequently is unnecessary further to notice the circumstances connected with it. The foregoing remarks have indirectly met the chief arguments adduced by the Counsel for the Plaintiff. From what is there stated, it will appear that at the Decennial Settlement the service lands—both those of the village watch and the Zemindary Pykes—were not included in the assessment on which the Settlement was based, neither was any remission of revenue made in lieu of them; that appropriated as they were to particular purposes before the Decennial Settlement, so they remained after it; that, burdened with these charges, they were declared to be the property of the Zemindar; and though, in the case of Zemindary Pykes, the Zemindar can, at his pleasure, resume the lands, in that of the village watch he cannot; but that whilst the public service requires them, they must remain appropriated to those purposes. It follows, from this view, that the lands are burdened by the operation of law, and not by a private contract [33] between the Zemindar and the tenant Chowkeedar, and that, consequently, an unauthorized act of the latter can in no way justify the resumption of them by the former, as, under other circumstances, it might have been done."

The third Judge, Mr. Raikes, being dissentient, delivered a separate judgment, in which he stated at length his reasons for considering that the Appellant was entitled to recover possession of the lands, and that the decree of the Zillah Judge should have been reversed. The material part of his judgment was as follows:—"It has been admitted by the Government Pleaders, that where these services have been purely Zemindary, the practice (right or wrong) has been to resume, whenever the Zemindar chose to dispense with such services; but that, in the present case, as the occupant of the land has performed the duties both of a Zemindary Pyke and a village Chowkeedar, the Zemindar, in consequence of the village Chowkeedar being also a Police officer and a servant of the State, cannot resume the lands on a cessation of the Zemindary services. Now, I cannot allow that the village Chowkeedar is a Police officer, or a servant of the State. Section 13, Reg. XXII. of 1793, enacts, that 'All Pykes, Chowkeedars, Pashans, Dusauds, Negabans, Harees, and other descriptions of village watchmen, are declared subject to the orders of the Darogah. He shall keep a register of their names; and upon the death or removal of any of them, the landowners or others to whom the filling up of the vacancies shall belong, shall send the names of the persons who they may appoint to the Darogah of the jurisdiction, that they may be registered by him as above directed.' The next section describes the [34] particular duties these men are expected to perform, and provides 'that Pykes, Pashans, or other village watchmen, who shall not act in conformity with this section, shall be dismissed from the station by the landholders, or other persons by whom they are employed, upon the requisition of the Magistrate; and shall be further punished as the law may direct,' etc. These two sections appear to me to recognize in the plainest terms that these Pykes, Pashans, or village watchmen, are servants of 'the landholders or other persons by whom they are employed,' and are not servants of the State. At page 44 of the Fifth Report of the Select Committee on the affairs of the East India Company, mention is made of the above Regulation in the following words:—'The Pashans, Pykes, and other description of village guards, who still have their subsistence from the village establishment, are, by the Regulation then above cited, placed under the authority of the Darogah, who keeps a register of their names, and on a vacancy occurring in their number, calls on the Zemindar—to whom the privilege still appertains—to fill it up.' And again, at page 71 of the same Report, when treating of the Police under the system introduced in 1793, we find it stated, that 'the village watchmen, and such as remain undismissed of the Zemindary servants, are by the public Regulations required to co-operate with the Darogah; but a provision of this nature, without the means of prompt enforcement, has not been attended with the desired effect.' These extracts show that it was not the village watchmen only who were declared bound to obey the Darogahs, but all the Zemindary servants, as such: and if the argument be good, that a person who acts as Zemindary [35] servant, and as village Chowkeedar, and holds lands for these services, becomes

through the above Regulation a Police officer and servant of the State, for precisely the same reason any other Zemindary servant must be a Police officer and servant of the State, and equally independent of the Zemindar who feeds and employs him, and remunerates him either with land or money. I feel no hesitation in coming to the conclusion, that when the persons here alluded to as village watchmen perform, as in the case before us, the duties of a Zemindary Pyke and of a village Chowkeedar, and hold land rent free, they are not Police officers of the Government, but servants of the Zemindary establishment, and the tenure of the land is a service tenure, that the occupant holds it, in lieu of wages, for services to be performed to the proprietor, and not, as alleged by the Government Pleader, exclusively for services rendered to the State, and for any services he may render to the community of the village; and, I believe, a separate charge may be legally made." And he concluded as follows:—"I have no hesitation in holding that the Chakeran lands, of which it is admitted the present lands form a part, were made over to the Zemindars as a part of their Malguzary lands, and that consequently any one who holds a portion of these lands without paying rents is bound to prove his right to do so. In the present case the Defendant justifies his right to rent-free occupation on the ground that he performs the duties of village Chowkeedar. But he has failed, in my opinion, to show that the lands were bestowed upon his predecessors for such services only; whereas I consider the Appellant has shown good ground to establish the belief that these lands were [36] held exempt from payment of revenue, in consequence of the holder rendering services to the Zemindar in collecting the revenue, and that the exemption was not made in consequence of the protection he is supposed to afford to the village community. For that protection, I believe, as stated by Mr. Brooke, the community are bound to pay in Burdwan as well as in other parts of the country. Hence I am of opinion that, on failure of the services which the Chowkeedar Defendant was bound to render to the Zemindar, and of which the Appellant was most arbitrarily and illegally deprived by the Commissioner of Police, the Appellant is entitled to resume his tenure; and I would reverse the judgment of the lower Court accordingly."

As the value of the subject-matter in dispute was under the prescribed amount, Rs. 10,000, the Appellant petitioned Her Majesty in Council for special leave to appeal against this decree; and, in consideration of the important question at issue, and also that other suits were pending involving the same point, leave to appeal was granted (see case reported on this point, 8 Moore's Ind. App. Cases, p. 265).

Mr. Rolt, Q.C., and Mr. Leith, for the Appellant.—This case is of considerable importance, as the decision in this appeal will govern a great many other suits in which the Government of Bengal, Zemindars, Talookdars, and rent-free holders are interested. Our broad proposition is, that the land in question was always an integral portion of the Malguzary land, within the Talook of the Appellant, and held on a service [37] tenure; in respect of which Talook, Government revenue was assessed at the Decennial Settlement, and covered by that Settlement, as Gram Surunjamee, by the predecessors, of the second Respondent, on a personal service tenure to the Talookdar for protection of the Zemindary by performance of certain duties. *Raja Lelanund Sing Bahadoor v. The Government of Bengal* (6 Moore's Ind. App. Cases, p. 101). The *onus*, that the second Respondent was entitled to continue in possession of the land without payment of rent, or rendering service to the Appellant, lay upon the Respondents, who claim the exemption, *Maha Raja, Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government* (4 Moore's Ind. App. Cases, p. 466). But the Government rested their defence on the allegation that the land was at the time of the Decennial Settlement, Tannahdary Chakeran, or Police service lands, within the meaning of Ben. Reg. I. of 1793, sec. 8, cl. 4, yet the decree of the Sudder Court declared that it was not of that tenure but Zemindary Chakeran, or service land, and the property of the Appellant, as Talookdar, under Ben. Reg. VIII., 1793, sec. 41, and had been so held since the Decennial Settlement, on condition of performing services both to the village community, as village watchmen, and to the Talookdar. If so, and as the land was Zemindary Chakeran, and the second Respondent had failed to perform the conditional personal service to the Talookdar, on which the same was held, the Appellant, having been arbitrarily deprived to those services, ought to have been declared by the decree, under the last-mentioned Regulation, entitled to resume

possession [38] of the lands. The Government really had no interest whatever in the matter.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Respondent, the Collector of East Burdwan.—The Appellant failed to make out his case, and he had no right to take possession of the lands in question, such lands having always been appropriated and held as remuneration for services which were wholly or in part Police duties, and not solely personal service to the Zemindar, and if those services were discontinued the Appellant had no right to resume the lands. On account of the nature of the services, no assessment in respect of the jumma of the lands was made at the time of the Decennial Settlement. Upon the nature of the tenure in dispute they referred to the 5th Rep. of Select Com. on the affairs of India, in 1812, pp. 44, 71, 198, 317, 319, 404-6; Wilson's Glos., *voce*. "Pyke," and "Parik," pp. 388, 591. Harrison's Analysis, p. 513. Ben. Regs. I., 1793, sec. 8, cl. 1; VIII., 1793, secs. 36, 41; XXII., 1793, secs. 1, 13; XII., 1807, sec. 1; XX., 1817, sec. 21.

The consideration of the appeal was reserved: judgment was now delivered by

The Right Hon. Lord Kingsdown (May 5, 1864). The question in this case relates to a small quantity of land, consisting of nineteen beegahs and some cottahs, in the Talook of Gobindopore. This Talook originally formed part of the great Zemindary of Burdwan, [39] and previously to its purchase by the Appellant it had been granted in Putnee by one of the Rajahs of Burdwan. In the year 1852 it was put up to sale by the Collector of the Zillah of East Burdwan, under the provisions of Ben. Reg. VIII. of 1819, in order to realize the amount of arrears of rent due from the then Putneedar. The Appellant became the purchaser, and entered into the receipt of the rents and profits of the Talook, and it must be assumed that, as Putneedar, he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the Zemindar.

At this time the lands now in dispute were in the possession of a person named Ahmed Buksh, who paid no rent for them either to the Government or to the Talookdar, but, instead of rent, performed certain services. What was the nature of those services is one of matters now in question. Another is, what is the character of the lands thus held by these services: are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the Talookdar, and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services, or providing from other sources for the performance of these services if he be under any obligation to secure their performance?

On the 11th of January, 1855, the plaint in the present suit was filed, and the Collector of East Burdwan, as representing the Government, was made a Defendant. The plaint insisted that the lands in question were part of the Talook; that the lands were what are called "Mâl Surunjamee" or "Gram Surunjamee" held for the performance of services personal to the [40] Zemindar, and for the protection of his property; that Ahmed Buksh had ceased to perform any Zemindary services: and that the Plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the 9th of January, 1856, the Collector of East Burdwan filed his answer, and he thereby insisted, "that the land in question was not Mâl Surunjamee (service land for taking care of the Mâl or Zemindar's property), but Chakeran land for the performance of Police or Chowkeedary duties; that the land being Chowkeedary Chakeran land, the Zemindar has no power to interfere with the property as long as the Policemen carry out their various duties."

The main issue raised between the parties, therefore, was as to the nature of the tenure on which the land was held: the contention on the part of the Appellant being that they were of one description and subject to the performance of no Government services, and the contention of the Respondent that they were of another description and subject to the performance of no services to the Zemindar. Shortly before the Collector put in his answer, the Foujdary Court of East Burdwan had issued an order "that a Perwannah be sent to all the Darogahs of this jurisdiction, that the Chowkeedars under their control be instructed not to attend to Zemindary duties."

It appears that these Zemindars were entrusted, previously to the British possession of India, as well with the defence of the Territory against foreign enemies,

as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against [41] hostile inroads, but also a large force of Tannahdars, or a general Police force, and other officers in great numbers, under the name of Chowkeedars, Pykes, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the Zemindar, the collection of his revenue, and other services personal to the Zemindar.

All these different officers were at that time the servants of the Zemindar, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services.

The lands so enjoyed were called Chakeran or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

First, Tannahdary lands, which, by Ben. Reg. I. of 1793, sec. 8, cl. 4, were made resumable by the Government; the Government taking upon itself the maintenance of the general Police force and relieving the Zemindar from that expense.

Second, All other Chakeran lands, which by Ben. Reg. VIII. of 1793, sec. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the Malguzary lands, and declared responsible for the public revenue assessed on the Zemindars' independent Talooks or other estates, in which they were included in common with all other Malguzary lands therein.

It is clear upon the evidence, and in fact was not disputed at the Bar, that the lands in question are Chakeran lands of the second class, and it follows [42] that, if resumable at all, they are resumable by the Appellant; and secondly, that if the services on which they are held are Police services at all, they are the services of Chowkeedars, or village watchmen.

The Zemindar had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property; but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government, as representing the public, reserved therefore a strict control over them.

Accordingly, various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each Zemindary, with a statement of the funds allotted for their support. The officers themselves were made subject to the orders of the Darogah, or Superintendent of the Police of the District. The Zemindar was required to remove them on complaint of their misconduct by the Darogah, and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the Zemindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the Chowkeedar such services as he was bound by law or usage to render to the Zemindar. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his Police duties, to the performance of other services personal to the Zemindar, as [43] the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognize the interests both of the Zemindars and the public in lands of this description. They were not to be included in the Malguzary lands for the purpose of increasing the jumma, because the Zemindars had not the full benefit of them; but they were to be included in the Malguzary lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest.

Such being in our opinion the general law, let us look at the facts of this particular case. It is found by the Zillah Judge (see *ante* [10 Moo. Ind. App.], p. 28) that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement, have been partly Police and partly

Zemindary, as follows:—Zemindary: First (personal to the Zemindary). To collect or enforce collection of rents; to guard Mofussil treasures, and perhaps to escort Mofussil treasures. Second (common to the village community). To keep watch at night, and to secure the harvests. Police: To maintain the peace; to apprehend offenders under the orders of the Tannahdar; to report criminal occurrences; to convey public money to the Sudder Treasury (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. The Judge adds:—"I may add that it is notorious, and in my certain knowledge, that most of [44] these duties are at this time performed by the village watchmen in Burdwan."

From this finding their Lordships see no reason to dissent.

But it may well be that although these lands have been held by the predecessors of the Defendant, Ahmed Buksh, and were held by him as Chowkeedar, liable to perform services to the public as well as to the Zemindar, yet that there has been no legal appropriation of the land for that purpose, and that the Appellant may be entitled to recover the land, though he may be under an obligation to provide for the performance of such services as a Chowkeedar is liable to perform for the public.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were included in the Zemindary, their annual value does not seem to have been taken into account in fixing the jumma. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the Zemindar, either for his own or for the public interest, to maintain. We find that in 1813, the particular lands in question were in this Talook held by Srishteedur, who is described as Tannahdar, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as Tannahdary lands in the strict sense of the expression—lands of that description had already been resumed by the Government—but as Chowkeedary lands: lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circum-[45]-stances are sufficient to warrant the inference that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable, to the maintenance of such an officer, and that the Talookdar has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject.

On the other hand, it is established by the evidence that the Chowkeedars in this district have always been accustomed to perform services personally to the Zemindar as well as to the Police. This is distinctly stated to be the fact by Mr. Skipwith, the officiating Collector in 1837, and by the Judge of the Zillah Court in the present case, and it is admitted by the Government. We think, therefore, the order of the Foujdary Court in December, 1855, forbidding the performance of Zemindary services by the Chowkeedar, was without any warrant in law.

Cases of this description must, as it seems to us, depend mainly if not wholly for their decision upon the question, what was the tenure or character of the lands at the time of the Decennial Settlement, and how they were dealt with in that Settlement.

In this case the result, in our opinion, is, that both parties have insisted on more than they were entitled to. One side has contended that the holder of these lands is liable to the performance of none but Zemindary duties; the other, that he is liable to the performance of none but Police duties.

Under these circumstances, we feel considerable difficulty as to the course which we ought to take. If we advise the affirmance of the judgment, we may seem to countenance the opinion that the Government has the right to take possession of these [46] lands, and to appoint a person to perform, as Chowkeedar, general Police duties, to the exclusion of duties to the Talook and the Talookdar: and this is very far from being our opinion.

On the other hand, we think that we cannot advise the reversal of the judgment, having regard to the form of the pleadings, without maintaining the position assumed by the Appellant, that these are Gram Surunjamee lands, not liable to

the performance of any but personal services to the Appellant ; and from this opinion also we dissent.

The state of the pleadings prevents us from reaching the real merits of the case. It is not for us to say how these merits may best be reached. It may be that the Appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or it may be that the person so appointed may himself be entitled to recover the land. On these points we give no opinion. But on the whole, having regard to the Appellant being Plaintiff in the suit, and having failed to make out the case which he set up, we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs, and to declare that the lands in question are to be considered as appropriated to the maintenance of a Chowkeedar or village watchman in this Talook, and that the right of appointing such officer belongs to the Talookdar, and that such officer is liable to the performance of such services to the Talookdar as, by usage in the Zemindary of Burdwan, Chowkeedars have been [47] accustomed to render to the Zemindar, and to declare that the affirmance of the judgment is to be without prejudice to any (if any) other suit which the Appellant may think fit to institute in respect to the matters in dispute in this cause.

[See *Forbes v. Meer Mahomed Tuquee*, 1870, 13 Moo. Ind. App. 461.]

THE ZEMINDAR OF RAMNAD,—Appellant; THE ZEMINDAR OF YETTIAPooram,—Respondent* [June 27, 28, 1864.]

On appeal from the Sudder Dewanny Adawlut at Madras.

Disputes respecting the boundaries of the Zemindaries of Yettiapooram and Ramnad, in the District of Madura, having led to acts of violence by the Ryots, the Government, in the year 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the Zemindar of Yettiapooram was in possession of certain lands adjacent to and taken as a part of the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years ; no steps having been taken regarding them till the year 1855, when the Zemindar of Yettiapooram brought a suit against the Collector of Madura and the Zemindar of Ramnad, to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either Zemindar, it was held by the Courts in India and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the Zemindar of Yettiapooram before and at the time of the attachment by the Government was, in the circumstances, evidence of title, and the Government was ordered to restore the lands to him.

In this appeal the question was one of boundary, involving an issue whether certain lands which had been taken possession of by the Collector of Madura, to await a judicial decision upon the title thereto, the subject of the suit, belonged to the Zemindary of [48] Ramnad, or to the Zemindary of Yettiapooram. Disputes

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

respecting the boundaries of these Zemindaries, and suits respecting it, had taken place between the Zemindars anterior to the institution of the present suit.

The circumstances of the case were these:—

The Zemindary of Yettiappooram, in the district of Tinnevely, was bounded on the north and east by the Zemindary of Ramanad, in the district of Madura. The village of Budalapuram, and another village in Yettiappooram upon the north, join the village of Paralachi, in Ramanad; and the village of Mavaliodai, and two other villages in Yettiappooram upon the east, join the village of Perunali, in Ramanad. The lands in question in this appeal were the northern lands alleged by the Respondent as belonging to Yettiappooram, in the village of Budalapuram, adjoining the village of Paralachi, in Ramanad. Prior to the year 1819, such lands in question, which were mostly uncultivated, were in the possession of the Zemindar of Yettiappooram, and portions thereof were from time to time brought into cultivation by the Ryots of Budalapuram, and cultivated by them as being within the limits of that village. In that year a representation was made to the Collector of Madura by the Tahsildar of Ramanad, to the effect that the Ryots of Budalapuram had encroached upon lands to the extent of 550 Kuruhams attached [49] to the village of Paralachi, and were proceeding to cultivate them; and upon that representation being communicated by the Collector of Madura to the Collector of Tinnevely, the last-mentioned Collector, on the 26th of January, 1819, issued orders to the Zemindar of Yettiappooram, directing him to investigate the matter and to submit a report thereon. An investigation was accordingly made, and the result of the inquiry was that the lands in question in this appeal remained in the possession and enjoyment of the Zemindar of Yettiappooram. It appeared that the Ryots of Budalapuram proceeded to bring into cultivation divers waste portions of the lands in question, and in the month of January, 1825, a complaint was made to the Collector of Madura, by the Ameen of Talook Kamudai, the Talook of Ramanad, in which the village of Paralachi is situated; that the Zemindar of Yettiappooram had encroached upon 2000 kurukhams of land attached to Paralachi; and upon such complaint being made known to the Collector of Tinnevely, he deputed a native Officer attached to his collectorate to proceed to the spot, and hold an inquiry into the matter, and ordered the Zemindar of Yettiappooram to send an authorized Vakeel to give evidence and information before such native officer. Orders were given to the people of the Zemindary of Ramanad to be present upon the spot on the day of the inquiry. The native officer deputed to hold the inquiry arrived at the village of Budalapuram on the 30th of March, 1825, and on the following morning, in company with the Vakeel of the Zemindar of Yettiappooram, proceeded to the lands which were the subject of the complaint. No person connected with the Zemindary of Ramanad attended, and, [50] after investigation, a report was made by the Officer, that the lands within the boundaries specified were under the enjoyment of the Zemindar of Yettiappooram.

In the year 1829, Ramasami Setupati, the Zemindar of Ramanad, the late husband of the Appellant, preferred another complaint to the Collector of Madura, against the Zemindar of Yettiappooram, stating that the inhabitants of Budalapuram had encroached upon 3000 kurukhams of land lying within the limits of Paralachi, and also that the inhabitants of Mavaliodai had encroached upon 4000 kurukhams lying within the limits of Perunali.

It appeared that arrangements were made by the Collector of Madura for the settlement of the disputes between the villagers of Mavaliodai and Perunali, and with respect to the lands in dispute within the villages of Budalapuram and Paralachi which were alone in question in this appeal, and that the Collector of Madura had sent a letter to the Zemindar of Ramanad, stating that arbitrators had been named by the Zemindar of Yettiappooram, who would be upon the lands in dispute on a certain day, and directing the Zemindar of Ramanad to name arbitrators who should attend on his behalf on that day; but he neglected to send such arbitrators, consequently no final settlement was effected.

In the year 1834, proceedings were had with respect to the lands in dispute between the villages of Mavaliodai and Perunali, and such proceedings resulted in an award being made by Mr. Blackburne, the Collector of Madura, on the 23rd of August, 1834, which awarded the lands to the extent of 1016 kurukhams to belong

to the Zemindary of Ramnad, and, in accordance with [51] such award, boundary stones were fixed between the eastern side of the Zemindary of Yettiapooram and the Zemindary of Ramnad. The Zemindar of Yettiapooram was dissatisfied with Mr. Blackburne's award, and after divers proceedings in the Courts in India, was successful in getting the same set aside by a decree of the Sudder Court. That decree, however, was reversed upon appeal by the Judicial Committee, who made an order maintaining the award (see Case reported, 7 Moore's Ind. App. Cases, 441).

Shortly after the award of 1834, in favour of the Zemindar of Ramnad, the claim to the lands in question, which were not affected by such award, was again set up, and the disputes between the Ryots of the villages of Budalapuram and Paralachi assumed so formidable a character that steps were taken at the end of the year 1835, with a view to the attachment of the lands by the Government, and in the month of January, 1836, the Collector of Madura, under instructions from the Board of Revenue, attached and entered into possession of the lands, in order that the public peace might be preserved.

At the time of the attachment by the Collector, the Zemindar of Yettiapooram was, as he had been before, in the possession of the lands in question. The lands remained under attachment for a period of about twenty years prior to the institution of the suit in which this appeal was brought, and the rents were paid into the Collector's treasury.

On the 5th of March, 1855, Jagaveera Rama Venkataswara, the then Zemindar of Yettiapooram, and the father of the Respondent, filed his plaint in the Civil Court of Madura against the Collector of Madura, and the Appellant, the widow of Ramasami [52] Setupati, deceased, whereby, after stating the boundaries of the lands and generally to the effect that the same belonged to the Zemindary of Yettiapooram, and that his possession thereof had been interfered with, the Plaintiff prayed that the Court would put the lands in his possession, and recover for him from the defendants the amount of tirva of the lands collected during the twenty years of attachment.

The Collector, by his answer, stated that the surplus profits of the lands claimed, after deducting necessary expenses, amounted to Rs. 6096. 8. 2., and that he was ready to pay that amount, and to give up the lands to the party in whose favour the Court might give judgment; and it was submitted that, as the attachment was made solely in order to preserve the public peace, one of the Zemindars ought to pay his costs of the suit.

The answer of the Appellant, in substance, was, that the lands did not appertain to the Plaintiff's Zemindary, nor were they enjoyed by him; that the lands were in the Appellant's enjoyment, as could be proved by evidence; that the lands were marked off from the Plaintiff's Zemindary by Uranis (tanks), dug as boundary marks by the people of Ramnad; that the disturbances were caused by the Plaintiff, who, in the year 1819, and again in 1832, neglected to send arbitrators to the lands in dispute. That, amongst other documents, to show that the lands appertained to Paralachi, there were particulars of an attachment by the Court, and also a Bill of sale at auction of certain of the lands as part of that village.

The Plaintiff in his reply, so far as respected the answer of the Appellant, pleaded, that the lands sued for did not appertain to Paralachi, and that they were [53] never enjoyed by the Zemindar of Ramnad, but were in the enjoyment of the Zemindar of Yettiapooram up to the time of the attachment; that the Uranis were not dug by the Zemindar of Ramnad as boundary marks; that the disturbances were caused by the Zemindar of Ramnad, and that it was the fault of that Zemindar that the dispute had not been settled by arbitration; and denied that the particulars of the attachment and the Bill of sale, upon which reliance was placed in the Respondent's answer, were of use in support of his case.

The following points for proof were recorded by the Judge of the Civil Court of Madura. The Plaintiff to prove his right to the lands mentioned in the plaint, and his enjoyment thereof, either at the time of their attachment by the Government in 1835, or for any period immediately preceding it. The second Defendant to prove her right to the lands mentioned in the plaint, and her enjoyment thereof, either at the time of their attachment by the Government in 1835, or for any period immediately preceding it. The first Defendant (the Collector) to prove that he is

bound to make good to the party obtaining a favourable judgment the balance of the mesne profits collected during the time of the Circar attachment, and no further sum.

The Plaintiff's case was established by the production of attested copies of documents in the records of the Collectors of Madura and Tinnevely, which comprised the communications and documents relating to the disputes in the years 1819, 1825, and 1829, hereinbefore referred to, and also a copy of a Panchayat decree, dated the 24th of May, 1784, [54] awarding the lands within the disputed boundaries to the Zemindar of Yettiapooram. The Appellant tendered, among other documentary evidence, divers Cadjan measurement and other accounts alleged to relate to the lands in question, but they were rejected by the Civil Court as being unauthenticated, and there being no proof as to their genuineness.

Several witnesses were examined, and a plan showing the lands in question, and also the lands on the eastern side of Yettiapooram, which were awarded to the Zemindar of Ramnad by Mr. Blackburne, in 1834, and marked off by boundary stones placed by him, as hereinbefore mentioned, was called for by the Civil Court. From an inspection of that plan it appeared that the boundary stones were so placed as to mark off the eastern lands awarded to Ramnad from the lands in question which belonged to Yettiapooram.

On the 30th of July, 1860, the suit came on for final hearing before Mr. R. R. Cotton, the Judge of the Civil Court, and that Court made the following decree:— "That the first Defendant (the Collector) do make over to the Plaintiff the land in dispute and under attachment, together with the net revenues of the same, in deposit, from the time it was taken possession of by the Government to the present date; and that the second Defendant (the Appellant), as the admitted originator of the attachment and consequent cause of this action, do pay her own and first Defendant's costs, as well as those of Plaintiff, on the amount decreed." In giving judgment, the Civil Court stated that, in addition to the documents tendered as evidence by the Plaintiff and [55] the second Defendant, which were rejected, as hereinbefore stated, the Court discarded the whole of the oral testimony as most unsatisfactory and unworthy of any reliance being placed upon it. The judgment mainly proceeded upon the fact of the possession and enjoyment by the Zemindar of Yettiapooram of the lands in question up to the attachment by Government, as established by the Plaintiff's exhibits, and upon the fact that, although there had been disputes about the lands between the Zemindar of Ramnad and the Zemindar of Yettiapooram in the year 1819 and subsequent years, the Zemindar of Ramnad had always shrunk from an investigation into the alleged title; and the Court stated as their opinion, that the second Defendant (the Appellant) had entirely failed to establish the fact of her having any legal title to the lands in question.

An appeal against this decree was made to the Sudder Dewanny Adawlut at Madras, and on the 15th of July, 1861, that Court, consisting of Messrs. H. D. Phillips and H. Frere, pronounced a decree affirming the decree of the Civil Court, and dismissing appeal with costs.

The present appeal was brought from this decree of affirmance.

Sir Hugh Cairns, Q.C., and Mr. Pontifex, appeared for the Appellant; and The Attorney-General (Sir R. Palmer), and Mr. W. H. Melvill, for the Respondent.

For the Appellant it was contended, first, that his claim to the land was sufficiently established, and that the Respondent had not proved his title; secondly, [56] that as evidence adduced by him had been improperly rejected by the Court below, the case ought to be sent back to India for further inquiry, as it would be a denial of justice to uphold the Sudder Court's decree in such circumstances.

On the part of the Respondent it was insisted, that the lands for many years prior to the attachment by Government had been in possession of the Zemindar of Yettiapooram, and that the case presented to the Court below was such as to afford a strong presumption of title in the Respondent, who was entitled to be reinstated in the possession of the lands, as the Appellant had utterly failed in making out any right or title of himself, or any preceding Zemindar, to the lands, and that all that he had done for years was simply to object to the Respondent's possession; and it was submitted that, even assuming that neither of the parties had shown a good

title, yet that the Respondent, as being the occupier of the land at the time of the Government attachment, was to be presumed the owner, and entitled to possession.

The Right Hon. Lord Kingsdown.—This suit was instituted for the purpose of establishing the right of the Plaintiff to certain lands which he said belonged to his Zemindary of Yettiapooram. The result of it was, that neither the Plaintiff nor the Defendant could make out any clear title, and the Plaintiff was only able to establish that he had had possession of the property at the time of, and prior to, the attachment by the Government. Under these circumstances, the Civil Judge thought that the best course to be adopted was to restore possession of [57] the lands to those from whom it had originally been taken.

It was an uncultivated district, lying between the Zemindaries of Yattiapooram and Ramnad; and it would seem that in the year 1819, the Ramnad Zemindar complained that, although the land in question belonged to her village of Paralachi, it had been encroached upon by the Ryots of Budalapuram, a village belonging to Yettiapuram, to the extent of 550 kurukhams. An inquiry was ordered by the Collector of Madura, the result of which appears to have shown that the Ryots were only doing that which they had always been accustomed to do.

No further steps were taken, and the party complaining seems to have been satisfied that there was no sufficient case, and the lands in question continued to remain in the possession and enjoyment of the Zemindar of Yettiapuram. In the year 1825 another complaint was made to the Collector of Madura, by the Zemindar of Ramnad, of another encroachment upon land belonging to the village of Paralachi. An officer was deputed to make inquiries. He proceeded to the village of Budalapuram, and commenced an investigation. Notice was given of the purpose for which he had arrived, but no one attended on behalf of the Zemindary of Ramnad; so that the Officer was obliged to go away without hearing anybody in support of the complaint.

There is no reason to doubt that at this period the lands were occupied by the Zemindar of Yettiapuram. In 1829, a complaint was again made by the Zemindar of Ramnad of encroachments on his territory, and again, although he received due notice, he neglected to proceed with his complaint. Then, [58] in the year 1834, proceedings were had with reference to the eastern lands, and the Zemindar of Ramnad appears to have abandoned all claims to the northern lands. Mr. Blackburne then makes his award in favour of the Zemindar of Ramnad, and the Zemindar of Ramnad on this revives the dispute as to the northern land, and thereupon the lands were attached by the Government in 1836, and have since remained in their hands. These facts, in our opinion, go to show that in 1836, at the time when the lands were attached by the Government, and long prior thereto, the lands in dispute were in the possession of the Zemindar of Yettiapooram. We think that the title of the Respondent must be preferred, and their Lordships will, therefore, advise Her Majesty to dismiss this appeal with costs.

[59] GOUR MONEE DEBIA.—*Appellant*; KHAJAH ABDOL GUNNEE.—*Respondent** [June 4, 1864].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Upon special application, permission to appeal was granted in December, 1860, upon condition of the Appellant depositing with the Registrar of the Judicial Committee of the Privy Council the sum of £300, for costs. The record was transmitted from India and the Respondent brought in his printed case, but

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John T. Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the Appellant, though served with a peremptory notice, did not lodge his case or take any other step in the matter. In such circumstances, on application by the Respondent, the appeal was dismissed, and the Respondent's costs directed to be paid out of the sum deposited in the Council office, the balance to be returned to the Appellant.

In this case leave to appeal had been granted by the Judicial Committee in December, 1860, upon the terms of the Appellant giving security in the sum of £300, for the costs, in case the appeal should be dismissed. This sum was deposited with the Registrar of the Privy Council, and the transcript of the record transmitted from India. The Respondent lodged his printed case; but the Appellant, although served with peremptory notice to lodge his case, took no step to bring the appeal to a hearing.

In these circumstances,

Mr. Cave, for the Respondent, moved to dismiss the appeal, and for payment of [60] the Respondent's costs out of the £300, deposited with the Registrar of the Privy Council; and

Their Lordships made an Order in those terms, directing the residue of the sum, after payment of the Respondent's costs, to be paid over to the Appellant.

The Respondent's costs were taxed, and the residue of the £300, paid to the Appellant's Solicitor.

PAKALA BALAKRISTNAMA PATRULU,—*Appellant*; SREE NARAINA MARDARAZ DEVU,—*Respondent*; * and between PAKALA BALAKRISTNAMA PATRULU,—*Appellant*, SREE NARAINA MARDARAZ DEVU,—*Respondent* * [July 5, 6, 1864].

On appeal from the Sudder Dewanny Adawlut at Madras.

In the district of Ganjam, situate in a remote part of the Presidency of Madras, the administration of justice is by the Act of the Legislative Council of India, No. XXIV. of 1839, vested in an Officer called "The Agent of the Governor of Madras," who exercises both judicial and revenue authority, within the district. The Court there established is not subject to the Madras Regulations applicable to the ordinary Tribunals. In these circumstances, it was held, that it was not to be expected that the proceedings before such a Court should be conducted with all the attention to technical rules observed in the regular Courts in Madras, and, therefore, that it was sufficient if the proceedings had been such, in point of form, as to enable each party fairly to bring forward and establish his case, and the decision of the Agent consistent with law and justice [16 Moo. Ind. App. 63].

A Razinamah to compromise a suit, and a Bond, arising out of the same transaction, recognizing a right in one-fourth of a Talook, declared null and void, as having been obtained by fraud and intimidation by the Manager of the Agent's Court at Ganjam, who used his official character, as a pressure upon a Zemindar in difficulties in that district, to effect from him the execution of such instruments.

These appeals were brought from two judgments of the Sudder Dewanny Court at Madras, which [61] confirmed two previous decrees made by the Agent of the Governor of Madras at Ganjam in the Presidency of Madras, in suits instituted before that Agent.

The first suit was brought by the Appellant against the Respondent and one Sree

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir Edward Ryan. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Ramachandra Manasing Santa, since deceased, in which he claimed under a Bond, one fourth part of the Talook of Aragada, belonging to the Respondent, with mesne profits. This suit was dismissed on the ground that the instrument under which the Appellant claimed was obtained by intimidation exercised by means of his official position, as chief manager of the Agent's Court at Ganjam, from the Respondent under pressure and without consideration; which decree was confirmed on appeal by the Sudder Court at Madras. The second suit, instituted by the Respondent against the Appellant, sought to set aside and cancel a Razinamah, or compromise of a suit between the Appellant and Respondent. By the decree of the Agent of the Governor at Ganjam the Razinamah was, in the circumstances, declared null and void, and such decree was upon appeal affirmed by the Sudder Court.

When the transactions in question arose, the relations of the parties stood thus:—The Appellant was [62] the chief manager of the Agent's Court at Ganjam. The Respondent was a person in high position, the Zemindar of the Talook of Kallikota and Aragada, residing within the jurisdiction of the Agent's Court.

The administration of justice in Ganjam, a District situate in a wild and remote part of the Presidency of Madras, is, under the Act of the Legislature of India, No. XXIV. of 1839, vested in an officer called "The Agent of the Governor of Madras," before whom the suits out of which these appeals arose were brought.

The evidence with respect to the execution of the above-mentioned instruments, and the questions raised by the appeals, are sufficiently stated in their Lordships' judgment.

The Attorney-General (Sir R. Palmer), and Mr. F. J. C. Millar, appeared for the Appellant in both appeals; and Sir Hugh Cairns, Q.C., and Mr. A. S. Ayrton, for the Respondent.

Their Lordships' judgment was pronounced by

The Right Hon. Lord Kingsdown (July 23, 1864).—These appeals arose out of certain transactions which have taken place between the Appellant and the Respondent, in the District of Ganjam, within the Presidency of Madras.

Ganjam is situate in a remote and wild part of that Province, and is governed by an Officer called the Agent of the Governor of Madras, who appears to exercise both judicial and revenue authority within the district.

[63] The Courts of Justice there are not subject to the rules prescribed by the Government Regulations for the guidance of the Tribunals in more settled and civilized parts of the country; and, under such circumstances, it is not to be required or expected that the proceedings should be conducted with all the attention to technical rules which might be reasonably demanded from Courts differently constituted. It is sufficient if the proceedings have been such, in point of form, as to enable each party fairly to bring forward and establish his case, and if the decision appears to be consistent with law and justice.

In the year 1855, the Appellant was the chief manager of the Agent's Court at Ganjam. His brother held the office of Moonshee to one of the assistant Agents.

The Respondent is a Zemindar of wealth and considerable position within the District. He seems at this time to have been a very young man, and to have been acting in the management of his affairs under the advice of his uncle, Sree Ramachunder Manasing, who lived with him in his palace.

The questions in these two appeals are, whether certain instruments executed by the Respondent in favour of the Appellant were obtained from him fairly, or were the result of fraud and intimidation practised on him by the Appellant.

The facts appear to be these:—

In the year 1854, the Respondent purchased at a public auction the Talook of Aragada. The property was put up for sale by the Government in consequence of the failure of the former Talookdar to make payment of the revenue due from him.

[64] The purchase-money paid by the Respondent was Rs. 1,51,000.

In 1855, it was agreed between the Appellant and the Respondent that the Appellant should become the Manager of this Talook on behalf of the Respondent. The Appellant alleges, that the offer was made to him by the Respondent and that he accepted it, and gave up his situation under the Government in order to take this office, but that when in the year 1856, he came to take possession of it, the Respondent

refused to appoint him; and for this breach of his agreement the Appellant demanded compensation.

The Respondent alleges, that the offer to become Manager of the Talook came from the Appellant, who represented that he was not willing to continue in the service of the Agent: that he, the Respondent, accepted the offer, but afterwards declined to employ the Appellant, upon two grounds: first, because he did not come to undertake the duties of his office until, in consequence of his delay, the Respondent had been obliged to engage another manager; and, secondly, because he had discovered that the Appellant had given up his office under the Government, not for the purpose of entering upon the management of the Talook, but from apprehension that he would be turned out of his place under the Government for misconduct and corruption as soon as his principal, who had been for some time absent from his office, should return to it.

In order to recover damages from the Respondent for his alleged breach of contract, the Appellant instituted a suit against him in the Civil Court of [65] Ganjam, in the month of August, 1857, to which the Defendant put in a plea denying all claim on the part of the Appellant.

Nothing further appears to have been done in this suit, which in the present record is termed suit No. 29 of 1857.

In a few months afterwards, in April, 1858, the Respondent and his uncle were accused of having ill-used a native called Mudhava Dalai, and on this charge they were both arrested and placed in custody.

On the 18th of May, 1858, while they were thus in custody, the Respondent executed two instruments, the validity of which is the subject of the present dispute.

The one related to the settlement of the suit, No. 29 of 1857, and professed to be a compromise of that suit. It is termed a Razinamah, and is in the form of a memorial presented to the Court in the suit by the Defendant, and assented to by the Plaintiff in these terms:—"The Defendant begs to represent that as the Plaintiff in this suit had entered into an amicable settlement, I agreed to pay him, in eight days from the date hereof, Rs. 5441 $\frac{3}{4}$, made up of Rs. 3790, the amount claimed; of Rs. 1380, for nine months and six days from the date of the plaint, etc., the 13th August, 1857, to the present date, at Rs. 150 a month; and of Rs. 271 $\frac{3}{4}$, the value of the stamp for the plaint and other costs. Further, under the conditions entered into by me, to continue paying to the Plaintiff for his life, at Rs. 150 a month, in consequence of my having effected his removal from the office of Manager of the Agent's Court, I agree to pay to the Plaintiff for his life, on or before the 19th of every consecutive month, Rs. 150 a month, from the 19th instant, with-[66]-out regard to the service held by the Plaintiff or any business carried on by him. In the event of my not paying the same the Court is at liberty to collect the amount by enforcing this Razinamah, and pay it to the Plaintiff. Further, I have undertaken to pay my own costs. I, therefore, request the Court will be pleased to hold diary proceedings accepting this Razinamah, and directing the payment of Rs. 5441 $\frac{3}{4}$, being the plaint amount and others aforementioned, and of Rs. 150 a-month, by me to the Plaintiff for his life. The Plaintiff begs to say that as I have agreed to the conditions above-mentioned, I request the Court will enforce the same.—18th of May, 1858."

The other instrument is called an "Instalment Bond," and is in these words:—"Instalment Bond executive by Sri Sri Sri Narayana Mardaraz Devu, Zemindar of the Talooks of Kallikota and Aragada, to Pakala Balakrishna Patula, on the 18th of May, 1858. Having sold to you for Rs. 42,000, one-fourth share of the Talook of Aragada, which I have purchased in auction, and received from you the sum of Rs. 23,125, out of the said purchase-money, both of us now enter into the following settlement, *i.e.* that the sale of the one-fourth share in question should be cancelled. That on this condition I should pay you Rs. 29,000, according to the instalments hereunder specified, and obtain receipts from you. And that in the event of my paying the money without failure of instalments, and taking receipts from you, neither you, nor your heirs, should ever and on any ground claim the portion of the Talook from me or my heirs. I shall, therefore, pay you the said amount accordingly and take back this document. If I fail to pay [67] the money according to the instalments, I shall receive from you the balance of the sale amount, get the

subdivision of the Talook registered, and deliver it over to you with the past produce. Thus I have of my free will and consent executed this instalment Bond.

" Amount to be paid in eight days from the date hereof is . . .	Rs. 18,000
Ditto to be paid in six months from the date hereof is . . .	Rs. 11,000
	<hr/> Rs. 29,000 "

A third instrument was executed, which was an acknowledgment by the Respondent of the terms contained in the papers already stated, and an engagement to abide by them on his part, and was as follows:—" Nadava Sunnud (Deed of acquittance) executed by Pakala Balakrishna Patrulu to Sri Sri Sri Narayana Mardaraz Devu, Zemindar of the Talooks of Kallikota and Aragada, on the 18th of May, 1858. As you have sold to me, for Rs. 12,000, one fourth share of the Talook of Aragada, which you have purchased in auction, and received from me the sum of Rs. 23,125, out of the purchase-money, I have this day, as desired by you, become friend to you, and entered into the following settlement, *i.e.* that the sale of the one-fourth share in question should be cancelled. That you should pay me Rs. 29,000, according to the instalments hereunder specified. That on payment to me of the money according to the instalments, and obtaining receipts from me, I should forego my right to the said one-fourth share; and that with respect to my allowance, provision having been made in the Razinamah, filed in suit, No. 29 of 1857, [68] I should have no other claim against you. Having acceded to these conditions, I have executed this deed of acquittance. On payment of Rs. 29,000, according to the instalments fixed, I shall return to you the instalment Bond you have this day executed to me, and neither myself nor my heirs shall for ever, and on any ground, claim from you or your heirs for the said one-fourth share. Thus I have executed this deed of acquittance of my free will and consent.

" Amount to be paid in eight days from the date hereof is . . .	Rs. 18,000
Ditto to be paid in six months from the date hereof is . . .	Rs. 11,000
	<hr/> Rs. 29,000 "

It will be seen that by the instalment Bond a sum of Rs. 18,000, was to be paid in eight days from the date thereof. This would be on the 26th of May. On that day the Appellant and his uncle were discharged out of custody on depositing Rs. 1000, and entering into an engagement to appear in person to answer the charges against them when required by the Government. Fourteen days afterwards the Rs. 18,000, were paid by the Respondent to the Appellant. It is fit to observe that there is no direct evidence to connect the discharge of the prisoners with the execution of these instruments and the payment of this money, but the coincidence is certainly remarkable, and considering the situation which had been held by the Respondent and the situation which was still held by his brother, it is difficult to believe that the release of the prisoners was entirely unconnected with the transactions which had then taken place, or that the [69] Appellant had not something to do with their discharge. There seems to have been no reason why, if the accused parties were entitled to be discharged on their own recognizances on the 26th of May, they should not have been equally entitled to be released on bail when the charge was first made against them, instead of being exposed to the inconvenience, and, what they seem to have felt much more, the degradation and outrage on their personal dignity consequent upon their arrest and imprisonment.

These instruments were of a character in themselves to excite suspicion, particularly when executed by a person who at the time was under duress.

The suit, which was compromised by the Razinamah, had not been prosecuted. If the facts alleged by the Respondent were true, he had a complete answer to the demand. He had up to this time denied all liability to the Appellant, and yet by this document he submitted to all the demands of the Appellant in this suit, and engaged to make payments and incur obligations to the Appellant far beyond anything which any Court of Justice could have awarded to him if he had established all his allegations.

When this Razinamah was presented to Mr. Thornhill, the Principal Assistant Agent for registration, he seems to have been so much struck by its extreme improvidence that he ordered the head of the police in Ganjam to see the Respondent, and learn from him whether it really was his spontaneous act. This was on the 19th of May, and notwithstanding a certificate from the police officer that he had seen the Appellant, who acknowledged that he had acted from his own free will, Mr. Thornhill required the [70] personal attendance of the Appellant. The Appellant accordingly, after some remonstrance, attended, and was examined, and after this the Razinamah was allowed to be filed, and the Rs. 5441½ mentioned in it were paid, but Mr. Thornhill seems still to have been far from satisfied, for the order for registration was in these terms:—"22nd June, 1858.—The Zemindar having personally appeared before me and assured me that he agrees to these terms, this Razinamah may be filed; but the settlement as to the filing of this Razinamah being very dubious, it cannot burden the estate with this allowance after the death of the Zemindar."

The effect of these acts of recognition we will consider when we have dealt with the case as to the instalment Bond.

With regard to the instalment Bond, it seems that the Respondent refused or neglected to pay the instalment of Rs. 11,000, which, by the conditions of that instrument, were due on the 18th of November, 1858. On the 13th of January, 1859, the Appellant filed a plaint, dated the 18th of November, 1858, against the Respondent, joining his uncle as a Defendant, on the ground that he was aiding and abetting the Respondent. The plaint stated the effect of the instalment Bond, and insisted that the Respondent had forfeited his right to repurchase the quarter share of the Talook, by reason of his neglect to pay the second instalment on the day, and he prayed to have a conveyance of the quarter share, together with mesne profits from the year 1855.

It is obvious that the Appellant's title to this relief depended entirely upon the truth of the facts which are recited in the Bond. If there had been such a [71] purchase of the quarter share as is therein stated, and such a payment as was therein alleged to have been made of part of the purchase-money, there was nothing unreasonable in the subsequent agreement. It amounted only to this, that the Appellant consented to give up his purchase on the condition of receiving a certain premium for doing so, with a right to retain his purchase if the conditions of the Bond were not performed.

His right, therefore, in this suit rested entirely on the first agreement, and not on the second. The instalment Bond was, in truth, according to the Respondent's construction, at an end. The Appellant insisted that, by the failure of the Respondent to perform its conditions, he, the Appellant, was remitted to his original rights. The matter for him to prove, therefore, was the first contract.

Now, the Respondent by his defences asserted, that the recital in the instalment Bond was a pure fiction, and that there had been no such sale by the Respondent, and no such payment by the Appellant, as were stated in the Bond, and he insisted that if there had been any such sale, a Bill of sale must have been executed on stamp paper, and that the Plaintiff should prove that a proper stamp had been purchased. Likewise, that if the Plaintiff had paid Rs. 23,000, he would have obtained a receipt, and the receipt should be produced. He alleged, also, that both this instrument and the Razinamah had been obtained from him under circumstances of pressure and intimidation while he and his uncle were both in custody on a false charge; that such charge had been contrived and instigated by the Appellant in order to force the Respondent to comply with his unjust demands; that [72] he had required the Respondent not only to pay him a large sum of money, but also to give him a share of the Talook; that he had threatened, with this view, to set up false charges against both the Respondent and his uncle, and that the Respondent was induced to execute these instruments by threats and promises of the Plaintiff, in the hope of relieving himself and his uncle from this persecution.

On the 29th of June the Judge of the Court gave out to the parties a statement of the points which each should endeavour to prove.

The Plaintiff was to prove the due execution of the alleged sale contract, and the payment by him of Rs. 23,000 on account of the purchase-money and the Bill of sale, and receipts were to be produced in Court.

The Defendant was to prove his statements regarding the threats and promises used by the Plaintiff in the interview during which the Bond was executed; secondly, to put in a concise statement of the grounds on which he believed the criminal charge against his uncle and that on which he was himself then under trial to have been the work of the Plaintiff; thirdly, to state briefly the nature of his connection with the Plaintiff, and the cause and date of the rupture between them.

As regards the Plaintiff, he failed to give any proof whatever of the execution of any sale contract or of the payment of any sum of money whatever on account of it, or to produce any document purporting to be such Bill of sale or receipt, or to show, as he had been challenged to do by the Defendant, that any stamp paper had been purchased on which the Bill of sale could have been written.

[73] On the other hand, the Defendant proved by a return from the proper officer that no sale appeared to have been made at the Stamp Office for this district of a stamp applicable to this transaction between the months of July and September, 1855, the Bill of sale being alleged to have been made on the 28th of September, 1855.

The Plaintiff had alleged in his replication that the Bill of sale and other documents were in the possession of the Defendant, but he gave no evidence of this fact, nor did he either prove, or indeed allege, any circumstances which could reasonably account for such an unusual circumstance as the delivery to the vendor of the title-deed of the purchaser.

Destitute of all other proofs, the Plaintiff relied entirely on the evidence afforded by the recital in the Bond, and the circumstances under which it was executed and afterwards recognized. Now, with respect to the circumstances under which it was executed, it appears that on the 17th of May, the Defendant, being in custody on the charge already alluded to, signed a paper addressed to Mr. Thornhill, the principal Assistant Agent, in these words:—"I have to speak to Pakala (describing the Appellant) touching the matter of the suit No. 29 of 1857, on the file of the Agent, and, therefore, request you will be pleased to direct the Circar Peons watching at my gate not to prevent Pakala from coming in." It will be observed that this note makes no allusion to any dispute about the sale of any share of the Talook, but is confined to the suit of 1857. The Judge in the Zillah Court considers this application to have been a contrivance on the part of the Appellant to obtain access to the Respondent, and not the spontaneous [74] act of the Respondent. But however this may be, it certainly does not indicate that at this time he was contemplating any arrangement with respect to the Talook, of which he had been for years, according to his representations to the Agent, resisting the attempts of the Appellant to obtain a share.

Yet we find that, without any intermediate communication, this note having been sent on the 17th of May, an interview takes place on the 18th between the parties, and the result of that interview is, that the Respondent signs this Bond, by which he recognizes the right of the Appellant to one fourth part of the Talook, and agrees to pay Rs. 29,000, for its re-purchase.

It seems very much as if these two papers must have been taken, ready prepared, by the Appellant to the Respondent, and no evidence is given to explain under what circumstances or with what assistance the Respondent consented to sign them. The only fact relied on by the Appellant is this—that more than once after the execution of the instruments, and after the Respondent had been discharged out of custody, he expressly recognized them, and paid a sum of Rs. 5441 $\frac{3}{4}$ on account of the Razinamah, and Rs. 18,000, on account of the instalment Bond.

But if the account given by the Respondent be true of the influence under which he acted, that influence continued at the time when the recognition took place, and under such circumstances recognition goes for very little. His object was not merely to get out of custody, but to relieve himself from the persecution to which he and his uncle had, as he conceived, for two years been subjected by the Appellant in consequence of their refusal to comply with his demands.

[75] With respect to the proof which the Respondent was called upon to give, he did not offer any evidence of the threats and promises alleged to have been used by the Plaintiff at the interview during which the Bond was executed, but he put in the statement required by the Judge, and also various documents in support of it.

The statement contained detailed particulars of the constant intrigues which he alleged to have been carried on against him and his uncle by the Plaintiff from the

time of the rupture between them in 1856, and of the reasons by which he was led to believe that the charge by Madhava Dalai had been concocted at the Plaintiff's instance.

The documents which he put in to support this statement consisted of a great number of Arzees, or Memorials, presented by him to the Government during the year 1856, and subsequent years, and of other Arzees presented by his uncle on the same subject. The earliest of these papers seems to have been dated on the 25th of July, 1856, and the latest in 1858, and they contain statements of alleged acts of violence and threats by the Appellant against the Respondent and his uncle, of the arrest and conviction of the uncle on a false charge, which conviction was afterwards reversed by the Agent; this and other acts being attributed to the contrivance of the Appellant and to the abuse by the Appellant's brother of his authority as Moonshee to one of the Assistant Agents. These Arzees, supposing them to be true, would abundantly support the charges brought forward in the pleadings and subsequent statements.

But it is urged, and with truth, that these Arzees [76] are no proof of the facts alleged in them, and that there is no direct evidence that they were ever communicated to the Appellant. But for the purposes of this suit, the important question is, what was the impression on the Respondent's mind and under which he acted, rather than whether the impression itself was or not well founded; and we think that the Arzees contain sufficient evidence that at the time when the Respondent executed the instruments in dispute he was really under the influence of the feelings by which he alleges that he was induced to grant them, viz. that he believed that it was in the power of the Appellant, through his own influence and that of his brother with the Government authorities, to injure and to ruin him, and that for two years he had been suffering under such influence, and that the only way of relieving himself would be to comply with the exactions of the Appellant.

When regard is had to the nature of these instruments, and to the relative situation of the parties when they were executed, we think that more evidence would justly have been required to support them than was produced in this case by the Appellant, even if the transactions had taken place in Europe. But here they took place in a wild part of India, where exaggerated notions are entertained by the natives of the extent of power possessed over them by the Officers of the Government, and no great confidence seems to be felt in the honesty of the subordinate Officers, or the vigilance with which they are controlled by their superiors.

Now, upon these important points the Judge of the Zillah Court must be far more competent to form a [77] correct opinion than persons unacquainted with the district: and in his judgment in both the cases he expresses himself in the strongest terms upon the subject. In one of his judgments he uses these expressions: "It is clear from the public records that the Zemindars of Ganjam entertain the belief that the public servants possess the power of injuring or befriending them, and they have been in the habit of furnishing their local Agents with large sums to secure their goodwill. Hence the Defendant's plea that he feared the influence of a man like the Plaintiff, conversant with all the details of public business, and enjoying the confidence of the then authorities, is consistent with the ideas and practice of his class." He then remarks (a fact which must be within his own knowledge) that the Respondent first began to dispute the validity of these instruments about the time when the Appellant had fallen under the displeasure of the Agent on account of his intrigues in other Zemindaries, and when, therefore, the terror occasioned by his supposed influence with the Government authorities was removed, or at all events diminished, in the mind of the Respondent.

The Judges of the Sudder Court, who are gentlemen also well acquainted with the modes of thought and feeling amongst the natives of India, have unanimously concurred in the judgment appealed from, and on application for a review have persisted in their opinion.

It was said that in the Razinamah suit there was really no evidence. In strictness that seems to be so. But the suits were substantially suit and cross-suit, and the evidence in the one might very properly be looked at in the other. The effect of the decision in the [78] Razinamah suit is only to remit the Appellant to the prosecution.

of his original claim, towards satisfaction of which, if he has any just demand, he seems already, under the Razinamah to have received between Rs. 5000 and Rs. 6000.

Upon the whole, we must humbly advise Her Majesty to affirm both the decrees complained of, with costs.

RAJAH PERLADH SEIN.— *Appellant*; BABOO BHOODOO SINGH,—*Respondent* *
[Nov. 28, 1864].

On appeal from the High Court of Judicature at Calcutta.

By a decree of the Sudder Court at Calcutta a suit was remanded to the Zillah Court to be tried *de novo*. An appeal to England from this decree was refused, but upon special application was admitted by the Judicial Committee of the Privy Council; whereupon the Appellant applied to the High Court at Calcutta to stay proceedings pending the appeal to England, on the ground, that the decision of the appellate Court would govern the question at issue, which application that Court refused. The Appellant then presented a petition to Her Majesty in Council, and applied *ex parte* for the same relief, but the Judicial Committee, in the Respondent's absence, refused to make any order, though without prejudice to the Petitioner's further application when he had served the Respondent.

By an Order in Council, dated the 27th of July, 1863, special leave was given to appeal from a decree of the High Court of Judicature at Calcutta, dated the 7th of February, 1863, refusing an appeal from a [79] decree of the late Sudder Court of the 27th of September, 1860. By this latter decree the Court remanded the suit to the Zillah Court to be tried *de novo*; the question at issue being the validity of a deed of sale and an account.

The Appellant, after the admission of the appeal in England, presented a petition to the High Court of Judicature at Calcutta, setting out the Order in Council allowing the appeal, and submitted that the decree of the 27th of September, 1860, having been appealed from, could not be carried out against the Order in Council of the 27th of July, 1863. This application came on for hearing before the High Court on the 16th of September, 1864, when the Respondent appeared and objected to the proceedings being stayed, and the Court was of opinion, that there were no sufficient grounds for staying the further execution of the decree of remittal.

The Appellant now presented a petition to Her Majesty in Council praying that the proceedings in India might be stayed, pending the appeal; and submitted, first, that the hearing of the suit in the Zillah Court, if proceeded with under the remand, would involve much litigation and expense, and might turn out wholly unnecessary, as the validity of the instrument of sale would in fact depend upon the decision come to upon the appeal; and secondly, that the proceedings by the High Court under the remand of the suit, as well as the refusal to stay proceedings and the execution of the decree, was a violation of the Order in Council granting him leave to appeal; and he prayed that the proceedings ordered to be taken before the Zillah Judge under the remand by the decree of the 27th of September, 1860, as well as [80] execution thereof, might be stayed, pending the appeal, and until the same had been heard.

The Respondent, being in India, was not served with notice of the application, which was made *ex parte*.

Mr. Leith, for the Petitioner, urged the above grounds, and, by analogy, referred to the practice of the House of Lords, Macqueen's Prac., pp. 236-8, in staying execution of proceedings pending an appeal to that House.

The Lord Justice Knight Bruce. — Their Lordships feel great difficulty in making any Order upon this petition. It is an *ex parte* application, novel in its circumstances and nature. Upon the whole, they think the petition must be dismissed; but, if the Petitioner desires it, his petition may stand over, with a view to enable

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Ryan. Assessor: The Right Hon. Sir Lawrence Peel.

him to try to bring the Respondent here, by serving him in India. If the Petitioner desires it a fresh application can then be made.

Mr. Leith elected to adopt this course, and by an Order in Council, it was ordered, that the petition be dismissed, without prejudice to any further application to their Lordships.

[See *Nanab Sidher Nazar Ally Khan v. Rajah Oajoodhyaram Khan*, 1865, 10 Moo. Ind. App. 328.]

[81] RAJAH LELANUND SINGH BAHADOOR,—*Appellant*: MAHARAJAH MONESHUR SINGH BAHADOOR, and by revivor, MAHARAJAH LUKHMISSUR SINGH, his son, MAHARAJAH RUHMUT ALI KHAN and Others, and the Government,—*Respondents* * [Dec. 2, 3, 5, 6, 7, 8, 9, and 10, 1864].

On appeal from the Sudder Dewanny Adawlut of Benegal.

In a question of disputed boundaries the *onus probandi* lies upon the Plaintiff to prove by independent evidence his right to recover. But in the circumstances held, that the mere failure on the Plaintiff's part to support the burthen of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment, and the case remitted to India for further inquiries [10 Moo. Ind. App. 111, 112].

Upon a reversal of the Sudder Court's decree, costs of the suit already paid by the Appellant ordered to be refunded, and the Court below directed to deal with those costs and all other costs, including those of the appeal, according to the result of the inquiry.

The suit out of which this appeal arose was brought by the Appellant's father, Rajah Bidianund Singh, deceased, against the Respondent, Maharajah Moheshur Singh Bahadoor, and Maharanee Wujhoonissa, the Government, and the other Respondents, tenants [82] of the lands in dispute, to recover possession of a large tract of hill and forest country, containing 175,000 beegahs, claimed by the Plaintiff as belonging to and forming part of his Zemindary of Khurruckpoor, generally known as the Nizamut Mahals of Khurruckpoor, in the district of Monghy, in the province of Behar. The Appellant's father and the Respondent, Maharajah Moheshur Singh, were proprietors of separate estates conterminous with an estate of the latter, called Pergunnah Havelee Khurruckpoor, which had been formerly a Mahal or portion of the Zemindary of Khurruckpoor, but separated from it by the Government resumption lands, and completely surrounded on all sides by the revenue-paying lands belonging to the Appellant. Maharajah Moheshur Singh claimed the tract of land in dispute as being included from ancient times within, and as belonging to Pergunnah Havelee, and of certain resumed lands taken out of the Zemindary of the Appellant.

The question raised by the suit and upon appeal was solely one of boundaries. The documentary and oral evidence was of a most voluminous character, consisting chiefly of village papers, maps, proceedings and records. The important portion of the evidence adduced on either side which bore upon or is material to the question at issue, and the arguments, are sufficiently referred to in their Lordships' judgment.

The appeal was argued by

The Attorney-General (Sir R. Palmer) and Mr. Leith, for the Appellant; and Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for Maharajah Lukhmissur Singh Bahadoor, the heir of the first Respondent.

[83] Mr. Forsyth, Q.C., also appeared for the Government.

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

The case after argument stood over for consideration. Their Lordships' judgment was pronounced by

The Right Hon. the Lord Justice Turner (May 6, 1865).—The outline of this case is as follows:—At the time of the perpetual Settlement, the large Zemindary known as the Khurruckpoor Mehals in Zillah Bhagulpoor was settled with Maharajah Kadir Ali Khan, who in or before the year 1790 was in possession of it. It consisted of twenty-six Pergunnahs, of which five were alleged to be and were then held as Lakhiraj. Of these alleged Lakhiraj Pergunnahs it is only necessary to specify Pergunnah Khurruckpoor Havelee, which has throughout the argument before us been conveniently called "Havelee." Of the Malguzary, or revenue-paying Mehals, it is sufficient to name Pergunnahs Suhrooe, Sukrabadee, and the most important of all, Purbutparah, which was subdivided into Tuppahs, Lodhwah and Semroum, Daygee, Mullia, and Bhudra.

The Settlement above mentioned was made, as in other cases, by Pergunnahs, without any survey or measurement of the lands comprised in them; and as this vast Zemindary included a great deal of wild, uncultivated mountainous and forest land, it may be supposed that, however well ascertained may have been the boundaries of the whole, those of its component parts, or Pergunnahs, *inter se*, were not very clearly defined. The effect of the Settlement was to fix permanently and for ever the revenue payable in respect of the Malguzary, or, as they are [84] termed in these proceedings, "the Nizamut Mehals," and to leave the Lakhiraj Mehals free from the payment of revenue, but subject to the right reserved to the Government by Ben. Reg. XIX. of 1793, to resume and assess the lands, should the tenure, under which they were claimed to be held Lakhiraj, thereafter be found to be invalid. Kadir Ali Khan on his death was succeeded by his eldest son, Ikbul Ali Khan, who also died some time before the year 1836, and was succeeded by his brother Ruhmut Ali Khan.

In 1836, the Government impeached the Lakhiraj title of the Zemindar. Pergunnah Havelee was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in the year 1836, and continued until the 9th of April, 1844, when a temporary settlement for twenty years was made with the Maharanee Wujhoonissa, to whom the interest of her husband, Ruhmut Ali Khan, had been transferred.

Pending the proceedings for the resumption and settlement of this Pergunnah, Ruhmut Ali Khan suffered the Government revenue on the Nizamut Mehals to fall into arrear, and these Mehals were accordingly sold by public auction for such arrears, and on the 11th of August, 1840, were purchased by the Appellant's father, Rajah Bidianund Singh, and another person, who afterwards transferred his share to Rajah Bidianund Singh. This sale, of course, put an end to the unity of ownership of the Nizamut Mehals and of Havelee; Rajah Bidianund Singh thenceforward being the Zemindar of the former, with all the rights possessed by the original Zemindar at the date of the perpetual Settlement; whilst the latter, [85] subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to Ruhmet Ali Khan, and after him to Wujhoonissa.

In 1845, Wujhoonissa having failed to pay the revenue assessed on Havelee, that estate was also sold for the arrears, and was purchased by Maharajah Rooder Singh, the grandfather of the present Respondent, Lukhmissur Singh, on the 5th of November, 1845.

The estates having thus become separate, boundary disputes took place between the owner of the Nizamut Mehals, or his tenants, on the one side, and the owner of Havelee, or her tenants, on the other. It may be necessary hereafter to refer more particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the Zillah Bhagulpoor in the years 1846 and 1847.

It appears to have been the duty or practice of the Officers employed in this survey, to lay down the boundaries of estates or other divisions of land, where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to

deal with a controversy touching the boundary line between Havelee and Pergunnah Purbutparah, and the other Nizamut Mehals contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the settlement of Havelee by a map prepared after actual survey and admeasurement by a Captain Ellis, under the instructions of the settlement officers. The [86] owner of Havelee, on the other hand, disputed the accuracy of Captain Ellis's map, if it purported to be a map of the entire Pergunnah Havelee, and questioned the intention to include the whole of Havelee in that map. The Officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the Appellant's ancestor, and prepared the map known in the proceedings as "Captain Sherwill's map," by which upwards of 175,000 beegahs of land in excess of that comprised in Captain Ellis's map was attributed to Havelee, and taken out of the Nizamut Mehals, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question, whether this land was included, or intended to be included, in the settlement of 1841, or whether it was a Towfeer or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the Foujdary Courts and elsewhere, touching the right to the possession of this land; but the effect of these proceedings was to remit the Appellant, or his father, Rajah Bidianund Singh, to a regular suit, in which alone the title could be litigated.

The suit of which this appeal has arisen was accordingly instituted by the Appellant on the 5th of June, 1851. Its object is to recover as part of the Nizamut Mehals the 175,000 beegahs of land laid down by Sherwill's map as within Havelee, in excess of the land attributed to Havelee by Ellis's map; but the plaint divides this land in certain proportions between certain specified Mouzals, the names of which occur in the lists of the villages, comprised in Pergunnahs Purbutparah and Sukrabadee, which [87] were prepared at the time of the perpetual Settlement, or shortly subsequent to it. The Defendants to the suit, the Respondents to this appeal, are the Government, Maharajah Lakhmissur Singh, and some of his tenants, and they insist that the 175,000 beegahs of land in question properly belong to Havelee.

The suit was heard first by the Principal Sudder Ameen of Bhagulpore, who by his decree, dated the 9th of July, 1855, dismissed the suit on the ground that the Plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was Towfeer.

On appeal to the Sudder Dewanny Adawlut, that Court, by a majority of two Judges to one, confirmed the decision of the Principal Sudder Ameen, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain Ellis's map was included in the Havelee settlement, that the extent of that excess was undetermined, and that it lay upon the Plaintiff to show what he was entitled to recover, which he had failed to do. The dissentient Judge, on the contrary, held that no part of the land in dispute was included in the settlement of Havelee; that, therefore, *ex necessitate*, the whole must be taken to form part of the contiguous Nizamut Mehals, and that the Plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the dissentient Judge, the decision of this suit depended on the question whether the land claimed, or any, and if any, what defined part of [88] it, was included in the Havelee settlement; and we think that this was a correct view of the case. It was incontestable that the land in question formed part of the Zemindary which by the perpetual Settlement was assured to Kadir Ali Khan; but that Zemindary consisted partly of the Nizamut or revenue-paying Mehals, in respect of which the revenue payable by the Zemindar was then finally settled, and partly of the Mehals, including Havelee, which were alleged to be Lakhiraj, and on which, therefore, no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to Havelee or to the contiguous Nizamut Mehals; but the perpetual Settlement unfortunately omitted to define the boundary line between Havelee and these Mehals; had it done so the question in the cause could not have arisen, since, we need hardly say, no Court would disturb what had been fixed by the perpetual Settlement. The resumption of Havelee afforded a fresh occasion for the definition of these boundaries,

even whilst both Havelee and the Nizamut Mehals belonged to the same owner; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of Havelee, whilst it had no right to assess any fresh revenue upon a single beegah of land within the Nizamut Mehals. Subsequent events severed the ownership of Havelee from that of the Nizamut Mehals, and the question of boundary then arose in this suit, not as a question of revenue between the Government and a Zemindar, but as one of title to land between the Zemindars and proprietors of two contiguous and separate estates, the Nizamut Mehals and Havelee.

In dealing with this question it must, as we have [89] said, be assumed that so much of the land in dispute as was not included in Havelee belongs to the Nizamut Mehals; and in considering what was included in Havelee the Court below could only deal, as we upon this appeal must deal, with the Havelee settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of Havelee ascertained by it are at all capable of being corrected, they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the Havelee settlement taken as it stands, the whole, or what part of the lands in question, belongs to Havelee, or the whole, or what part of them, is included in the lands which were the subject of the perpetual Settlement.

In considering this question three views of this Havelee settlement present themselves for our consideration.

The first is that it included, and was intended to include, the whole of Pergunnah Havelee, and that all which it did include is within the limits of Ellis's map. The second is, that it included, and was intended to include, the whole of Pergunnah Havelee, but that some portion of what it did include lies beyond the limits of Ellis's map, and is to be found in the district of which the ownership is now in dispute. The third is, that it did not include the whole of Pergunnah Havelee, but that, either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a Towfeer or surplus.

[90] We proceed, therefore, to consider the intention, extent, and effect of the Havelee settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of July, 1836. By it Mr. Travers, the Deputy Collector of the Zillah Monghyr, on grounds which, for the purposes of this suit, must be deemed sufficient, decided against the claim of Ruhmut Ali Khan to hold Havelee and the other four Pergunnahs to which we have before referred Lakhiraj, and affirmed the right of Government to resume and assess them.

There was an appeal against this Order, pending which the Government, not being able to affect an arrangement with the Zemindar as to the intermediate collections of Havelee, assumed the management of it by a Tehsildar of their own appointment. The appeal was dismissed on the 30th of November, 1837, by a Special Commissioner acting under Ben. Reg. III. of 1828, and the title of Government to assess the whole of Havelee thus became complete.

It then became the duty of the Deputy Collector, or the Settlement Officer, under Ben. Reg. II. of 1819, sec. 21, cl. 4, "to ascertain the limits of the land" (*i.e.* of the whole of Pergunnah Havelee), and to fix the assessment: and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first volume of the printed record, and we must refer to the more important of them.

On the 9th of April, 1838, Mr. Farquharson, described as the Superintendent of the Khas Mehals, but acting as the Settlement Officer in the case, held a proceeding as to Havelee. After reciting that the Surhudbundee and Rookbabundee (the specifica-[91]-tions of boundaries and area) were not with the record, it ordered Ruhmut Ali Khan to file a list of the villages of Havelee, and also of Pergunnahs Subrooe, Sukrabadee, Singhool, and Luckhumpore, Pergunnah Purbutparah (these being doubtless assumed to be the contiguous Nizamut Mehals), accompanied by a Surhudbundee thereof. It also ordered the Putwarrees to file the Surhudbundee and Rookbabundee of their respective Mouzahs. The object obviously was to obtain a definition by metes and boundaries both of the whole Pergunnah and of its component villages.

In the proofs and documents filed by the Plaintiff we have the actual process issued in respect of Rounuckabad, a principal village of Havelee, under this order, and the return to it. The dates are the 17th of April and 31st of May, 1838, and there is a proceeding in the office of Khas Mehals of the 14th of April, 1838, before Mr. Farquharson. It complains of the omission of a village named Bheembandh, though part of Havelee, and that two other villages have been returned as waste, though in fact they were inhabited. It directs the attachment of Mouzah Bheembandh as far as Koh Marug, Tuppah Dighee, and gives other directions that are not material to the present question. It orders notice to be sent to Ruhmut Ali Khan that no settlement will be concluded with him unless he file correct Jummabundee papers.

On the 11th of November, 1838, Mootee Lall, the Tehsildar appointed by Government, reported to Mr. Farquharson that two Mouzahs adjoining the Beembandh, one named Goormah, the other Pakum, were west of Beembandh in the hills, and asked for an inquiry concerning them.

[92] This led to Mr. Farquharson's proceeding of the 23rd of January, 1839. In that, after stating that it had come to his knowledge that two villages (there called Tolahs) are situate in Bheembandh, but had not been attached, he directs the issue of a Purwannah to Mootee Lall, ordering him to bring these Tolahs under collection, and to explain why they had not been resumed along with Bheembandh.

Then we have the report of Mootee Lall, the Tehsildar of Khas Mehal, in answer to this order: it is dated the 8th of April, 1839. It appears to be indorsed on the Purwannah, and reports that after the issue of it, Mr. Farquharson had arrived at Khurruckpoor and had given a verbal order to relinquish Mouzah Kormaha (which is obviously the same place as that previously called Goormah), and to have the survey of Kita Bakum (before called Pakum) made with Bheembandh; that afterwards a Purwannah of the 23rd of March, directing a separate survey of Bakum, had arrived, and that accordingly Mouzah Kormaha had been relinquished, and Mouzah Bakum would be surveyed. On this report Mr. Farquharson has indorsed "That this be put up with the record: May 16th, 1839."

Intermediately Mr. Farquharson seems to have taken the depositions of Meer Dad Khan, a former Tehsildar of Havelee, and of Blowanni Lall, described as an inhabitant of Havelee, but Peshkar of Pergunnah Purbutparah. The former was taken on the 8th of April, 1839, the other was taken on the 15th of March, 1839. They may have conducted to Mr. Farquharson's determination to relinquish Kormaha.

In the evidence there are detailed measurements [93] of the lands of Mouzahs Rounceekabad, Bheembandh, and Mudhobun. The second alone is dated, and as the date is the 24th of March, 1839, it may be inferred that Kita Bakum, which by the report of the 8th of April is treated as about to be separately measured, was not included in this measurement.

On the 15th of April, 1839, Ruhmut Ali Khan who describes himself as Malik or Zemindar of the entire Mehals of Khurruckpoor, presented a petition, which, as we understand it, is confined to Bakum as a Kita or part of his Nizamut Mouzah Bhorebhundaree. He protests against its inclusion in Havelee. The petition seems to have been presented to Captain Ellis, then engaged in surveying Havelee and making his map. He on the 22nd of April, 1839, directed a copy to be sent to the Settlement Officer (Mr. Farquharson), who on the 6th of May, 1839, directs the officer (Ellis) to be informed that the case is pending in that Cutcherry. The decision was adverse, for we have a further petition from Ruhmut Ali Khan, which (and as it seems wilfully) confounds Bakum with Kormaha, alleging that the former though relinquished had been separately surveyed by Mootee Lall: that the measurement papers of Havelee are being prepared and Kita Bakum inserted in the English map, and stating that he objects to take attested copies of the English map because Kita Bakum (a Nizamut Mehal) is inserted in it. The order indorsed on this petition is dated the 8th of July, 1839, and is, that it be rejected.

On the 14th of September, 1839, a summary settlement was concluded by Mr. Farquharson with Ruhmut Ali Khan for one year, *i.e.* from the 1st of [94] May, 1839, to the 30th of April, 1840, and this by a subsequent order was confirmed and extended to April, 1841.

It was during the currency of this temporary settlement that the Nizamut

Mehals were sold, and Ruhmut Ali Khan's interest became limited to the resumed Mehals.

It is also probable that during the same period Mr. Beadon, who had succeeded Mr. Farquharson, began the investigation which resulted in the proposal for a permanent Settlement, next to be considered, and that, in aid of that investigation, Captain Ellis, by his proceeding of the 30th of June, 1840, directed "the measurement papers of the Mouzals of Havelee, filed by the Ameens, which had on comparison with the English measurement papers been found to correspond," to be forwarded to the Superintendent of Khas Mehals.

Mr. Beadon's final settlement proceeding is dated the 16th of December, 1841. It gives a summary of the former proceedings, and states that "whereas a perpetual Settlement of that Mehal (Havelee) was proper, and the Mehal having been surveyed by the Revenue Surveyor (who from the mention of his name in the next paragraph is clearly Captain Ellis), the measurement papers are forthcoming in the office. Hence, after inquiring into the Jumna bundee, from the statements and papers of the cultivators and Putwarrees, a perpetual Settlement had been, conformably to Regulation VII. of 1822, concluded from the 1st of May, 1841."

The proceeding then details at great length the principles upon which this Settlement had been effected. It seems sufficient to state that Mr. Beadon [95] took the area as measured at 123,207 beegahs and a fraction. From this he deducted 60,433 beegahs and a fraction as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 beegahs and a fraction. This again, when subdivided, was found to consist of 18,998 beegahs and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 beegahs and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land he estimated at S. Rs. 15,517, to which he added S. Rs. 738. 2, the amount of Sayers or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue S. Rs. 16,255. 6. The moiety of this, being, when converted from sicca Company's rupees, 8666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 beegahs of culturable, or the 60,433 beegahs of unculturable land.

It is to be observed that Bakum (spelt Bakhum) is included in the list of villages, its measured area being stated to be 129 beegahs 19 biswas. It follows, therefore, that whether the Bakum resumed by Mr. Farquharson be in Ellis's map or not (a question hereafter to be considered), its measured area is included in the 123,207 beegahs, the basis of the Settlement.

It is further to be observed that there is no trace of Goormah or Kormaha in this or the subsequent Settlement proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, Sayers, or cesses, was taken by Mr. Beadon to be S. Rs. 738. 2., of which [96] S. Rs. 576 consisted of rents payable by the lessees of the Sayer Mehal, according to the deposition of Ameen Dad Khan, taken on the 14th of March, 1841, and the rest consisted of the Sayers returned by the Putwarrees and Ameens. We may here observe, too, that in the S. Rs. 576 is included an item of S. Rs. 400 payable by Rujjib Ali as farmer of "Ghauts Marug and Kurrailee, etc.," touching which we have also his deposition, taken the 24th of March, and the Ummulnameh of 1248 (1841), a document which may be of some importance with reference to the present inquiry: for whilst it gives the names of various Ghauts as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise not only such tolls as may be conceived to be leviable from persons passing the Ghauts, but Bunkur, which properly is a right of cutting wood, and Phulkur, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of September, 1843, Mr. Beadon's proposal of a permanent Settlement on this basis was overruled by the Commissioner, who, on the 25th of the same month made over the estate to Mr. Joachim Piron, to be settled *de novo*.

Shortly before this, and on the 13th of June, 1843, the transfer of Havelee from Ruhmut Ali Khan to Wujhoonissa had taken place.

Mr. Piron's first step was to ask whether he was to make a new measurement.

He was told to test the former measurement : to adopt it if he found it to be correct : to make a new one if he found it to be incorrect.

Mr. Piron's general report bears date the 20th of June, 1844 ; his settlement proceeding of the same [97] date : the Doul Settlement. The report states that he made a settlement for twenty years with Wujhonnissa, of which the other papers give the details and the principles. His report also states expressly that the measurement which he tested was that completed under Captain Ellis : that he found it correct in every instance ; and that his only objection to the former survey regarded the classification of the various qualities of land and the rates assessed thereon.

The result of Mr. Piron's settlement was somewhat different from that of Mr. Beadon. But it is perfectly clear that both Officers dealt with the same measured area, viz. the 123,207 beegahs and a fraction defined by Captain Ellis. Mr. Piron, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of Havelee at S. Rs. 20,678. 3. 17½. In this he included the sum of S. Rs. 2336. 8. 9¾ for Sayers, cesses or other miscellaneous revenue. Instead of leaving, as Mr. Beadon had done, free from any direct assessment of revenue 60,443 beegahs of unculturable + 43,775 beegahs of culturable land, making together 103,209 beegahs of land, he excludes from assessment only 4447 old fallow land, + 35,051 rocks with jungle, + 42,586. 8. 4 of jungle, making a total of 82,084 beegahs and a fraction of land free from assessment.

The result of Mr. Piron's proceedings was a settlement with Wujhonnissa for twenty years at the moiety of the gross rental as estimated by him, which, when converted into the Company's rupees, amounted to C. Rs. 11,028. 12. 10.

The documents by which this arrangement was carried out with her, and her petition, Kaboolat, and [98] Mr. Piron's final order, all of the 9th of April, 1844, are all among the papers in the case. In the Kaboolat she describes herself as occupier of the entire Pergunnah Havelee, and says " 123,186 beegahs and a fraction of land of the Pergunnah have been taken by me from you under temporary settlement at an absolute sum of C. Rs. 11,128. 12. 10, being a moiety of the jumma, including Julkur, Bunkur, Phulkur, etc."

We stop at this point in order to state the conclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the Sayers or cesses, or miscellaneous revenue—conclusions which in our judgment are no way affected by what has already appeared, or by what we shall presently state, as to these Sayers and cesses, or miscellaneous revenue. We are satisfied from these proceedings and documents that the settlement officers throughout intended to resume and settle and assess the revenues of the whole of Pergunnah Havelee, and that they throughout proceeded on the assumption of the correctness of the survey, measurements, and map made by or under the inspection of Captain Ellis. Looking to the great care and the minute attention which was given to the settlement of this Pergunnah, it cannot be supposed that any portion of it was designedly omitted from the settlement ; and if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement, to which we have above referred, may for the purposes of this suit be laid out for consideration, and that no part of the district in question can for any of those purposes be considered as Towfer, or surplus. We are also [99] satisfied from the evidence afforded by these proceedings that Bakum was included not only in the measured area of 123,186 beegahs, but also in Ellis's map. The objection expressed by Rulmur Ali Khan in his rejected petition, to take attested copies of the map because it included, or was about to include, Bakum, is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the report of Mootee Lall, and Mr. Farquharson's mode of dealing with that report, and from the absence of all mention of Goormah or Kormah in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. Farquharson as part of the Nizamut Mehals, and probably as part of Mouzah Bhorebundharee in Pergunnah Purbutparah.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that from the proceedings by Mr. Beadon, officiating

special of Deputy Collector of the 27th of August, 1841, the case of Mouzah Ghorak-hore appears to have been solemnly decided in favour of the Nizamut Mehals, and that, in our opinion, the proceedings of the Officers of survey, of the 11th and 24th of June, 1848, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals.

It results from what we have already stated that, looking at this case without reference to the Sayers, cesses, or miscellaneous revenue, we should have come [100] to the conclusion that Havelee as settled consisted only of the measured area of 123,186 beegahs; that this was all comprised within Ellis's map, and that the Appellant, by showing this, had at least shifted the burthen of proof, and established a good *prima facie* title to recover the whole of the disputed territory; but it certainly cannot be denied that what appears upon the record before us as to these Sayers, or cesses, and this miscellaneous revenue, raises a very serious question whether some territory in excess of the measured area, and beyond the limits of Ellis's map, does not belong to Havelee, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these Sayers, or cesses, or miscellaneous revenue. By Mr. Beadon's settlement the revenue derived from these sources is stated to amount to S. Rs. 738. 2; and we have already shown how that sum was made up. By Mr. Piron's settlement the Sayers or cesses are stated as amounting to Rs. 2336. Sa. 9 $\frac{3}{4}$ p., made up partly of the sums returned by the Putwarrees and Ameens as the Sayerat of their respective villages, and partly of sums aggregating S. Rs. 1116, which were not so returned; this last-mentioned item being thus entered in the settlement proceedings:—"Bunkur and Boondee Mehal, besides the Putwarree's paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of Pottahs, etc., S. Rs. 1116." We have here, therefore, some, at least, of these Sayers, or cesses, described as Bunkur and Boondee Mehals; and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to [101] inquire what these Bunkur and Boondee Mehals really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. Piron himself says that the S. Rs. 1116 was made up of S. Rs. 785 inserted in the Pottah of Peer Khan Soobahdar; of S. Rs. 251 inserted in the deposition of Rajee Singh, son of Durshun Singh; and S. Rs. 80, inserted in the deposition and Pottahs of Posun Pasee and others.

Now, we have Peer Khan Soobahdar's examination, which seems to have been taken on the 20th of January, 1844. He is described as farmer of Mehal Bunkur and Boondee Koh Marug, and Kurrailee, etc., Pergunnah Havelee. He professes to hold, but in the name of his son, Wahid Khan, Ghauts Marug, Kurrailee, Tabawee, Kuru Khataun, Hursa Poteeah, Burramupea, Shakole, and several other hills and Ghauts, for the names of which he refers to the Pottah, at a rent of S. Rs. 785, and to pay the rent to Ruhmut Ali Khan.

Again, we have the examination of Rajputtee Singh, the son of Durshun Singh, taken on the 30th of January, 1844, from which and the proceedings of Mr. Piron of the 26th of that month, we learn that Durshun Singh, was farmer of Mehal Bunkur Ghaut Koolurhea, attached to Mouzah Mudhoobun, Pergunnah Havelee; that he, during the subsistence of his lease, paid a jumma of S. Rs. 251 to Ruhmut Ali Khan, who on the expiration of the lease in April, 1844, was about to bring that Bunkur Mehal under his personal collection.

The S. Rs. 80 "inserted in the depositions and Pottahs filed by Posun Pasee and others" we have been unable to trace in the record.

[102] Again, Mr. Quintin, who was the superintendent of surveys of Zillah Bhagulpore, in his letter of the 19th of October, 1848, addressed to Mr. G. F. Brown, the Commissioner of Revenue for the division of Bhagulpore, refers to a variety of Ghauts as included in Piron's settlement; and so far as we can see they can have been so included only under the head of Bunkur and Boondee Mehals.

Again, it is clear upon the evidence that Ghauts Marug and Kurrailee, and possibly other Ghauts held by Peer Khan Soobahdar in the name of Wahid Khan at the date of Mr. Piron's settlement, were, at the date of Mr. Beadon's settlement, held by Rujjib Ali, and, indeed, that the whole of the property, whatever it was, the

revenue of which Mr. Beadon estimated at S. Rs. 576, is included in the property of which the revenue was estimated by Mr. Piron at S. Rs. 1116.

It is clear, therefore, that Mr. Piron's settlement did include under the head of Bunkur and Boondée Mehals the revenue coming from certain Ghauts, of which the most prominent are Ghauts Marug and Kurrailee; and that Mr. Piron was right in including rights in these Ghauts as part of the assets of Havelee is, we think, almost proved to demonstration by the village papers in the second and third volumes of the Appendix to which Mr. Melvill directed our attention.

Some of these are produced by the Appellant, others by the Respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these Ghauts were uniformly treated by the owners of the whole Zemindary as part of the revenue [103] of the Lakhiraj Mehal, Havelee. Against this evidence it is vain to set the award of Ruhmut Ali Khan of the 13th of April, 1837, after the date of the resumption, or the Kabooleats, or the occasional entry in the village accounts of Morkhut as Marugkhat. They would at most support the theory that there may have been more than one Ghaut of the same name, or different rights resulting from the same Ghaut: the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these Ghauts for the Nizamut Mehals, which until the sale of those Mehals, it was Ruhmut Ali Khan's interest to do.

It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, Kurrailee, and other Ghauts in his settlement: but then the question is, What was this property, and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of Ellis's map?

There is much evidence bearing more or less directly upon this point. There is the Ummulnaneh, to which we have already referred, and there are the various suits and proceedings arising out of the long-continued litigation concerning these Ghauts.

The earliest of these proceedings which we find is under date the 12th of March, 1842. It was before the Magistrate in the Criminal Court under Act, No. IV, of 1840, and arose out of the alleged forcible dispossession of Rujjib Ali, the farmer under Ameer Buksh, of Ghaut Bhoondée, and Koh Marug, etc., by Munniar Rae, claiming the same subjects under a Pottah granted by Ruhmut Ali Khan, in his [104] capacity of Zemindar of the Nizamut Mehals. Rajah Bidianund Singh intervened in the suit, objecting that it was brought in collusion with the former proprietor of the Nizamut Mehals, Ruhmut Ali Khan. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in Rujjib Ali's farm, or some of them, belonged to Havelee, or to the Nizamut Mehals. The decision as to possession was in favour of Rujjib Ali.

The proceeding of the 24th of March, 1841, before Mr. Beadon, shows that during the investigation which led to his settlement there were disputes between the auction purchaser and the owner of Havelee touching certain stone quarries stated to be with the hill Mar and part of the Boondée Mehal. The report of Ronshun Lall, Record Keeper of the Khass Mehal department, of the 21st of September, 1841, was obviously made in answer to a reference made in some suit arising out of the same dispute touching these Ghauts, which we have been unable to trace. It shows that as early as the 21st of September, 1841, Mr. Beadon had included the Ghauts held by Rujjib Ali in the settlement of Havelee.

The question, whether these Ghauts belonged to Havelee or to the Nizamut Mehals continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. Beadon and that by Mr. Piron.

One instance is the suit of Kishna Tewarry, of which the final proceeding is that of the 12th of June, 1845, which gives the history of the whole litigation. It began with a summary suit brought before the [105] Collector by the Naib of the auction purchasers of the Nizamut Mehals (we presume in their name) against the Plaintiff for rent. The Collector has under the Regulations no jurisdiction to entertain such a suit unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against Kishna Tewarry for the sum sued for. Thereupon Kishna Tewarry, alleging that he was not the tenant of the purchasers of the

auction Mehals, but a sub-tenant of the owners of Havelee, brought his suit in the Civil Court (the Moonsiff's) against Rajah Bidianund Singh to quash the Collector's decree as made without jurisdiction. The Moonsiff decreed in his favour. There was an appeal to the Principal Sudder Ameen, who was against him. This was followed by a special appeal to the Sudder Dewanny Adawlut, which Court remitted the cause back to the Principal Sudder Ameen, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than Rs. 7, was obviously made a mode of trying the question of title between Rajah Bidianund Singh as the purchaser of the Nizamut Mehals, and first Ruhmut Ali Khan and afterwards Wujhounissa (each of whom intervened in the suit as an objecting party), as the owner of Havelee. The proceedings show that the real issue was, whether certain subjects, as to which all parties were agreed, including Ghauts Marug and Kurrailee, belong to Havelee or to the Nizamut Mehals. The proceeding and report of the 9th December, 1843, are set fully forth in the evidence, showing that Ghauts Marug, Kurrailee, etc., were included in Mr. Beadon's settlement, were before the Court. The decision was, that [106] the Moonsiff's decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be Plaintiff and Defendant. Not the least important part of this proceeding is that Rajah Bidianund Singh, in his answer in the suit, alleged that the Ghauts did not appertain to the rent-free Pergunnah Havelee, that the Revenue Surveyor had excepted them from the measurement. The objectors do not contest this last proposition, but insist that they are attached to Havelee, and do not belong to Purbutparah. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of Ellis's map. There are similar decisions to the above in other suits specified and set forth in the Court below. The last is as late as the 15th of July, 1847.

Another instance of litigation involving the same issue is that in which Syud Reaz Ali, claiming as farmer of Tuppah Lodwah, was the suing party. By a proceeding of the 20th of November, 1843, the Collector of Monghyr, before whom this person had brought a summary suit to recover rent alleged to be due from one Omachurn, then an occupier of part of the Boondee Mehal, the Defendant having pleaded that the property in respect of which he was sued was part of Havelee, and had been settled with Ruhmut Ali Khan, called for the Settlement proceeding, and, in its absence, for a report from the Collector of Bhagulpore whether Mehal Boondee of Ghauts Kurrailee and Komaruk (obviously the same as Koh Marug) was comprised within the Settlement rights of Ruhmut Ali Khan, or was appended to any other Mehal.

[107] There is a report of the Record keeper which purports to bear date the 13th of November, 1843, which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the Defendant. On this coming in, the suit was finally disposed of by Mr. Vansittart, the Collector, who dismissed the suit as one which he was incompetent to try, with liberty to the Plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that Wahid Khan, the then farmer of Ghauts Marug, Kurrailee, etc., under Havelee, had intervened in the suit against his sub-tenant.

Again, the proceedings of the Collector of Bhagulpore of the 11th of November, 1843, those of the 9th of December in the same year, and the proceeding of the 19th of March, 1844, on the petition of Syud Reaz Ali, a farmer of Tuppah, Lokwah, all point to the conclusion that during the investigation which led to the settlement of Mr. Piron, Meaz Reaz Ali, claiming title under Rajah Bidianund Singh, if not Rajah Bidianund Singh himself, was unsuccessfully resisting the inclusion of the Bunkur of Ghauts Marug, Kurrailee, etc., in the settlement of Havelee. The proceeding of the same Collector of the 11th of May, 1844, is also some evidence of this.

It appears that Peer Ali Khan Soobahdar delivered over possession of Ghauts Marug, Kurrailee, and the other Ghauts comprised in his farm, to the purchaser of Havelee at the sale for arrears of revenue in November, 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that Ghauts

Marug, Kurrailee, and others, which were included in the settlement, were some [108] thing beyond the limits of the measured area and Captain Ellis's map. It is impossible to read them without believing that the parties knew well what they were disputing about, and that each was claiming the same things. It is not probable that these things were within the measured area. Rajah Bidianund Singh could hardly push his pretensions so far as to claim anything within that area. On the contrary, as we have seen in Kishna Tewarry's case, his contention was that the things claimed were beyond the measured area, and, therefore, belonged to him, and the opposite party seems to have admitted the fact and denied the consequence. Had one of the parties been claiming a Ghaut in one part of a mountain range, and the other insisting on his right to retain a Ghaut of the same name in another part of the range, it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of Rujjib Ali, sometimes of Wahid Khan, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the Officers employed in the topographical survey also bear upon this point.

Of the reports of Talib Kurream and Syud Hossein, Thachabust Ameens, dated respectively the 28th of February and the 10th of February, 1847, both in answer to the petitions from Rajah Bidianund Singh and the orders thereon, it is sufficient to say that if they have no other value, they at least prove that when these persons passed from admitted portions of Pergunnah Purbutparah in the course of their survey into the disputed territory, they were met by [109] claims on the part of Rooder Singh and his tenants; and a *bona fide* contention whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the Nizamut Mehals; or, as appertaining to some of the Ghauts in question, was part of Havelee.

Then came the proceeding of Mr. John Brown on the 5th of April, 1847, in which both the parties were in presence. Mr. Brown's conclusion is no doubt against the view contended for by the Respondent, that the ownership of the revenue of these Ghauts imports the ownership of land in excess of the measured area, but his proceeding sufficiently shows that what the parties were claiming was in the disputed territory; one witness at least (Lushkurree Lall) connects the property claimed with the former holding of Soobahdar Khan; and though Mr. John Brown, in his eight reason, suggests that the Ghauts Marug and Kurrailee, that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that Rooder Singh had shifted the locality of the property, so long in dispute between Havelee and the Nizamut Mehals. Mr. Brown's decision seems to have been overruled by Mr. Quintin, mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession.

Then followed the proceeding of the Deputy Collector, Surfraez Ali, of the 29th of December, 1847, in which there may be some false reasoning as to some of the points before him, but which clearly establishes that the Ghauts there claimed as comprised in the settlement of 1844, were the Ghauts of those names in the [110] disputed territory, and were sworn to by Soobahdar Khan, who seems to have ceased to have any interest in the question, to be the Ghauts that were comprised in his lease. It seems very difficult to question the finding of this Officer making a local investigation, that the identity of the Ghauts claimed with those settled was made out.

Again, Captain Sherwill, the Revenue Surveyor, was a European officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the Ameens, viz. that a large hilly district belonging to Havelee, and comprising these Ghauts, had been omitted from Ellis's map. He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the Ghauts known in the district as Marug, Kurrailee, and by other names, about which the parties were disputing before the Ameen. His personal examination of the district is recorded in Mr. Quintin's final proceeding of the 24th June, 1848, at p. 171. On the other hand it is to be observed

that Captain Ellis's map does not profess to fix the sites of these Ghauts. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point for the most part rather to what was claimed as belonging to Havelee than to the nature and character of the Bunkur and Boondee Mehals above mentioned, and of the revenue arising from the Ghauts, of which, in part at [111] least, they consisted; and certainly it does not satisfy us that Havelee, if entitled to any part, was entitled to the whole of the land in question in right of these Bunkur and Boondee Mehals and Ghauts. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by Havelee and other Pergunnahs, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain Ellis, if the whole of it belonged to Havelee at the time of its being resumed; neither can we easily suppose that this large tract of land could have been intended to have been included in the Havelee settlement under the description of Sayers and cesses, when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the Officers of the survey have, as we have already pointed out, given to Havelee more than in our opinion belongs to it, and looking to the whole of the evidence in the case, we cannot see our way to conclude judicially that they have been right in giving to it the rest of the land in question.

We agree, indeed, with the majority of the Sudder Judges, that the Appellant has failed to prove that no part of the disputed territory was included in the Settlement, and that he has failed to prove by independent evidence his right to recover the Mouzals specified in the plaint; but we cannot think that they were right in determining the case upon the mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure: it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, is to [112] give to Havelee some things which, on the evidence, we think belong to the Nizamut Mehals.

In these circumstances, the case, we think, is one which calls for further inquiry; but in saying this we by no means mean to intimate that the Appellant can be relieved from the burthen of proof. On the contrary, we think that there has been so much of possession on the part of Havelee that the burthen of proof must still rest upon the Appellant.

For the reasons which we have given, we think that this decree cannot be supported in its integrity, and the Order which we shall humbly recommend Her Majesty to make upon this appeal will be,—

To reverse the decree, but without prejudice to any question which may arise upon the inquiries to be made as after directed;

To declare the Appellant entitled to the Mouzals Goormah and Ghorakhore, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not included in the settlement of Havelee;

To declare that the settlement of Havelee comprises only the measured area of 123,207 beegahs, and so much of any of the land in dispute as upon the inquiries after directed may appear to belong or be properly attributable to the Bunkur and Boondee Mehals in the pleadings mentioned, or to the Ghauts, of which the same in part consist; and that the rights of Havelee in respect of Bakum do not extend beyond the 129 beegahs and 19 biswas mentioned in Beadon's settlement, and which are included in the 123,207 beegahs;

To inquire what is the nature and character of the Bunkur Boondee Mehals, and of the Ghauts comprised therein respectively which are included in Piron's settlement, and are therein estimated at S.Rs. 116; and whether the same, or any, and which of them, included any and what part of, or any and what right or interest in the land in question in this suit;

To declare that so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said Bunkur and Boondee Mehals or Ghauts belongs to Havelee, and that the Appellant is entitled to recover the residue of the land in question, and to direct the Court to proceed in the suit as upon the result of such inquiry may appear to be just;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all the other costs of the suit, including the costs of this appeal, as may seem just, having regard to the declarations aforesaid, and to the result of the said inquiry :

To declare that this Order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of Haveli.

[For subsequent proceedings see 13 Moo. Ind. App. 490.]

[114] SALIGRAM and HURNARAYUN.—*Appellants*: MIRZA AZIM ALI BEG.
Respondent * [Dec. 12, 1864].

On appeal from the Court of the Judicial Commissioner of the Province of Oude.

By sec. 9 of the Limitation Rules for the guidance of Civil Courts in Oude, as explained by the Circular Order of the Judicial Commissioner, No. 104 of 1860, the limitation of suits is fixed for three years in "suits for money lent for a fixed period, or for interest payable on a specified date, or dates, or for breach of contract, unless there is a written engagement or contract, and where Registry Offices existed at the time such engagement was registered, within six months of its date." That section held not to apply in the case of a Bond executed in 1855, before the annexation of Oude, when there was no Registry at the place it was made, and sued for in 1860, such transaction falling within section 14 of that Circular Order, where the period of limitation is, six years for "all suits on Bonds registered within six months of their date, or on Bonds formally attested when there was no means of registry, and all other suits for which no other limitation is expressly provided by these rules"; and a decree of the Judicial Commissioner of Oude, holding that a suit on the Bond was barred by the three years' limitation, provided by section 9 of the rules, reversed on appeal.

Quære, whether the rule of limitation as a bar to the suit, can be entertained without being pleaded [10 Moo. Ind. App. 120].

This appeal was brought from a decision of the Judicial Commissioner for the Province of Oude, which affirmed a judgment of the Civil Judge of Lucknow, by which the suit of the Appellants brought to recover Rs. 10,000 and interest was dismissed on the ground that it was barred by the rule of limita-[115]-tion applicable thereto. The question raised by the appeal turned solely on the point of limitation.

It appeared that on the 23rd of November, 1855, the Respondent being indebted to the Appellants, then carrying on business as Bankers at Lucknow, in the sum of Rs. 10,000, gave them a Bond for the repayment of that amount and interest, by monthly instalments of Rs. 1000. This Bond was executed by the Respondent according to the native method which prevailed at that time between Bankers and their customers in Lucknow, but was not registered, there being no Registry Office or law or Regulation in force at that time by virtue of which it could have been registered.

In the beginning of the year 1856, the Kingdom of Oude was annexed to the Territories of the East India Company, and was thenceforward known as the non-Regulation Province of Oude, and on the 4th of February in that year, by a despatch of the Governor-General of India, the Courts of the Judicial Commissioner and Civil Judge were established for the administration of justice in that province.

At the time of the annexation of Oude the Respondent had paid nothing on account of the Bond. After the annexation the Appellants continued to demand pay-

* Present: Members of the Judicial Committee—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (The Right Hon. Sir John Romilly). Assessors—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

ment of their money, but the Respondent put them off on various pretexts. In the meantime the rebellion broke out, and the Appellants were obliged to leave Lucknow. On the restoration of the British authority, the Appellants again applied to the Respondent for payment, and were again met by various excuses; in consequence, the Appellants, on the 7th of August, 1860, filed a plaint in the Court of the Civil Judge at Lucknow, for recovery of the principal and [116] interest due on the Bond, then amounting to Rs. 18,630.

The Respondent put in a plea, in which he alleged that the money for which the Bond was given had been borrowed by him as Agent for the ex-King of Oude, and that he had executed the Bond in his own name only in accordance with the then prevailing custom. He also objected that the date of the Bond had been altered, and denied that he ever had received the money.

The suit was heard, and on the 15th of October, 1860, Mr. Fraser, the Civil Judge, delivered his judgment, in which, after fully investigating the accounts between the parties and over-ruling the Respondent's objections, he dismissed the suit, on the ground that it had not been brought within three years from the date of the Bond. The Civil Judge in his judgment, after stating that the interval which had elapsed between the date of the Bond and the institution of the suit was four years, eight months, and fourteen days, proceeded as follows:—"Circular Order, No. 104 of 1860, supersedes the previous rules of limitation, and this suit was instituted after the promulgation of the new rules. These contain no prospective period of warning, so that I feel precluded from acting on the Officiating Judicial Commissioners' construction of Circular Order, No. 51 of 1859, which gave such Bonds as the present, the limitation of six years, as well attested Bonds, for when that Circular was cancelled, the Order, which is merely a construction of its provisions, was in effect cancelled too. But there remains a point which I suppose must have been fully considered, though it stands unexplained. Circular [117] Order 104 introduces Act, No. XIV. of 1859, as of immediate effect, while the last section of that Act prohibits its taking effect in any non-Regulation Province until two years after notice."

The Appellants being dissatisfied with this judgment, proceeding, as they contended, upon an erroneous view of the law of limitation applicable to their case, appealed to the Court of the Judicial Commissioner.

The Judicial Commissioner (Mr. G. Campbell) by his judgment, pronounced on the 14th of December, 1860, after observing that he had laid down his interpretation of the law of limitation as affecting such cases in Circular, No. 181, dated the 11th of December, 1860, proceeded as follows:—"It is quite clear to me that the Bond in this case is not one formally attested after the native method, and which should rank with registered Bonds. On the contrary, it is a mere unattested note of hand, and I think that not only the law, but equity, would give a short limitation in such cases under circumstances such as this. The defence is, that the money was drawn for matters connected with the Defendant's position as an Official of the late Government, and the informal character of the document favours the idea of its being an affair for prompt settlement. I think, therefore, that the three-year limit applies." After remarking that the case seemed a somewhat hard one, and that he should have been glad if a compromise could have been effected, the Judicial Commissioner confirmed the decision and dismissed the appeal, directing each party to pay their own costs in both Courts.

There being no provisions by Statute or Charter for [118] appeals from the decision of the Judicial Commissioner of the Province of Oude, in order to prevent the denial of justice leave to appeal was, upon special petition, allowed by the Judicial Committee under the Statute, 3rd and 4th Will. IV. c. 41 (see case reported on this point, *nom. Salik Ram v. Azim Ali Beg*, 8 Moore's Ind. App. Cases, 270).

As the Respondent did not appear, the appeal was heard *ex parte*.

Mr. Hobhouse, Q.C., and Mr. Cave, for the Appellants.—At the date of the contract, which was prior to the annexation of Oude by the Government, the Mahomedan law was in force in Oude, and by that law there was no rule of limitation to bar the Plaintiff's suit. Macnaghten's "Princ. of Moohumadan law," ch. XII., sec. 1, p. 76. Since the annexation various rules of limitation have at different times been regarded as in force in Oude, some of which were promulgated by Circular Orders of the Judicial Commissioner, without, as we submit, any authority for that

purpose. At first the general twelve years rule, established by Ben. Reg. III. of 1793, sec 14, appears to have been considered in force in Oude, although Oude being a non-Regulation Province, the Regulations were not applicable thereto. In December, 1856, the Punjab Amendment of that rule by which the limitation of actions of debt or contract, excepting partnership accounts, was reduced from twelve to six years, appears to have been applied to the Province of Oude, and was considered to have come into operation on the 1st of June, 1857, in accordance with notice to that effect; and again, the Circular [119] Order of the 26th of March, 1859, No. 51, introduced further alterations in the rule of limitation after six months from the promulgation of that Circular; but the only legislative enactment imposing limitations of that kind is the Act, No. XIV. of 1859. That Act, however, does not bar the Appellants' rights, for two reasons: first, it is framed so as not to affect suits instituted, as this case is, in a non-Regulation Province within the period of two years from the date of the extension of the Act to that Province; secondly, if it affected this suit, it would allow the period of limitation to be six years, being founded on a written contract, which at the time and place of its execution could not be registered. Assuming the Circular Orders to have the force of law in Oude, the rules in force when the suit was instituted was No. 104 of 1860, which superseded Circular Order No. 51 of 1859; and the limitation for such a suit as the present is, by Circular Order, No. 104 of 1860, six years, as the suit, being founded on a written contract incapable of registry, falls within the exception of Rule 9, and is, therefore, provided for by Rule 14 of that Order. Section 10 certainly does not apply, as it refers to money lent for no definite period. Even if it could be held that the law in force when the suit was commenced was the Circular Order, No. 51 of 1859, the suit would fall within the six-year rather than the three-year limit, being founded on a Bond formally attested and duly executed.

Although the Respondent in his pleadings has admitted his execution of the Bond, yet he has not raised the defence of limitation at all. All he pleads is an unfounded hypothesis that the date was fraudulently altered by the Appellants.

[120] The Right Hon. the Lord Justice Turner.—There are some points in this case upon which their Lordships do not think it necessary to give any opinion.

They give no opinion upon the question whether the Regulation of limitations could or could not be made available without being pleaded; or upon the question whether this Bond ought to be considered as a Bond "formally attested" within the meaning of the Circular Order, No. 51 of 1859, or upon the question whether there is or is not in force, in the Province of Oude, any period of limitation.

These points may, as their Lordships think, be laid out of the case; and as to the Circular Order No. 51, they are of opinion, that it cannot be resorted to or applied in the present case, because there was a proclamation on the 31st of July, 1860, before this action was brought, by which that Circular Order was expressly repealed.

The Circular Order, No. 51, being then out of the case, the question to be decided must depend upon the Act of the 4th of May, 1859 (No. XIV. of 1859), or upon the Circular Order, No. 104 of 1860.

As to the Act of the 4th of May, 1859, it is clear, in their Lordships' judgment, that it cannot affect the question, because it was not to come into force in any non-Regulation Province until two years after a period to be fixed by proclamation, and those two years had not elapsed when the plaint was filed.

The case, therefore, is reduced to the single point, what is the effect of the Circular Order, No. 104?

Now assuming, as their Lordships do (that being the view most favourable to the Respondent), that this Order was in force (and their Lordships observe [121] that it was upon this Order the case appears to have been considered in the Court below to depend), its effect must, in their Lordships' judgment, rest entirely on the 9th and 14th sections of the Order; the 10th section, which was referred to in the argument, relating exclusively to "suits for money lent for no definite period," and it being clear that this suit was for money lent for a definite period. Let us consider, then, first, the effect of the 9th section, which has reference to suits in which the period of limitation is to be three years. It is in these terms: "Suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of

contract, unless there is a written engagement or contract, and where registry offices existed at the time such engagement was registered within six months of its date, and signed by the party to be bound thereby, or his duly authorized agent."

Their Lordships understand this section, especially when contrasted with the 10th section, to mean that the rule referred to in it, is not to apply where there is a written engagement, and where, there being a written engagement, it is registered within six months of its date in cases in which a Registry Office existed at the date of the engagement; and there being, in this case, a written engagement and no Registry Office at the date of the engagement, they think that the section does not affect the case.

Then section 14, which has reference to suits in which the period of limitation is to be six years, is in these terms: "All suits on Bonds registered within six months of their date, or on Bonds formally attested when there were no means of registering, and [122] all other suits for which no other limitation is expressly provided by these rules."

Now, as their Lordships have said, they give no opinion upon the question whether this is to be considered as a Bond "formally attested when there were no means of registering." If, on the one hand, it be so considered, the case clearly falls within the first branch of the section: but if, on the other hand, it be not so considered, the case as clearly falls within the other words of the section, "all other suits for which no other limitation is expressly provided by these rules."

Upon this ground, therefore, their Lordships are of opinion, that the judgment appealed from ought to be reversed, and that judgment should be entered for the Plaintiffs in the action. It may be right to add, that the Circular Order, No. 181, has not been overlooked, but that their Lordships do not consider it effectual to alter the view which they have taken of the case. The Plaintiffs are, in their Lordships' opinion, entitled to judgment for the debt and costs, and they must have the costs of the appeal. Their Lordships will humbly recommend Her Majesty so to order accordingly.

[See *Shah Mukham Lal v. Nawab Imtiazood Dowlah*, 1865, 10 Moo. Ind. App. 379.]

[123] RANEE SURNOMOYEE.—*Appellant*: MAHARAJAH SUTTEESCHUNDER ROY, Bahadoor,—*Respondent* * [June 17, 18, 1864].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Suit by a Zemindar against a mesne tenant of his Zemindary, holding by hereditary tenure, in the nature of a Mouroosee Istemraree, to enhance the rent of the lands which had been held by the tenant and his predecessors anterior to the Decennial Settlement at an invariable fixed rent, dismissed.

By section 5 of Ben. Reg. XLIV. of 1793, it is provided, that when a Zemindary is sold by public sale for discharge of arrears due from the Zemindar, or others, to Government, "all engagements which such proprietor shall have contracted with dependent Talookdars, whose Talooks may be situated in the lands sold, as also all the leases to under farmers and Pottahs to Ryots for the cultivation of the whole or any part of such lands (with the exception of the engagements, Pottahs and leases, specified in secs. 7 and 8), shall stand cancelled from the day of sale, and the purchaser, or purchasers, of the lands shall be at liberty to collect from such dependent Talookdar, and from the Ryots or cultivators of the lands let in farm, and the lands not farmed,

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whatever the former proprietor would have been entitled to demand according to the established usages and rates of the Pergunnah, or District, in which such lands may be situated, had the engagements so cancelled never existed." And the 7th section provides, that section 5 is not to authorize the assessment of any increase upon the lands of such dependent Talookdars as were exempted from increase by sec. 41 of Reg. VIII. of 1793 at the Decennial settlement of 1793.

In 1823, a Zemindar fell into arrears of revenue, and Government sold the Zemindary at public sale for discharge of the arrears due, whereby the auction purchaser acquired such rights to cancel leases, etc., as then existed: but he took no steps under Ben. Reg. XI. of 1822, secs. 30, 32, 33, which gave power to a purchaser to cancel the leases, or to enhance the rent, nor was any claim in that respect made by subsequent purchasers from him, until the year 1856, when the Zemindar then in possession brought a suit to enhance the rent. Held, reversing the Sudder and Zillah Courts' decree:

First, that the tenure, a Mouroosee Istemraree, under which the Defendant held was hereditary, and as it had been uninterruptedly held anterior to the Decennial Settlement at a fixed rent, the Zemindar had no power to enhance the rent.

Secondly, that such a tenure was not cancelled, *ipso facto*, by the sale in 1823, as the language in sec. 7 of Ben. Reg. XLIV. of 1793 showed that what was intended by sec. 5 of that Regulation was not the destruction of the tenure, but the enhancement of rent, under certain specified and equitable limitations.

Whether such power is not confined to the auction purchaser himself, and not to those claiming under him. *Quære*.

When false witnesses or forged documents are produced to support a case, such fact naturally creates suspicion; but if the appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstance will not prejudice the judgment on the merits, when the case is supported by independent evidence.

So ruled, when their Lordships were satisfied from the evidence that an ancient tenure existed, which was endeavoured to be supported by a forged document and evidence [10 Moo. Ind. App. 149, 150].

Such document being impeached, as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from India for inspection at the hearing of the appeal.

The Appellant, a Talookdar, holding under the Respondent as Zemindar, was in possession of lands, on which certain buildings were erected, situate in [124] Dehee Shurruck Gobindnuggur, in Pergunnah Ookhra, under a Mouroosee Istemraree, an ancient tenure, which had been held at a perpetual fixed rent for sixty years previous to the Decennial Settlement.

The Respondent, who was a purchaser under mesne assignment from, and deriving title through, a previous purchaser of the Zemindary in the year 1823, at a public sale for arrears of Government revenue, under Ben. Reg. XI. of 1822, claimed the right to enhance or raise the rent hitherto paid by the Appellant, and those under whom she derived title. The suit was brought by the Respondent's father for that object.

The facts of the case were these:—

[125] Alexander Seaton, a former Collector of the Zillah of Nuddea, obtained previous to the Decennial Settlement from the then Zemindar, Maharajah Kisto Chunder Bahadoor, a Mouroosee Istemraree Pottah, creating an hereditary tenure in respect of 128 beegahs and 4 cottahs of land situate within his Zemindary, called Pergunnah Ookhra, at a perpetual fixed rent of Rs. 64. 1p. 12a. Seaton sold the land and factories erected thereon to Rajah Lokenauth Roy, Bahadoor (the grandfather of Rajah Kristonauth Roy, the husband of the Appellant), who paid to the Zemindar for the time being the same fixed rent. On Rajah Lokenauth's death,

his son, the late Rajah Hurrenauth Roy, Bahadoor, succeeded, as his heir-at-law, to the land, also paying the same fixed rent.

About this time the Zemindar in possession allowed the Government revenue payable by him in respect of the Zemindary to fall into arrear; and, in consequence, in the year 1823, the Government Collector, under Ben. Reg. XI. of 1822, sold the Zemindary by public auction to one Moodoo Soodun Sandial.

After the sale, Rajah Hurrenauth Roy attorned to Moodoo Soodun Sandial, as such purchaser, and the latter received payment of the same fixed rent from the Rajah during the time that he remained the proprietor of the Zemindary. The purchaser did not take any proceedings under Ben. Reg. XI. of 1822, secs. 30, 32, and 33, with the view of avoiding or annulling the tenure on which the land was held or to enhance the rent payable in respect thereof; nor did he in any manner question the title of the Rajah, or the validity of the tenure; but received the same rent. Subsequently, a Mr. Harris [126] purchased the Zemindary from Moodoo Soodun Sandial, and he also received from Rajah Hurrenauth Roy the same fixed rent.

On Harris's death, his widow became the proprietor of the Zemindary, and received the same fixed rent from the Rajah. On the Rajah's death, his son, Rajah Kristonauth Roy succeeded as heir to the land. In the year 1845, Maharajah Sreesh Chunder, Bahadoor, became the purchaser by private sale of the Zemindary, from Mrs. Harris. Some time in the year 1846, Rajah Kristonauth Roy died, leaving the Appellant his widow and heiress-at-law.

It appeared that by an Ijará (lease), dated the 15th Cheyt, 1256 (1849), Sreesh Chunder Roy leased the Dehee Shurrack Gobindnuggur for six years to one Sreenauth Roy (who was originally made a Defendant, but who was no party to the appeal), upon the terms that a measurement should be made at the joint expense of the lessor and the Ijaradar; and that afterwards, in the year 1855, the Ijaradar not being able to concur in making the measurement, a measurement was made by the Zemindar, and in such measurement it was found that the Appellant was in occupation of the land in question, and was paying an inadequate rent according to the current Pergunnah rates. Accordingly, on the 25th Jeyt, 1263 (1856), a notice of an intended enhanced rent under sec. 9, Ben. Reg. V. of 1812, was issued with the jumma wassil papers.

On the 15th of August, 1856, a suit was instituted in the Civil Court of Zillah Nuddea by the Respondent's father, Maharajah Sreesh Chunder Roy, Bahadoor, against the Appellant, and Sreenauth Roy, [127] to recover from her an enhanced rent, estimated at Rs. 1470, according to the rates current in the village, of the houses and lands in her occupation.

The Appellant, by her answer, among other things, stated that more than sixty years before the year 1856, and previous to the Decennial Settlement, Seaton took of the then Zemindar a Mouroosee Istemraree Pottah on an annual rent of Rs. 64. 1a. 12p., and having erected some factories and buildings, sold his interest to Lokenauth Roy, Bahadoor, the Appellant's husband's grandfather; that on his death it passed to his son, Hurrenauth Roy, and from him to his grandson, Kristonauth Roy, the Appellant's husband, and from him to her; that on the 23rd Bysack, 1230 (1823), during Hurrenauth Roy's lifetime, he, not being able to lay his hands on the Mouroosee Pottah granted to Seaton, in consequence of confusion in his office during his minority, obtained from Muddoo Soodun Sandial, who had purchased the Zemindary at auction sale for arrears of Government revenue, a Mouroosee Pottah at the same rent, with a condition that the rent should "never undergo any increase or diminution;" and the Appellant further alleged, that the rent having been paid, it was not competent to the Zemindar, who claimed as a private purchaser under Muddoo Soodun Sandial, the auction purchaser and grantor of the Pottah, to enhance the rent. She further objected that Seaton's Pottah being for the erection of a factory, the case fell within the fourth exception out of the 26th sect. of Act, No. I. of 1845, and was, therefore, exempted from enhancement of rent within the meaning of that section. The Appellant filed with her [128] answer the alleged Pottah of the 23rd Bysack, 1230, from Muddoo Soodun Sandial.

The Respondent in his replication (his father Shreesh Chunder Roy having died in the meantime) denied all the allegations in the answer in reference to the creation of any lease at a fixed and permanent rent; and, with regard to Mr. Seaton, he

observed that, before the Decennial Settlement, to which period it was necessary to carry the creation of the tenure back to make it binding on an auction purchaser, there was a prohibition against the grant of perpetual leases to Europeans holding office in the Mefussil; and, in reference to the Pottah by Muddoo Soodun Sandial, he alleged that in several proceedings since the alleged execution of it, no mention of it whatever was made, when, if it existed in fact, it would have been mentioned.

The material issue was, whether the possession of the Appellant of the land, which was sued for, was held under a Mouroosee title, with a Mocurrery Istemaree jumma.

No evidence was offered by the Respondent in proof of the statements made by him in his pleadings, or to disprove any of the Appellant's statements or the facts which were proved by her witnesses.

The Appellant put in evidence the alleged confirmatory Pottah; the dakhilas, or receipts for rent, a Mooktearnmah signed and recorded by the late Maharajah Sreesh Chunder, Bahadoor, as well as a petition and report signed in the name of the late Maharajah, which acknowledged the title of the Appellant's husband and herself to the land in question. No document was put in evidence anterior to [129] the alleged confirmatory Pottah of 1823. Six witnesses were examined. Four of these witnesses deposed to the signing and delivery of that instrument by Muddoo Soodun Sandial. Among the other witnesses, one proved the dakhilas for rent given by the late Zemindar, Mr. Harris; another, who was at the time in the Respondent's service as Mooktear, proved the signing the dakhila, which bore the name of the first Ijardar of the late Maharajah; and a third proved the signing and granting the three other dakhilas, bearing the name of the second Ijardar of the late Maharajah; and each of which dakhilas acknowledged the Mouroosee tenure, or Mouroosee jumma (perpetual rent), under which the land in question was held.

The hearing of the suit came on before Ray Ram Lockun Ghose, Bahadoor, the Principal Sudder Ameen, who considered the Pottah a forged document, and on the 19th of November, 1857, a decree was pronounced by him in favour of the Respondent at an enhanced rent of Rs. 822. 3., which enhanced rent the Appellant was decreed and ordered thereafter to pay in respect of the lands in question.

The Appellant appealed from this decree to the Zillah Court of Nuddea, and an appeal was also brought against a portion of the Sudder Ameen's decree by the Respondent.

The hearing of the two appeals took place on the 21st of July, 1858, when the Judge, Mr. A. Littledale, made a decree, the material part of which was in these terms:—"The Plaintiff sues to re-assess certain lands in the occupancy of Defendant, in accordance with the rates of the Pergunna. The Defendant denies his right to do so, on the ground of her holding [130] the lands under a Mocurrery lease, granted to her deceased husband's father in 1230 by a former proprietor, Muddoo Soodun Sandial, in recognition of a similar lease granted to Mr. Seaton before the Decennial Settlement, by the ancestors of the Plaintiff, who were at that time owners of the estate. The question admits of two points for inquiry. First, whether the validity of the Mocurrery lease granted in 1230 is satisfactorily proved; secondly, whether, irrespective of that lease, the right of Defendant to hold the lands without re-assessment is established. The objections taken by the Principal Sudder Ameen against the document, on account of incorrect spelling observable in it, are, in my opinion, weak and unimportant. It is urged on the part of the Rajah that it neither bears the seal of the grantor nor the names of any persons as subscribing witnesses. The first of these objections is of more weight than the second, and is entitled to consideration. As to the second, it is not usual for leases to be signed by witnesses. The document in question, according to the date of it, was written more than thirty years ago, and, considering the length of time that has elapsed since its alleged execution, the appearance of it is calculated to raise strong suspicion as to its ever having been written at that period; and unless satisfactorily supported by other evidence, I do not hold it in itself entitled to credit. Four witnesses have come forward to swear to its genuineness; but that circumstance alone throws suspicion upon it: for it cannot be considered otherwise than surprising that it should so happen, that after the lapse of more than thirty years there should be found four persons who all remember to have been present at the execution of a document, which

is not of such a very important nature as to cause [131] the recollection of it likely to be indelibly fixed on their memory; but, with the exception of the evidence of these witnesses, there is none of any other kind to support it. It is not shown to have been ever before produced; and there is not a document of any kind in which mention of it is made. Under these circumstances, I concur with the Principal Sudder Ameen in rejecting it as unworthy of credit. Coming now to the second point forming the subject of this issue, it is first argued on the part of the Defendant, that the Plaintiff is debarred from re-assessing the lands by reason of their being of the nature described in the fourth exception in section 26, Act, No. I., 1845. Of this there is no proof, the original lease under which the lands are said to have been granted not being forthcoming. The Pleader on the part of the Defendant next refers me to the Sudder Court's decision, in the case of Janubee Dasse, on the 27th May, 1848, p. 175, which he urges is of a nature very similar to the present suit. In that case the Plaintiff was not a purchaser at a sale made for arrears of revenue; whereas in this suit the plaintiff is the successor (by right of purchase) of one who was such, and consequently stands in his place, and must be held as entitled to exercise the same rights. Now, the simple question is whether (the authenticity of the alleged lease of 1230 by Muddoo Soodun Sandial, not being established) the Defendant can be considered to have proved her right to hold the lands on a fixed jumma, or not? She has produced no grant or document constituting the original Mocurrery tenure, and has failed to prove the payment of a fixed jumma for twelve consecutive years previous to the Decennial Settlement, or for a period of sixty years. Granted [132] that it has not been shown that Defendant has ever paid more than a jumma of Rs. 64. 1. 12., and that such has been stated to be the case by the Plaintiff's predecessor, Mrs. Harris, that cannot be, in the absence of all proof as to the lands having been held as Isteuraree or Mocurrery at a fixed jumma more than twelve years before the Decennial Settlement, or for sixty years at that rent, any bar to the Plaintiff's right to enhance the rent of the lands. The only documentary evidence produced in support of the payment of the alleged fixed jumma are seven dakhilas for a period commencing from 1250. I consider, therefore, that on this second point there is an entire failure of proof in favour of the Defendant, and that the Plaintiff's right to enhance the rent of the lands is clear:—and with the exception of a variation of the amount of that enhanced rent the Zillah Judge confirmed the Sudder Ameen's decree.

The Appellant presented a petition of special appeal to the Sudder Dewanny Adawlut, stating therein the following grounds of appeal:—First, that although the reasons contained in the decision of the Zillah Court for rejecting the Pottah of 1230 B.S. were defective and groundless; yet, independent of that, when possession from ancient times by payment of a Mocurrery rent had been proved, and the Pottah of 1230 could not but be deemed to be worthy of confirmation, then no assessment of rent could take place, either by law or justice. That, in fact, it clearly appeared that one fixed rent was uniformly paid from the time of Mr. Seaton, who was appointed Collector of Zillah Nuddea in 1797. That under such circumstances, a suit for assessment of rent could not, either by law or justice, be right or [133] proper. Second, that Mrs. Harris, of whose rights the Plaintiff was a private purchaser, had in her petition, dated 7th Bysack, 1251, distinctly acknowledged that, from the time of Mr. Seaton, the rents of this land had been regularly paid at Rs. 64. 1. 12.; consequently the Plaintiff, who represented her, could never possess the right to assess the rent. Third; that Maharajah Sreesh Chunder Roy, the father of the Plaintiff, had in a kyfeut dated the 6th Falgoun, 1253, and in a petition dated 18th Aughrum, 1252, after acknowledging the Mouroosee right and fixed rent, prayed to obtain the same, and for that reason the suit for assessment should be dismissed.

The hearing of the special appeal took place before Messrs. A. Sconce and H. V. Bayley, two of the Judges of the Sudder Dewanny Adawlut, and on the 26th of March, 1859, the following judgment was delivered:—The first point in the special appeal is, that as the under-tenure existed about the time of the Permanent Settlement, the Plaintiff could only carry an order for enhancement on proof that it was liable to be enhanced under the provisions of cl. I. sec. 51, Reg. VIII. of 1793. But this plea obviously falls from its own statement. The word used is "about," that is, it is assumed that the lands in question was first granted to Mr. Seaton, the Collector of

the district in 1797; but the Petitioner can only claim the support of the law quoted, on the assumption, that her tenure existed at the time of the Permanent Settlement, not seven years later. And, secondly, it is contended, that the suit is barred, as Plaintiff's predecessors in the estate admitted the existence of the tenure. But we find no admission to sustain this plea. Harris, a former proprietor, [134] once remarked in a petition, that the tenants had paid rent as they chose; and in another petition, the Plaintiff's father spoke of the tenure as a Mouroosee jummah; but we have no intimation at all that any of the proprietors of the estate had recognized the existence of the tenure under distinct terms as to the land comprised in it, and the rent which it bore.

As the rules of the Sudder Dewanny Court with respect to the value of the subject-matter in dispute prevented an application being made to that Court for leave to appeal to England, the Appellant, without applying there, presented a petition for leave to appeal to Her Majesty in Council, which, in the circumstances, was granted (see case reported on this point, *nom. Sree Mutty Ranee Surnomoye v. Maharajah Sutteeschunder Roy*, 8 Moore's Ind. App. Cases, 165).

The appeal came on in the first instance on the 28th and 30th days of November, 1863, when the genuineness of the original Pottah, dated the 23rd Bysack, 1230 (4th May, 1823,) being impeached by the Respondent as a fabricated document, their Lordships * directed the appeal to stand over for that document to be transmitted from India (see the cases of *Mussamat Khoor Komwur v. Baboo Moodnatain Singh*, 9 Moore's Ind. App. Cases, 10; *McCarthy v. Judah*, 12 Moore's P.C. Cases, 47; and *Mason v. The Att.-Gen. of Jamaica*, 4 Moore's P.C. Cases, 228, in which similar Orders to transmit original documents impeached, as in this case, were made). [135] This was accordingly done and the appeal was again argued.

The Attorney-General (Sir R. Palmer), and Mr. Leith, for the Appellant.—This question is of great importance, as it affects numerous other persons like the Appellant holding under ancient tenures similar to the one in suit. It is submitted, that the decrees of the Zillah Sudder Courts appealed from cannot be sustained. By those decrees it was declared, that the Plaintiff, a remote purchaser by private contract, deriving title through a purchase of the Zemindary at a public sale to realize arrears of Government revenue, was "entitled to exercise the same rights" as the last-mentioned purchaser, including the extraordinary powers given by the Regulations to purchasers at Government sales for arrears of revenue to avoid and annul sub-tenures created since the Decennial Settlement, but, even if the decree rightly decided the general principle, which we deny, it was wrong in applying the provisions of the public sale law contained in sec. 26 of Act, No. I. of 1845 of the Legislative Council, those provisions being restricted to purchasers of estates sold under that Act, which was not the case in respect to the Zemindary of the Respondent. Regulation XI. of 1822, was the sale law under which the Zemindary of the Respondent had been previously sold in the year 1823, to realize arrears of Government revenue, and from that Regulation the powers of the purchaser, Muddoo Soodun Sandial, to annul or avoid such tenures were exclusively derived. Two important considerations arise upon the construction of secs. 30, 32, and 33, of Reg. XI. of 1822. First, it is a penal Regulation, [136] and must be construed strictly, or equitably in favour of the sub-tenant. Secondly, it declares that the original purchaser "may" exercise this extraordinary power, but this discretion, we submit, must be within a reasonable time after the purchase, and that such right would be absolutely barred after twelve years by the Regulation of Limitation III. of 1793, sec. 14; but Reg. XI. of 1822, which was in force at the time of the sale, has been repealed by Act, No. XII. of 1841, sec. I. without any attempt by the original purchaser to exercise the powers conferred by the last-mentioned Regulation, long before the Plaintiff took any step to exercise the same. The new or substituted powers given by that Act are restricted to purchasers of estates sold under it. The *onus* was upon the Respondent, to prove

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Taylor Coleridge. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

that as Zemindar he was entitled to enhance the rent of this ancient tenure, Reg. VIII. 1793, sec. 51, cl. 2, which he failed to do.

Next, with respect to the merits. It appears by the evidence that the lands had always been held as Mouroosee Istemraree by the Respondent and those under whom she derived title, as an ancient hereditary tenure created previous to the Decennial Settlement, subject only to the payment to the Zemindar and of an uniform fixed rent, and the same rent has also been paid by five tenants successively since Seaton's grant. The Appellant has no power of enhancing a fixed rent, S.D.A. Rep., Vol. 11. p. 515, year 1848; S.D.A. Rep., Vol. 16, p. 365, year 1853. Again, the purchaser of the Zemindary at the public sale and those who subsequently became proprietors thereof, from whom the Respondent derived title, have admitted and confirmed [137] the ancient hereditary title of the Appellant to hold the lands in question of the Zemindary at a uniform invariable rent, payable to the Zemindar. A possessory title is made out by the Appellant, and the Respondent is estopped by his own acts and proceedings from disputing the right and title of the Appellant to hold the lands as an ancient hereditary tenure at a uniform fixed rent.

With regard to the evidence, the case divides itself into two heads, first under the confirmatory Pottah, and secondly, the evidence of tenure, independently of it. Now, we submit that the confirmatory Pottah of Muddoo Soodun Sandial, after his purchase at the public sale, was sufficiently proved by the evidence of the attesting witnesses, and moreover that no evidence was given by the Respondent to contradict them, or to show that the signature to the Pottah was not in the grantor's handwriting. But secondly, without such Pottah, even if it be a fabricated document, the other evidence was sufficient to show that the lands were held at an unvarying yearly rent.

Mr. Forsyth, Q.C., and Mr. Field, Q.C., for the Respondent.—First, the Respondent deriving his title under Muddoo Soodun Sandial, the purchaser at a Government sale under Ben. Reg. XI. of 1822, for arrears of revenue, is entitled to enhance the rents of the lands in question, and such lands were liable to be assessed by the Respondent at the current Pergunnah rates. The Respondent has acquired all the rights which Muddoo Soodun Sandial had when he purchased the Zemindary in 1823. By Reg. XLIV. of 1793, sec. 5, such a tenure upon the Government sale, ceased [138] *ipso facto* to exist without any act being done by the purchaser; and the Respondent, as subsequent purchaser by private contract, is entitled to avail himself of that enactment, as he has the same rights as the "purchaser at public sale" mentioned in the 5th section, and by this Regulation, which is not repealed, to cancel the lease. This lease is not, as contended by the Appellant, a Mouroosee, or inheritable tenure. In the answer the Appellant calls the lands Mocurrery (fixed) and Istemraree (perpetual). Wilson's Glos. It may be that the Court below was wrong in applying the provisions of sec. 26 of the Act, No. I. of 1845, to this case, as it is restricted to sales for Government arrears made under that Act, and, therefore, could not apply to a sale made in 1823, but that arose from the Appellant referring to that Act in her answer. The cases cited by the Appellant do not apply.

Second, there is no evidence of a grant of any Pottah at a fixed and invariable rent to Mr. Seaton at any time before or since the Decennial Settlement. The alleged grant of a confirmatory Pottah by Moodoo Soodun Sandial bears on the face of it evidence of being a fabricated document, and the witnesses examined in support of it, as was held by the Court below, are wholly unworthy of credit. If the Pottah was not made previous to the sale, the purchaser and those claiming under him hold the Zemindary freed of the tenure.

The Attorney-General in reply.—Section 5 of Reg. XLIV. of 1793, which the Respondent relies on as having *ipso facto*, upon the sale of the Zemindary in 1823, cancelled the [139] Mouroosee Istemraree Pottah under which we hold, is qualified by section 7 of the same Regulation, and at the most, according to a strict construction of those sections, empowers the purchaser to enhance the rent upon equitable principles. In fact, that Regulation was passed to free purchasers from improvident grants made by Talookdars, and to set them free from such obligations. But section 5 of that Regulation if not expressly, is impliedly, repealed by Reg. V. of 1812, sec. 9, and XI. of 1822, sec. 30, 22 and 33, so far as respects hereditary tenures giving a transferable right. The hardship upon grantees and subordinate interests by

Reg. XLIV. of 1793 was so great that an Act was passed in 1859 to modify it. That Act, however, was not in force when this decree was made. Supposing the confirmatory Pottah to be forged and the evidence of the witnesses in support thereof unworthy of credit, that instrument may be left out of consideration, as the other independent evidence of this property being an ancient tenure held at an invariable fixed rent is conclusive.

The judgment of the Lords of the Judicial Committee, after being reserved, was now delivered by

The Right Hon. the Lord Justice Turner (July 23, 1861). This was an appeal from a decree of the Sudder Dewanny Adawlut at Calcutta of the 26th of March, 1859, from a decree of the Judge of the Zillah Court of Nuddea, in Bengal, of the 21st of July, 1858, confirming substantially, a decree of the Principal Sudder Ameen of Nuddea, in Bengal, of the 19th of November, 1857. The suit was originally brought [140] by the Respondent's father, and the relations of the parties to each other were those of Zemindar and Talookdar, the Appellant holding as mesne tenant a portion of the Zemindary. The object of the suit is to enhance the rent at which the Appellant holds that portion, and no question is made upon the Respondent's general title, nor upon the relation in which the Appellant stands towards him. She does not dispute his right, under other circumstances, to bring this sort of action against her, and their Lordships, therefore, do not enter into the question whether the action has been properly so brought. They give no opinion on that point. What the Appellant insists upon is, that this present action must fail because her tenure is hereditary and at a fixed rent, which the Zemindar has no power to enhance.

It will be convenient in the first place to state what, upon the evidence, their Lordships consider to be established as to the Appellant's title, omitting for the present some parts of the evidence on which she relies, and to which too much importance has been, as it appears to their Lordships, attached in the Courts below. The interest which she represents was first created by grant in favour of a Mr. Seaton at some date prior to the commencement of this century. On parts of the land comprised within his grant he laid out gardens and erected factories and other buildings, but there is no direct evidence that the grant was made for these purposes. He appears to have been a Civil servant of the East India Company; and after some years, when leaving India for England, he sold the whole property to the grandfather of the Appellant's husband; on his death it [141] descended to the father, and thence in due course to her husband, from whom she has inherited it as his widow. A portion of the land during this course of years has been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent has always been paid. Upon this state of facts the Appellant contends that she is not merely a Mouroosee tenant, that is, one holding by hereditary tenure, but that she holds at a fixed rent, and under such circumstances as protect her from any enhancement of it.

The state of facts on the part of the Respondent is this: It appears that while Hurrenauth Roy, Bahadoor, the father of the Appellant's husband, was in possession, the Government revenue payable by the Zemindary fell into arrear, and the property was, therefore, put up to public auction; one Muddoo Soodun Sandial became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time he sold the Zemindary by private contract to Mr. Harris, from whom, on his death, it passed to his widow; from her it was purchased by the Maharajah Srees Chunder Roy, now deceased, who in August 1856, commenced the present suit, and on his death the Respondent, inheriting the Zemindary, has continued it.

Upon this state of facts the Respondent contends, that as he claims under Muddoo Soodun Sandial, he has acquired all rights which Muddoo Soodun Sandial had, and that as he purchased at a Government auction, he was entitled by the Regulations then in [142] force to cancel the lease under which the Appellant's ancestor was holding, and of course to impose new terms as to the rent.

It is, as it seems to their Lordships, necessary to the Respondent's success, that Muddoo Soodun Sandial should have had in him, at the time when he sold to Mr.

Harris, the rights above stated, so that he himself might at that time have enhanced the rent of these lands: that these rights should have passed to Mr. Harris, and the subsequent purchasers of the property down to and including the Respondent's father; and that they either could not have been or have not been in fact waived by the Respondent's father or by any one of the prior owners, for unless this be the case, their Lordships see no ground on which the hereditary tenure could be disturbed or the rent enhanced.

The reliance of the Respondent is on some one of the Regulations which have been made at different times in regard to purchasers at Government auction sales in the case of Zemindaries, from which the Government income has not been duly paid. These Regulations have been couched in different language, but all with the same policy in view, as regards the present question. It has been assumed, as the foundation of them, that the default of the Zemindar may have been occasioned by improvident grants of Talooks and other subordinate tenures at inadequate rents: that this was in breach of the condition on which the fund was originally created by the Sovereign Power; and the purchaser, therefore, has been set free from the obligation of these grants, with certain specified exceptions, and with certain limita-^[143]tions of his power as to new tenancies to be created. These laws, however, cannot but occasionally operate very hardly on the grantees of subordinate interests, and they have, therefore, been materially modified by an Act of 1859, not in force when this decree was made, and not, therefore, directly applicable to it; but such Regulations must on general principles receive a strict construction. There seems to have been doubt in the minds of the Respondent's advisers on which of these Regulations his case could safely be rested, and it would appear from the proceedings in the Court below that it was intended to rest it on Regulation Act, No. 1 of 1845, which certainly would not have supported it, because the sale relied on was not effected under that Regulation, and its provisions are limited to sales so effected. Upon the argument before their Lordships the Counsel for the Respondent relied on the fifth section of Regulation XLIV. of 1793, which is the earliest of the Regulations on this subject, and they contended that, although subsequent Regulations upon the subject have been passed in different language and repealed, this fifth section of Regulation XLIV., 1793, has never been repealed, but was in force at the time when the sale in question was made and this action was commenced. Whether upon the true construction of all the Regulations taken together this particular section ought to be taken to have been repealed or not, their Lordships did not think it necessary to determine. They assume in favour of the Respondent that it stands unrepealed and in full force, and will deal with the case upon that footing. The language of this section is no doubt favourable to the Respondent's case. It provides that when a Zemindary is sold at a public ^[144] sale for discharge of arrears due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent Talookdars, whose Talooks may be situated in the lands sold, as also all leases to under-farmers and Pottahs to Ryots (with the exception of the engagements, Pottahs, and leases specified in sections vii. and viii.), shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent Talookdars, and from the Ryots or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the Pergunnah or District in which such lands may be situated had the engagements so cancelled never existed." But the seventh section of this same Regulation provides, that this is not to authorize the assessment of any increase upon the lands of such dependent Talookdars, as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case, on which they think it safe to rely, see their way to the belief that the Appellant brings her case within the seventh section, but they cite it because it may have a bearing on the construction of the language of the fifth section. The Respondent contends that by the operation of the words "stands cancelled from the day of sale," the existing interests of the Talookdar, *ipso facto*, ceased to exist, without any act done by the purchaser; that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession ^[145] had remained in the Talookdar and those claiming under him un-

disturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the Zemindar for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think, that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same section, and from the seventh section, which creates an exception out of the provisions of that section. English lawyers are familiar with this principle of construction applied as early as the time of Lord Coke (see 1st Inst. 45) to the disabling Statute of 1st Eliz., c. xiv. sec. 5, and in several modern reported cases between landlord and tenant, on clauses of forfeiture in leases. Words which make a Bishop's grant "utterly void and of none effect to all intents, constructions, and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease, that it should be void altogether in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which for its justice, reasonableness, and convenience, must be considered of universal application. In the present case the object of the Government was that [146] the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the Zemindars who had made default; but cases of default might often arise where no improvident grant had been made, where the Talookdars and the Ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other cause, —in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the Talookdars and the Ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent, "according to the established usages and rates of the Pergunnah or district;" words in themselves showing, that the section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that in terms this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in section seven shows, that what was aimed at by section five, was not the destruction of [147] tenure, but the increase of rent, under certain specified and equitable limitations.

The conclusion at which their Lordships have arrived as to the construction of the section is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the Pergunnah, or District, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none, when the existing rent was already according to the usages and rate of the Pergunnah.

This conclusion is of great importance in the determination of the remaining questions. The sale to Muddoo Soodun Sandial, according to the Respondent's own case, took place some time before 1823, and he found those under whom the Appellant claims holding the land at an old rent of Rs. 64. 1a. 12p.; he did not attempt to disturb the occupation or increase this rent, but received it during all the time he remained owner. He sold by private contract to Mr. Harris, from whom it passed to his widow, Mrs. Harris, and from her again by private contract to the Respondent's father, Maharajah Sreesh Chunder Roy, as has been already stated. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure—more than sixty years ago), the same rent has always

been paid; and there is no evidence that when first imposed—nay, even when the purchase was made, it was not a perfectly adequate rent for the [148] property. Great changes in the value of property have now arisen, and the Respondent demands by his plaint an annual rent of Rs. 1470, or nearly twenty-three times the amount of the original rent, according, as he states it, to the actual rate current in the village.

If the section in question did not authorize the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised that option in favour of the Talookdar; and even if the same rights passed from him unimpaired to Mr. Harris, and in succession to those who claim under him, the evidence is equally strong—nay, as regards Mr. Harris personally, it is stronger. It is, therefore, unnecessary to decide whether the section is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the Zemindary, which passed to subsequent purchasers. Their Lordships, moreover, observe that the power given is to collect what the former proprietor would have been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and, as before remarked, in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him. Their Lordships, however, pronounce no opinion on this question, it not being necessary to decide it. They say no more than that a construction which would render the title to property unnecessarily uncertain, ought not, in [149] their judgment, to be given to a power of this description.

On examining the Regulations their Lordships are satisfied that the Respondent's case can rest only on the powers given by the section in question; and they are of opinion that those powers, assuming them to be in force, will not support the present action. They are glad to find that it is not their duty to support a claim which appears to them to be unjust. During the long period for which this property has been held at a small unvarying rent, it has been bought and sold, and changes and improvements have been made, no doubt at a considerable expense, and upon the faith of the rent to the Zemindar continuing unchanged: he has purchased while that state of things existed, and it must be presumed for a price calculated accordingly; and it is manifestly unjust that he should be allowed to disturb it.

It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the Appellant, or a confirmatory Pottah produced by her as having been granted by Muddoo Soodun Sandial, which, if received by the Courts below, would have concluded the case in her favour. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the Pottah as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to [150] the case itself; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to tender to Her Majesty, which will be that the appeal be sustained, the decrees complained of reversed, the plaint in the suit dismissed, and any costs which may have been paid by the Appellant in the Courts below re-funded, but that no costs of the appeal, or of any of the proceedings below, be allowed to the Appellant.

[See *Serraji Vijaya Raghunadha Valoji Kristnan Golopar v. Chinna Nayana Chetti*, 1864, 10 Moo. Ind. App. 162; *Baboo Dhunput Singh v. Gooman Singh*, 1867, 11 Moo. Ind. App. 461; *Rajah Sattosurrun Ghosal v. Moheshchunder Mitter*, 1868, 12 Moo. Ind. App. 263; *Khajah Assanoollah v. Obhoy Chunder Roy*, 1870, 13 Moo. Ind. App. 326; *Rajah Leelanund Singh Bahadoor v. Thakoor Munoorunjun Singh*, 1873, L.R. Ind. App. Sup. vol. 187, 188.]

[151] SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR.—*Appellant*; CHINNA NAYANA CHETTI.—*Respondent* * [Dec. 12, 13, 1864].

On Appeal from the Sudder Dewanny Adawlut at Madras.

Suit by A. to recover real estate in the possession of B. and of his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by A.'s ancestors, and that B. and those claiming under him were only usufructory mortgagees in possession. Held, that the *onus probandi* was on A., who could not succeed by the strength of his own title, and not by reason of the weakness of B.'s title [10 Moo. Ind. App. 160].

If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and if satisfied, adjudicate thereon [10 Moo. Ind. App. 162].

Act No. XVI. of 1853, c. 4, enacts, that no special appeal shall lie, nor shall any decision be reversed, altered, or remanded by any of the Sudder Courts upon the ground that the decision of any question of fact is contrary to, or not warranted by, evidence taken, or any probability deduced from the record. Held, that such enactment was to be carried to its full legitimate extent, except where the decree of the inferior Court is founded on an inference of law, when a special appeal lies to the Sudder Dewanny Adawlut [10 Moo. Ind. App. 163, 164].

Thus when the Judge of the inferior Court stated that the inclination of his opinion was, that there had been a sale, but that the Defendant could not rely upon that defence, because he had attempted to strengthen his case by a forged Bill of sale, and that the estate, if not sold, must have been mortgaged, as insisted by the Plaintiff, and thereupon decided without further proof that the estate was mortgaged; such judgment was held not to be a finding of fact, but an inference of law, and analogous to a misdirection of a Judge to a jury, and, in such circumstances, a special appeal to the Sudder Dewanny Adawlut lies from such decree.

The suit was brought in the subordinate Court of Combaconum by the Appellant, the Zemindar of Madukur, against the Respondent and others, to [152] recover the village of Udayamarttandapuram, which had been in the uninterrupted possession of the Respondent and those under whom he claimed for upwards of forty-four years before the institution of the suit.

The case of the Appellant was, that one Tayilaya his grandmother, in the year 1805, mortgaged the village and the title deeds to one Palaniyappa Chetti for 300 pons, under a mortgage Bond, and put him in possession, stipulating that he should enjoy the same in lieu of interest, and restore the village on repayment of the mortgage money. The Respondent, on the other hand, relied on his length of possession, contending that Palaniyappa Chetti, through whom he claimed, became the absolute owner of the village under a Bill of sale, dated the 15th of May, 1805, executed by Valoji Maikken Gopalar, the Appellant's grandfather, in consideration of the sum of 250 pons, and he submitted, that the burthen of proof was on the Appellant to prove the allegation that the village was, as he alleged, mortgaged and not sold.

The plaint was filed in September, 1849, against Parvatiachi, the widow of Palaniyappa Chetti, Selvanayaka Tevan, his heir, Selvanayaka Chetti, Subba Chetti, and Vaidilingar Chetti, the sons of one Gopala Chetti, and the Respondent, Chinna Nayana Chetti. The plaint alleged that Tayilaya, through whom the

* Present.—Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (the Right Hon. Sir John Romilly). Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Plaintiff traced his title, had, in the year 1805, [153] mortgaged the estate to Palaniyappa Chetti, and that the alleged Bill of sale in that year by the Appellant's grandfather, Valoji Maikken Gopalar, was a forgery, as he had died in 1799, before the date of the alleged Bill of sale, and prayed for the delivery back of the village on repayment of the mortgage money.

The Respondent alone appeared, and, by his answer, relied on the fact that the estate in question had not been in the possession of the Appellant or his ancestors for the last forty-four years, but had been in the possession during that time, with the mirassi and other rights, of the first Defendant's husband, and then of the third Defendant's father, afterwards of the third Defendant, and the Respondent successively; that the Appellant's grandfather, Valoji Maikken Gopalar, had sold the village to Palaniyappa Chetti, by a Bill of sale dated the 17th of May, 1805, for 250 pons, and that the village had been registered in Fusli 1215 (1805), in his name, as the sole proprietor; that as the second Defendant was a minor, his mother and guardian, Parvatattu Achi, sold the village to the third Defendant's father, Gopala Chetti, on the 18th of February, 1813, for 250 pons, put him in possession thereof, and got it registered in his name as the sole proprietor; that Gopala Chetti, on the 16th of July, 1837, sold it to his son, the third Defendant, who continued in possession for a great number of years, having improved it at a great outlay; that the estate, having been for a long time in Defendant's possession by virtue of a mortgage lien derived from the third Defendant, was afterwards sold to him on the 13th of July, 1845, for Rs. 12,250, under a registered Bill of sale, and that the Respondent had further repaired and improved it at a large outlay. It was [154] further insisted, that the suit was barred by cl. 4, sec. 18, Mad. Reg. II. of 1802; and that that Plaintiff's allegation that his grandfather died in 1799 was not true, and that he was alive in the year 1805.

The cause being at issue the Appellant examined witnesses to prove the alleged mortgage by Tayilaya to Palaniyappa Chetti, and of the demands and promises at different times to restore the village. The Respondent put in evidence, among other documents, the alleged Bill of sale by Valoji Maikken Gopalar to Palaniyappa Chetti, of the estate in question, dated the 15th of May, 1805, and the receipt of the same date. As the witnesses to this instrument were dead, three witnesses were examined to prove some of the attesting witnesses' handwriting. These instruments were challenged by the Appellant as forgeries.

The acting Judge of the subordinate Court of Combaconum (Mr. G. M. Swinton), by his decree, dated the 17th of November, 1851, declared that the estate was only mortgaged, and ordered the Respondent to relinquish the village to the Appellant on receipt of 300 pons, and to pay the Appellant's costs.

The Respondent appealed from his decision to the Civil Court of Combaconum, and among his grounds of appeal, again relied on the Bill of sale in 1805.

On the 26th of October, 1854, Mr. Scott, the Judge of the Civil Court, gave judgment on the appeal as follows. "I agree with the acting subordinate Judge in thinking that the Plaintiff's grandfather, Valoji Maikken Gopalar died before the date of the exhibits 3 and 4 (the Bill of sale and receipt of the 15th of May, 1805), and consequently that these documents must be considered as fabrications, the assumption now advanced by the Appellant, that [155] they were in reality executed by Valoji's younger brother, but were drawn up in the name of the elder, because the mirass was still registered in his name, being without any proof whatever. The Appellant has, therefore, failed to show that the village was sold to Palaniyappa Chetti, and if it was not sold, it must have been mortgaged, as contended by the Plaintiff, and I must, therefore, affirm that part of the decree of the lower Court which decides that the village was mortgaged. At the same time, judging from the various documents obtained by the Appellant from the Collector's Office, I am inclined to think that the village was sold, and that the Bill of sale has been lost, and I am of opinion, that the Appellant has broken down his own case by making it rest on title deeds that are evidently fabrication; he has resorted to forgery to establish his claims, and he must take the consequences of his own act. The Court is not at liberty to assume for him a position which he has himself rejected. Although, therefore, I affirm that part of the subordinate Judge's decree, I cannot concur with him in thinking that either justice or the practice of the Courts requires

that a village, so greatly improved as to be worth upwards of Rs. 12,000, should be delivered up to the mortgagor for less than a twentieth part of the sum. The mortgagee is entitled to be remunerated for the improvements he has made, but for the purpose of ascertaining what they are, and in order that a fresh decree may be passed on that point only, I remand the suit to the Court of original jurisdiction. The parties will pay their own costs of appeal."

The Respondent presented a special appeal to the Sudder Court against the above decree of the Civil [156] Court, but it was dismissed on the ground that the Court could not admit a special appeal, while the suit was remanded.

The suit being remanded to the subordinate Court, for the purpose of taking evidence in regard to the improvements by the mortgagee and those claiming under him, witnesses were called for that purpose by the Respondent.

The subordinate Judge (Mr. Innes), by his revised decree, decided that the decree originally passed should stand without alteration.

The Respondent appealed from this revised decree to the Civil Court, but the Civil Court dismissed such appeal.

Whereupon the Respondent presented a petition of special appeal to the Sudder Court for the following reasons: that the decree in the appeal which dealt with the title to the property, was erroneous. That the Civil Judge would evidently have found in Petitioner's favour, only for the Bill of sale and receipt. That no attempt had been made to show that these documents, if forgeries, were fabricated by him, and he submitted that his title, which was admitted by the Civil Judge to be sufficiently proved from other sources, could not be vitiated by the mere fact that two fabricated documents were handed over to him when he purchased the property. That the Plaintiff in ejectment must recover upon the strength of his own title, and that this had been found against him by the Civil Judge. That the Plaintiff's claim was barred by the Regulation of Limitations. That the decree of the Civil Judge was also erroneous, since the evidence proved that considerable sums had been laid out in improve-[157]-ments, and that mere variance, or vagueness, as to the precise amount, did not justify him in utterly rejecting the claim.

On the 6th of September, 1858, an Order was made by the Sudder Court, admitting the special appeal.

After hearing the appeal on the 5th of March, 1859, the Judges of the Sudder Court (consisting of Messrs. Hooper, Strange, and Philips) reversed the decrees of the Court below and dismissed the suit. The material part of the decree was in these terms:—"In a case like the present, where there has been lengthened occupancy, with repeated transfer from one party to another, it was imperative on the Plaintiff to show that, during this long interval, his alleged rights had been acknowledged; but it is plain from the decree of the Civil Judge that he has not accepted whatever evidence the Plaintiff may have adduced in proof of such recognition of title in him. The Civil Judge, in concurring with the Subordinate Judge that the Defendant's exhibits, Nos. 3 and 4 are forgeries, observes, that as the Defendant has failed to show that the land was sold to Palaniyappa Chetti, it followed that he must have received it on mortgage. The Sudder Adawlut cannot concur in such a conclusion. Indeed, in the next succeeding paragraph the Civil Judge himself demonstrates it to be untenable. He there records his opinion, based upon various documents obtained by the Defendant from the Collector's office, that the land actually was sold, that the Bill of sale has been lost, and that the Defendant has propped up his case with fabricated documents. The Civil Judge has thought that such resort on his part pre-[158]-cludes him from giving a decree in his favour. It is apparent to the Sudder Court that, owing to a presumed legal bar, the Civil Judge has given a decision on a point of fact against his own conviction. The Sudder Adawlut are, therefore, of opinion that there is no such bar in the case. The land has passed from hand to hand; and it is hard to fix the presumed forgeries upon the Defendant. He may very well have derived the documents as the muniments of title from the last vendor. Nor, in a case like the present, should the Plaintiff gain his cause upon the weakness of the evidence on the other side. But, as above observed, the Judge has found documentary evidence derived out of the Collector's records, establishing, in his opinion, the fact of the disputed sale; and it is clear to the Sudder Adawlut that the Defendant is entitled to the benefit of this opinion."

From this decree the present appeal was brought.

The Attorney-General (Sir R. Palmer) and Mr. W. W. Mackeson, for the Appellant.

First. A special appeal ought not to have been admitted by the Sudder Court, as none of the grounds allowed by Act, No. XVI. of 1853, with respect to special appeals, existed. It was not competent for that Court to reverse, or alter, the decree of the Civil Court, on any question of fact, upon the assumption that such decisions were contrary to or not warranted by the evidence taken in the suit, or upon any probabilities suggested by the Sudder Court.

Secondly, upon the merits, we submit the decree was erroneous. The estate was mortgaged by the Appellant's grandmother to Palaniyappa Chetti in the [159] year 1805, and could not have been lawfully sold by her. The right of redemption was kept alive by demands upon and admission made by the mortgagee, or those claiming under him ever since. The Bill of sale and the receipt of the 15th of May, 1805, were satisfactorily proved to be forgeries, and there is no other evidence from which any valid sale could be established or even presumed.

Sir Hugh Cairns, Q.C., and Mr. Pontifex, appeared for the Respondent.

Their Lordships, however, without calling upon them, delivered judgment by

The Master of the Rolls (The Rt. Hon. Sir John Romilly).—Their Lordships are of opinion that the decree of the Sudder Dewanny Adawlut must be affirmed.

Two questions are raised in this appeal: first, whether the Sudder Dewanny Adawlut had power under the Act, No. XVI. of 1853, to permit a special appeal in this case: and secondly, whether on the merits, the decision of the inferior Court was correct. On both these points their Lordships concur with the Sudder Dewanny Adawlut: but in order to explain the view they take of the application of the Act, No. XVI. of 1853 to this case, it will be convenient to refer to the facts of this appeal, and in doing so to consider the merits of the case.

It is a suit instituted by the Appellant in September, 1849, to recover possession of a village which has been held without disturbance since the year 1805. The Appellant alleges, that in the month of May in that year Tayilaya, the widow of the former owner, Valoji Gopalar, who had no power [160] to sell, made a mortgage of this village for 300 pons to Palaniyappa Chetti, and put him into possession on an agreement that the usufruct of the village should be set off as against the interest on the mortgage.

To succeed in such a case as this, it is obvious that the burthen of proof lies on the Appellant.

A Plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of his opponent's. It would be contrary to all principles of law and justice, that upon such an allegation, a Plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so to dispossess him of the land in question.

The first material thing, therefore, is to examine how far the Plaintiff's evidence establishes the fact of the mortgage. The original mortgage is not produced; no copy of it is produced; it never was registered. The whole of the evidence respecting it is that of three witnesses, Ananda Pillai, 76 years, Tambi Servagaram, sixty-eight or sixty-nine years, and Venkateshia, Ayyar, seventy years, who all swear that a mortgage of the village in question, for 300 pons, was executed by Tayilaya, in her house, at 10 or 11 o'clock in the morning, and that she received the 300 pons in Tanjore fanams.

Notwithstanding the minute accuracy of these witnesses' recollection, their Lordships are of opinion, that it would be too dangerous to act upon this [161] evidence, if unsupported by any other testimony, in order to disturb an uninterrupted possession of forty-four years.

There is also evidence of some applications by the Plaintiff, and by the preceding alleged owners of the equity of redemption, to redeem the mortgage. But with this exception, the Plaintiff's case is in fact wholly unsupported by any other evidence adduced by him. The Court of original jurisdiction seems indeed principally to have relied on the Defendant's evidence for the support of the Plaintiff's case. It

may undoubtedly sometimes happen that the evidence adduced by the Defendant, instead of supporting his case, may establish that of his adversary. It remains to be examined whether that is so in the present instance. The Defendant alleges that Valoji Gopalar sold the village to Palaniyappa Chetti, through whom the Defendant claims. He puts in evidence a Bill of sale purporting to be executed by Valoji Gopalar and supports it by many witnesses. This document is clearly shown to have been a forgery, and it is not only sufficient to destroy this supposed Bill of sale, but to throw discredit on the oral testimony which the Defendant adduces. But their Lordships are of opinion that it goes no farther, and that it does not follow, because the Bill of sale adduced by the Defendants is forged, that the evidence adduced by the Plaintiff must be correct. It might be possibly an advantageous rule if, as Mr. Scott expresses in his judgment, that where a party "has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected" (ante [10 Moo. Ind. App.], p. 155).

[162] But their Lordships are unable to arrive at that conclusion, and are apprehensive that if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party. We think also that in this case, even if this rule were adopted, it is pushed too far, as, though the Bill of sale is found to have been forged, the knowledge of the forgery is not brought home to the Defendant. We find also in a recent case, *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy* (ante [10 Moo. Ind. App.], p. 124), this Committee gave effect to the Defendant's title, although a document by which she sought to strengthen it was found to be a forgery.

The evidence which is not susceptible of being forged is *prima facie* strongly in favour of the Defendant.

Possession of the village, by persons through whom the Defendant claims, is proved by accounts registered in the years 1805, 1806, 1807, 1829, 1839, 1844. An arzee of 23rd of March, 1816, addressed by the Tashildar of Mannargudi to the Collector of Tanjore, and the answer of the Collector of the 2nd of April following, speaks distinctly of the village having been sold to Gopalar Chetti in 1804, a year previous to the period alleged by the Plaintiff as the date of the mortgage by the Tayilaya.

We think the preponderance of evidence is in favour of the Defendant, even if the burthen of proof lay on him. However much the want of trustworthiness in the evidence of cases from India is to be regretted, we cannot by reason of the proof that a document adduced by one party is forged, transfer the property in which he and those through whom he [163] claims have been in possession at the date of the suit for forty-four years, to another, who has not, in the opinion of their Lordships, established any right to it himself. If, therefore, the case had come before their Lordships, unfettered by any question on the Act, No. XVI. of 1853, they would have had no hesitation, in concurring with the Sudder Dewanny Adawlut, in holding that the Plaintiff had not established his case, and that his plaint ought to be dismissed.

The remaining point on which the Appellant mainly relies is, however, one of great importance; and, if determined in his favour, supersedes the question of merits.

The point is that by reason of the proviso in the 4th paragraph of the 4th clause of the Act, No. XVI. of 1853, the Sudder Dewanny Adawlut had no power to admit the special appeal. The words of the clause are these: "Provided always, that no such special appeal shall lie, nor shall any such decision be reversed, altered, or remanded by any of the said Sudder Courts, upon the ground that the decision of any question of fact is contrary to or not warranted by the evidence ~~only~~ taken in the cause, or any probability deduced from the record."

Their Lordships think it of great importance that this provision should be carried to its full legitimate extent, and that no appeal should be allowed on account of difference of opinion as to the value of evidence. But their Lordships concur with the Sudder Dewanny Adawlut that this is not the present case. Mr. Scott, whose judgment is appealed from to the Sudder Court, does not find, as a fact, that the Plaintiff had proved the mortgage he alleged. On the contrary, he states the inclination of his opinion [164] to be, that the evidence proved a sale, but that the

Defendant was not at liberty to rely on that evidence by reason of his having adduced and relied on a forged Bill of sale. What Mr. Scott does find is a conclusion of law. His words are these: "The Appellant has failed to show that the village was sold to Palaniyappa Chetti, and if it was not sold, it must have been mortgaged, as contended by the Plaintiff, and I must, therefore, affirm that part of the decree of the lower Court which decides that the village was mortgaged" (ante [10 Moo. Ind. App.], p. 155).

The Sudder Dewanny Adawlut considered this not to be a finding of fact, but an inference of law, and accordingly allowed a special appeal. Their Lordships concur in this view. By way of testing the accuracy of it, it may be supposed that the case has been tried before a jury in this country, and that the Judge had directed the jury in the words of the Civil Judge which I have just read, namely: "The Appellant has failed to show that the village was sold to Palaniyappa Chetti, and if it was not sold it must have been mortgaged, as contended by the Plaintiff. It is your duty, therefore, to find that the village was mortgaged."

Their Lordships entertain no doubt that a Bill of exception or misdirection to the jury would have been sustained if such direction had been given. That is, that such a statement would have constituted a misdirection in point of law, upon the reliance of which, the jury found the fact of the mortgage.

Their Lordships, therefore, are of opinion, that the Act, No. XVI. of 1853, does not prevent a special [165] appeal in this case, and that the Sudder Dewanny Adawlut was right in admitting the appeal, and dismissing the Plaintiff's plaint. This appeal will be dismissed, with costs.

JOSIAH PATRICK WISE and AYNUN BEBEE,—*Appellants*; BHOOBUN MOYEE DEBIA CHOWDRAINEE and RAJENDUR KISHORE ACHARJ,—*Respondents* * [Feb. 24 and 26, 1863; March 1 and 2, 1865].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

A purchaser of a Zemindary at a Government sale under Ben. Reg. XI. of 1822, to satisfy arrears of revenue, is entitled as purchaser, first, to immediate possession of such lands as were at the time of the sale in the possession of the Zemindary; and secondly, under secs. 30, 32, and 33 of that Regulation, to set aside by suit all sub-tenures created since the Decennial Settlement by the Zemindar last seized, or his predecessors [16 Moo. Ind. App. 168].

Mouzahs, forming a Shikmee Talook before the Decennial Settlement and held of the Zemindar by Mocurrery tenure at a fixed rent, are not liable to redemption by a purchaser under Reg. XI. of 1822, secs. 30, 32, and 33.

A sale took place in 1833. Possession of the Mouzahs was taken from the purchaser in 1841, who shortly afterwards died, leaving a widow, who, under a power from her deceased husband, adopted an infant son. In 1853 she instituted a suit for recovery of the Mouzahs. Held that the death of the purchaser and minority of the heir took the case out of the Ben. Reg. of Limitations III. of 1793 [10 Moo. Ind. App. 170].

Although in Indian proceedings the presumption in favour of the genuineness of documentary evidence is very weak, yet there is no presumption in favour of forgery [10 Moo. Ind. App. 173].

Thus, when a long series of documents are produced, showing a reasonable origin

* Present at the hearing of the first appeal: Members of the Judicial Committee. —The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge. Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

At the second appeal: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner. Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

of title, nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability must be very strong to counterbalance the weight of such evidence.

These were two appeals by the same parties from decrees of the Sudder Dewanny Adawlut. The first [166] appeal was brought from a decree of the Sudder Dewanny Adawlut of Calcutta, dated the 30th of July, 1858, which reversed a decree of the Zillah Court of Mymensingh in a suit instituted by the second Respondent to obtain possession and eject the Appellants from twelve and a half annas shares of mouzahs, Dakin Khalikaprosad Surrabad, and other mouzahs, which were held together as a Shikmee Talook, dependent on the Zemindary, Tappala Cooreekhuy, under an ancient hereditary Mocurrery tenure, at a fixed and perpetual annual jumma, reserved and made payable by the Talookdars to the Zemindar for the time. The second appeal was from a decree of the same Court of the same date, made in another suit brought by the first Respondent to recover an eight annas share of part of the same mouzahs.

The two suits, the subject of the appeals, were in substance identical, the parties being the same, and, although relating to different parts of the property, were under the same title, and substantially one suit.

The facts of the case and the principal grounds of the argument sufficiently appear in the judgment.

The Appellant's contention was, first, that the [167] mouzahs formed a Shikmee Talook before the Decennial Settlement held of the Zemindar by a Mocurrery tenure at a fixed rent, and not liable to alteration. Second, that as the purchase was made in 1833, and the suit brought in 1853, the claim was barred by the Ben. Reg. of Limitations III. of 1793, sec. 14, which prescribes twelve years for the recovery of the estate.

The Respondents' case was, that the mouzahs formed part of the Zemindary, and were held Khas by the Zemindar at the time of a sale of the Zemindary, under Ben. Reg. XI. of 1832, to realize arrears of Government revenue, and that the purchaser, and those claiming under, become thereby entitled to the mouzahs.

Upon the hearing of the first appeal, the Solicitor-General (Sir R. Palmer) and Mr. Leith, appeared for the Appellants; and Mr. Rolt, Q.C., and Mr. Field, for the Respondents;

When their Lordships reserved judgment until the hearing of the second appeal. On the second case coming on,

The Attorney-General (Sir R. Palmer) and Mr. Leith, again appeared for the Appellants; and Mr. Rolt, Q.C., and Mr. W. H. Melvill, for the Respondents.

Their Lordships' judgment having been reserved, was now delivered by

[168] The Right Hon. the Lord Justice Turner.—In the month of December, 1833, a Zemindary called Tuppah Cooreekhuy, in the Collectorate of Zillah Mymensingh, was put up for sale by public auction to satisfy arrears of Government revenue under Regulation XI. of 1822.

It was purchased by or on behalf of Bhubanny Acharjee Chowdry, and it was not disputed that the purchaser acquired whatever rights in the Zemindary belonged to the Zemindar at the time of the Decennial, or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the Zemindar, and he had a right under the Revenue sale law to set aside by suit all sub-tenures created since the Decennial Settlement by the Zemindar, or any of his ancestors.

Within this Zemindary were certain mouzahs, which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The mouzahs in question were alleged by persons now represented by the Appellants to form a Shikmee Talook created before the Decennial Settlement held of the Zemindar by Mocurrery tenure, *i.e.* at a fixed rent, not liable to alteration.

The purchaser, on the other hand, whose interests are now represented by the Respondents, insisted that these mouzahs were part of the Zemindary, and were

held khas by the Zemindar at the time of the sale, and that the purchase, therefore, became entitled to them. Possession of the Zemindary was ordered [169] to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the Zemindary. His possession, however, was disputed on the grounds already stated by the persons claiming as Talookdars, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the Sudder Court was of opinion, that the Talookdars had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as Talookdars were put into possession of part of the lands in dispute in December, 1840, and of the rest early in 1841, as appears by certain dakhulnamahs in evidence in this case.

This decision left the right undermined, and settled only the question of possession, and it became necessary for the purchaser of the Zemindary, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from this time. But about this time, that is, in the year 1840 or 1841, Chowdry, the purchaser, died, leaving a widow, and the widow and the mother of Chowdry became his representatives. The widow, as she alleges, under a Will made by her husband, had power to adopt, and adopted, a son, and neither the validity of the Will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed upon merely technical grounds, for want of a sufficient stamp on the proceedings, or for some such reason. In 1855, the first suit now under appeal was commenced. As regards any bar arising from the Regulations of Limitations, this suit must be treated as if it had begun in 1853.

The Appellants, in their pleadings insist, that the period from which the Respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they therefore, insist on the Regulation for the limitation of actions in bar of the present claim; but they do not by these pleadings insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841; and we are clearly of opinion, that this is the period from which the time must be computed. The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Regulation of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is whether the lands in question were constituted a Talook previously to the Decennial Settlement in 1790-91, by the then Zemindar, as alleged by the Appellants, or whether they were at that time held khas by the Zemindar as part of his Zemindary, as alleged by the Respondents.

The title set up by the Appellants is this: they allege that the lands in question were granted by Ghous Khan, the then Zemindar, by two Sunnuds, one dated in 1779, and the other dated in 1784, at a fixed rent to his sister, Amina Bebee, as Talookdar, in mududmash, or for her maintenance at a fixed rent.

If these documents be genuine, there seems to be no reasonable doubt about the Appellants' right.

[171] The Judge in the Zillah Court was of opinion that they are genuine, and he, therefore, dismissed the Respondents' suit.

The Sudder Court, on appeal, was of a different opinion, and made a decree, in favour of the Respondents.

The first of these suits was heard before us, on appeal, in February, 1863. It appeared that the second suit was coming on for hearing, and we were of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we, therefore, directed that the decision on the first suit should be delayed till the second had been heard, and that the Sunnuds relied on by the Appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original Sunnuds have been sent over, and the question now to be determined is whether, upon the whole, the Appellants have sufficiently established their case.

It is not disputed by the Appellants that these lands, being situate within the Zemindary purchased by the Respondents, are *prima facie* to be considered as part of the Zemindary, and that it is for them, the Appellants, who insist on the separa-

tion of these lands from the general lands of the Zemindary, and on their settlement as Shikmee Talook, to establish their title.

To prove their case they produce papers purporting to be the two Sunnuds to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon [172] them, nor have we been able to discover anything which does so.

We have three deeds of sale, by Amina Bebee, and persons purchasing from her, professing to convey different portions of the lands as parts of a Talook. One of these deeds is dated in 1808, and another in 1821.

There are also produced two other Sunnuds, one purporting to be dated in 1813, by Asheena Bebee, the then Zemindar, to Aymun Bebee (a purchaser, from Amina), and another in 1815, by Ibrahim Khan, the then Zemindar, to Khosh Kuddun, a purchaser of a part of this Talook, from Aymun Bebee. These Sunnuds purport to recognize and confirm the title of the purchasers.

In proof that Amina Bebee had possession of these lands as a Talook, in conformity with the Sunnuds granted, we have Chittas, or measurement papers, signed by Ameens employed on behalf of the Zemindar to measure the lands of the Zemindary in the years 1787, 1788, 1789, 1790, 1791, and 1792. These Chittas describe the lands as the Talook of Amina Bebee.

We have further the detailed accounts of the agent in receipt of the rents of these lands in the year 1790, describing them as the Talook of Amina Bebee.

There are other measurement papers or Chittas affording the same evidence in the years 1807 and 1816.

There are then produced dakhilas or receipts for rent on behalf of the Zemindar for the Talook of Amina Bebee in the years 1780, 1805, 1817, 1820, and 1828.

[173] Several other documents are in evidence showing, if they be genuine, the same fact, that at an early date and before the Decennial Settlement a Shikmee Talook had been constituted in favour of Amina Bebee at a Mocurrery jumma, and that the lands included in it were held by her or persons claiming under her up to the time or nearly up to the time of the sale of the Zemindary in 1833.

It was established by the Order of the Court restoring the Appellants to the lands in the year 1840, that they were in possession of them at the time of the sale, for the Order was made entirely upon that ground, and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the Respondents, but they allege and undertake to show that all the documents relied on by the Appellants are forgeries.

A long experience in Indian appeals has no doubt satisfied us that the presumption in favour of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favour of forgery; and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the commencement of the Respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

Still circumstances may be sufficiently strong for [174] this purpose, and they have been held to be so in this case by the Judges of the Sudder.

We will remark upon the principal of these circumstances, but it is material to consider them with reference to the case set up by the Respondents.

The case set up by them is shortly and accurately stated in the judgment of the Sudder Court in these terms:—"The general allegation of the Plaintiff is, that Ibrahim Khan, the proprietor of the Zemindary, up to the time of the revenue sale, fraudulently set up this Talook for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections, Aymun Bebee (one of the alleged purchasers from Amina) being his wife, and Amina Bebee, the professed Talookdar of the Sunnuds of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then Zemindar, Ghous Khan."

If this case be true, no doubt the Sunnuds purporting to create this Talook half

a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the Respondents' case must be untrue.

No direct evidence is offered against the genuineness of the Sunnuds, but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal:

First, it is said that the Talook is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement, as part of the Zemindary for which the jumma is assessed on the Zemindar.

[175] We have not before us the particulars of these Settlements, but assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the Talook.

If it had been an independent Talook it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the Talookdar, but being only a Shikmee Talook, paying rent to the Zemindar, the Talookdars were not required to mention it, nor was it necessary for the Zemindar to do so.

It is then said that if the Sunnuds and the various instruments by which conveyances of portions of the Talook are alleged to have been subsequently made had been really executed, those instruments, or at all events some of them, would have been registered, and that none of them have in fact been registered.

No Regulations have been pointed out to us by which the registration of these Sunnuds or of this Talook (created, if at all, before the Decennial Settlement) was made necessary; and though the observations of the Judges of the Sudder, "that the deeds want the authentication which registration would have afforded," and "that the Talook wants the corroboration which registration and its mention in the quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the Respondents' Counsel was this, that these Sunnuds were never produced or mentioned by the Appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought [176] to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, viz., that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original Sunnuds was of importance. Though these Sunnuds were not produced, the title under them was asserted, and the Sunnud of confirmation of 1813 from Asheena Bebee to Aymun Bebee seems to have been actually produced on the 2nd of July, 1839.

Another objection which was much pressed at our bar was this:—These Sunnuds describe the lands as La-khiraj and Muddudmash, whereas it is said that they were not alleged to be La-khiraj at the time of the Decennial Settlement, but were included in the lands subject to assessment, and that it was not till a much later period (not very long before the sale) that they were claimed to be La-khiraj, and these instruments must, therefore, have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pretended by the then Zemindar to be La-khiraj before the Settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of [177] fictitious claims to exemption from assessment of lands as La-khiraj were set up by different proprietors, and although it was held in what is called the Alluvion suit that the lands were not in fact La-khiraj, and that the Firman of the Sultan purporting to make them so had been forged by Ibrahim Khan, yet that fact by no means shows that at the dates of these Sunnuds the then Zemindar did not claim or pretend them to be so. Whether they were or not included in the assessment was a question depending

on the description contained in the Decennial Settlement : and though the Government officer was satisfied after much inquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great river Burhampooter, and are subject to be submerged and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess we are inclined to attribute the most weight, is that in 1836, Mr. Glass, the partner, as we understand it, with Mr. Wise, one of the present Appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by Ibrahim Khan, the late Zemindar, whereas Mr. Wise now claims under a purchase subsequently made by him and Glass from Aymun Beebee in 1840, and insists that Ibrahim Khan was never in possession of the lands, and that they were not part of the Zemindary, except as being part of a dependent Talook.

[178] Undoubtedly these two titles are inconsistent, but it is not impossible that Mr. Glass might first procure a lease from Ibrahim Khan, supposing him to be the owner, and might afterwards, when the title of the Talookdars was insisted on, and seemed likely to succeed, make a purchase from them, in order that he might, under any circumstances, be secure in the enjoyment of his indigo plantations.

The probability of this being so is strengthened by the statement in the petition of Glass to the Sudder Court in 1838, in which he alleges " that he had for a long time been making indigo cultivation on the lands after taking izara pottahs of them from the proprietors, *i.e.* Talookdars and Zemindars."

We are very far from thinking that the various objections thus made to the title of the Talookdars, and so ably urged at our Bar, are without force. But against them we must set the evidence produced by the Appellants in confirmation of their title.

Now, any evidence which proves the existence of this Talook at a period antecedent to that at which the Respondents allege it to have been falsely set up by Ibrahim Khan tends more or less strongly to disprove their case. The Appellants' evidence upon that point seems to us very strong.

In the year 1819, there is a proceeding in the appeal Court of Jehangur Nuggur, in which the question was, whether certain lands belonged to this Talook or were part of the khas lands of the Zemindar.

In 1824, we have a petition from a person complaining that Khosh Khuddum had agreed to sell to him a portion of his share of the Talook, but had refused to perform his contract.

[179] In 1833, we find an Order made in a suit which had been instituted in the year 1831 by Aymun Beebee against her husband, Ibrahim Khan, by which a part of the lands of this Talook was ordered to be sold to satisfy fees due to the Pleaders.

In 1843, we find it stated upon the result of an inquiry then directed by the Civil Court of Mymensingh, that when the Talook was about to be sold the Plaintiff's Mooktar deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important, not only because they show that in 1833 a portion of this Talook was dealt with by the Court as the property of Aymun Beebee, but because it makes the supposed collusion between Ibrahim Khan and his wife, Aymun Beebee, which is essential to the Respondents' case, in the highest degree improbable.

That the Sunnuds in question have not been fabricated since the institution of these suits is clear from the proceedings in the suit with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the Burhampooter was left dry by some change in the course of the stream. This tract was within the limits of Cooreekhuy. If these were now derelict lands they would be subject to assessment to the Government ; but it was insisted by the purchaser of the Zemindary and the Talookdars that they were lands which had originally been part of the Zemindary, had been submerged and again left dry ; the Zemindars insisting that the lands were part of the Zemindary, and the Talookdars that they were a part of their Talook.

[180] After some proceedings in other Courts, which failed from some irregularity, a proceeding was instituted by the Government in the office of the Collector of Mymensingh, under Regulation XI. of 1819, for the purpose of determining the right of the Government. To this proceeding Ibrahim Khan, the present Respondent, Bhoobun Moyee Debia, and the Appellants, Aymun Beebee and Khosh Kuddum, were parties.

A great deal of evidence was gone into, and, amongst other documents, the Sunnud of 1779 now relied on, and some of the chittas and other papers produced by the Appellants in this suit, were put in by them, and the same case which they now set up was stated and insisted upon.

Whether the other Sunnuds now produced by the Appellants and all other papers were produced, we cannot clearly make out.

The Sunnud of 1779 was the subject of investigation at that time, and it appears by the Order made in the proceeding, and which dismissed the claim of the Government, that on the 5th of April, 1845, in order to attest, as it is called (meaning, no doubt, to test the genuineness of), the aforesaid Sunnud of 1779 (which seems to have been disputed), the Record Keeper was directed to produce any other papers which might tend to show the truth, and the witnesses named by the Defendants to prove their case were summoned.

It is then stated, that subsequent thereto the Record Keeper filed a Kyfeut stating that along with the papers of Nattoora Mehal of Tuppah Cooreekhuy has been found a Sunnud sealed by Mahomed Ghous, and signed by him in the Persian [181] character, and that the seal and Persian character thereon tally with the Persian character and seal on the Sunnud filed in this case. It is then stated, that Aymun Beebee produced some chittas and a terij and jumna bundy, and produced witnesses who deposed that Ameena Beebee had in the year (worm-eaten) acquired a Sunnud of the Talook of these mouzals from Mahomed Ghous, Zemindar, had held possession since that year, and sold the same, and that in proportion to the said shares, Khosh Kuddum, Aymun Beebee, and Messrs. Wise and Glass, paid the rents of the Talook and held possession.

Now, it is said that the only question in that case was as to the right of the Commissioner to assess the lands as to which all the Defendants had a common interest, and that as co-Defendants the Respondents could not have disputed the evidence of the Appellants if they had had any interest to do so.

This may be true, although it is not easy to perceive why any inquiry into the truth of the Talookdar's title, or the genuineness of the documents produced in support of it, should have been made unless some contest on the subject had taken place between the Zemindar and the Talookdars. But, at least, at this time (in 1845), the Respondents having been turned out of possession in 1840, on the grounds which we have stated, had full notice of the title set up by the Appellants and of the evidence by which it was to be supported, and were bound to bring forward their claim in reasonable time. Yet these suits are not instituted for several years; and then, after every opportunity had been afforded of giving evidence to disprove these documents, no direct testimony against them is produced, and many [182] of the witnesses who were examined in 1845 may very probably be dead or not forthcoming. We have already expressed our opinion that, for the reasons which we have stated, the Respondents' claim is not barred by the Regulation of Limitations, but much allowance must be made for the difficulties which they have imposed on the Appellants by so long delaying a suit in a country where documentary evidence is peculiarly liable to destruction or effacement, as appears by the papers in this case.

Upon the whole, we must humbly advise Her Majesty to reverse the decrees complained of, and to restore the decrees of the Sudder Ameen, and we think that all the costs of these suits, subsequent to the last-mentioned decrees, including the costs of these appeals, must be paid by the Respondents. We have thought it right to go at so much length into the circumstances of the case, because we are at all times extremely reluctant to reverse a unanimous judgment of the Court below on a question of fact, and because it is due to those learned Judges to show that we have not done so without having carefully considered and weighed the evidence.

[183] BABOO GOPAL LALL THAKOOR,—*Appellant*: TELUCK CHUNDER RAI and Others,—*Respondents* * [March 2, 3, 1865].

On appeal from the Sudder Dewanny Adawlat at Calcutta.

Suits by a Zemindar claiming as purchaser at a sale for arrears of Government revenue, to enhance the rents of certain Talooks, which formerly constituted one Talook held of the Zemindary at a fixed or Mocurrery jumma; dismissed by the Sudder Court, and such dismissal affirmed on appeal by the Judicial Committee, as the evidence established that each Talookdar had paid a fixed and invariable rent anterior to the Decennial Settlement, and consequently was not liable to an enhancement of rent.

The *onus* of proving that a Talook had been held at a fixed and invariable rent twelve years antecedent to the Perpetual Settlement lies on the Defendant.

This was an appeal from an order of the Sudder Dewanny Court at Calcutta, dated the 26th of February, 1859, made in five several special appeals to that Court from the decree of the Zillah Court of Backergunge, bearing date the 17th of July, 1858; and also from the last-mentioned decree, made in five appeals from the decree of the Principal Sudder Ameen.

The five separate suits were rendered necessary by [184] the rules of procedure of the Courts in India. In each of these suits the Appellant was Plaintiff, and the several Respondents were respectively Defendants. The object of the suits was to obtain decrees for the enhancement of rent under Ben. Reg. V. of 1812, secs. 9 and 10, modified by Act, No. VIII. of 1848, in respect of five Talooks held by the Respondents respectively, of the Appellant, as Zemindar of Tuppah Nazirpore, in the Province of Bengal.

The facts appear from their Lordships' judgment.

As the Respondents did not appear, the appeals were heard *ex parte* on a single case, which was argued by

The Attorney-General (Sir R. Palmer) for the Appellant. Mr. Leith, who was with him, was not called on.

After consideration, their Lordships' judgment was now pronounced by

The Right Hon. The Lord Justice Knight Bruce (March 29, 1865). The question on this appeal, which has been heard *ex parte*, is upon the alleged right of the Appellant, as Zemindar of Tuppah Nazirpore, in the Zillah of Backergunge, and Province of Bengal, to reassess and increase the rents payable in respect of certain lands forming part of his Zemindary, which formerly constituted one, but were afterwards divided into five dependent Talooks.

The Appellant derives his title to the larger part of his Zemindary from a sale for arrears of Government revenue, which took place in 1819. Fourteen [185] sixteenths were thus purchased, partly by the Appellant's father and cousin jointly, and partly by one Petumber Mozumdar. All these shares have since, by descent or sub-purchase, become vested in the Appellant. The remaining two sixteenths are stated to have been acquired in 1830 by private purchase from a Mr. John Panioty and others in whom they were then vested.

To enforce his claim to enhance the rents of the five Talooks it was necessary for the Appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate amount involved in the five exceeded, the sum for which an appeal to Her Majesty in Council lies as of right. The Order of the 22nd of February, 1860, giving special leave to appeal, provided that in case the parties in India should consent that the Order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only (reported on this point, 7 Moore's Ind. App. Cases, 548). This consent has, unfortunately, not been given:

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the proceedings in all the suits have been sent home and are now before their Lordships. The argument of the learned Counsel for the Appellant embraced all the suits, and this judgment must be taken to be given in each of them.

The five suits were commenced in September, 1855. Each was founded on the alleged right of the Zemindar claiming, in part at least, as purchaser at a sale for arrears of Government revenue, to enhance the rents of a Talook described as Tashkhisi Zimma, or a sub-tenure held upon payment of a rent variable according to the current rates of the district.

[186] The title set up by the Respondents is to this effect. They allege that as early as 1701 (being the year 1111 of the Bengal era), one Mookondo Ram Chuckerbutty took, in the name of his son, Ram Chuckerbutty, an Amildari Pottah of the lands in question in the five suits, from Syud Shumsuddeen Mahomed, the then Zemindar, and held them as one Talook; that, on his death, his three sons, the said Ram Chuckerbutty, Gungadhur Shedhanto, and Gopeenath Chuckerbutty, held the Talook in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A.D. (or 1162 B.E.) they made a settlement, witnessed by the seal of Syud Imamoodeen Mahomed, the descendant of Syud Shumsuddeen Mahomed, whereby the rent of the waste lands being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint jumma of Rs. 1901. They further allege, that afterwards a complete separation between the brothers took place: that Gungadhur took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate Talook called Sheeb-Kant (a name compounded of the first syllables of the names of his two sons); that Gopeenath Chuckerbutty made in the same way a separate Talook out of his share, which he named Lukhee-Kant after one of his sons; that the remaining share continued as a third Talook in the possession of Ram Chuckerbutty, or of his two sons, Beeshodeb and Gobind Prosad; and that this division was sanctioned by the Zemindar, and the consequent mutation of names effected, on the 26th of Bysack 1164 (A.D. 1757), by a writing, under the seal of Syud Imamoodeen Mahomed, which provided that the jumma [187] or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that before this measurement took place Ram Chuckerbutty's share was sub-divided between his two sons, Beeshodeb and Gobind Prosad, and a further mutation of names effected in 1762, one of these sub-divisions becoming Talook Ram-Lukhun, the other Beeshodeb. They further allege that after this, the contemplated measurement and survey took place; that the Talook of Sheeb-Kant Chuckerbutty was then assessed at a fixed Mocurrery jumma of Rs. 691. 9a. 2g.; that the Talook Lukee-Kant Chuckerbutty was assessed at a like jumma of Rs. 643. 15a. 13g.; that Talook Ram-Lukhun Chuckerbutty was in like manner assessed at Rs. 335. 6a. 9g.; and that of Beeshodeb, existing under the name of Ram Chuckerbutty, at Rs. 337. 6g.; and that accordingly on the 14th Joistee, 1174 (being some time in the year 1767), separate bundobusts, or settlement papers, under the seal and signature of the Zemindar, Syud Imamoodeen Mahomed, were granted to the holders of each Talook, and contained these words: "The above amount of jumma being paid in current coin year by year, no increase shall be made to it, nor shall you give any."

Thus far the title of the Defendants in each of the five suits is common to all. The subject of the first suit is the Talook Sheeb-Kant Chuckerbutty; that of the second, Ram-Lukhun Chuckerbutty; that of the third, Lukhee-Kant Chuckerbutty; that of the fourth, Radha-Madub Chuckerbutty; and that of the fifth, Ramchunder Chuckerbutty; the two last named Talooks having, after the death of Beeshodeb, been [188] formed out of this Talook on a partition and division between his two sons, Radha Khristo and Radha Madub, in or some time before A.D. 1807. The Defendants in the several suits derive their title from the Tolookdars with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was, whether the Tolook that was the subject of it had been held from a period consider-

ably anterior to the Decennial Settlement at a fixed or Mocurrery jumma, or was held on a rent variable, and, therefore, subject to enhancement.

The other material issues in each suit were,—

First, whether the claim of the Plaintiff was barred by the Regulation of Limitations. And, secondly, whether the notice required by law as a preliminary to a suit for enhancement of rent had been duly served.

The five suits were heard together by the Principal Sudder Ameen of Zillah Backergunge on the 20th of January 1858. His decision was in favour of the Appellant on all points. The Defendants in each suit appealed to the Zillah Judge (Mr. Kemp), who, on the 17th of July, 1858, reversed the decision of the Principal Sudder Ameen, and decided in favour of the Defendants. His judgment proceeded on the ground that the Defendants had established by evidence that each Talook had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

[189] The Appellant then carried the five causes to the Sudder Dewanny Adawlut on special appeal, upon certain grounds. These seemed to have resolved themselves into the following objections:—First, that the Judge having determined that the suits were barred by the Regulation of Limitations, was in error in afterwards going into the merits of them: and secondly, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the Plaintiff's title accrued.

The judgment of the Sudder Court dismissed the special appeals on the ground that the Judge had in fact decided the suits, not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present appeal, will assume that the Appellant's claim is not barred by lapse of time, and that he has duly served the notices required by law. These points appear to have been decided below in his favour, and their Lordships see no ground to doubt the correctness of that decision. They propose, then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present Talooks had been held at a fixed and invariable rent for more than twelve years antecedent to the Perpetual Settlement, it being admitted that, as the law stood in 1858, the burthen of proving this lay on the Defendants.

The principal documents on which the Defendants rely in support of their title are the settlement of the 21st of Srabun, 1162; the Kharijee Likhons, or mutation papers, of the 16th and 26th of Bysack, 1164; the similar document of the 13th Joistee, [190] 1169; the four Bundobusts, or settlements of the 11th and 14th Joistee, 1174; the Furud of 1198; the petition of 1810; the Dakhilas, or receipts for rent. The mutation paper of Choitro, 1214, bears only on the partition in 1807 between the sons of Beeshodeb, and the titles of the Defendants in the fourth and fifth suits.

What then is the effect of these documents if taken as genuine? The first establishes the existence of the dependant Talook, Ram Chuckerbutty, in the year 1755; the two next prove the division of that Talook into three in the year 1757, and the further subdivision of one of these into two in 1762. But all these fail to show that these Talooks were held at a fixed and invariable rent. The first is at least consistent with the hypothesis that the rent of the parent Talook might vary with the amount of land brought under cultivation; the others import that the rent of each of the four derivative Talooks was not to be settled until after survey and measurement. On the other hand, the four Bundobusts or settlement papers of 1174, if genuine, prove that in 1767 A.D., the rent of each of the four Talooks became fixed and invariable; and the Dakhilas support the contention of the Defendants that they and their predecessors had ever since continued to hold their lands at these rents. The Furud shows that in 1792, and the petition shows that in 1810, the Zemindar for the time being recognized the Bundobusts of 1174, and admitted the title of the Defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the Zillah Judge that the Defendants had relieved themselves of the heavy burthen which the law

cast upon them, and [191] established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the Defendant's evidence, their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no "words of inheritance" (to use the English phrase), *i.e.* no expression importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the Appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the Defendants, in which case he might have been successfully met, and no doubt would have been met, by a plea of the Regulation of Limitations. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the Defendants. The only question between the parties is, whether the Talooks are Tashkhis or Mocurrery; *i.e.* whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the Appellant, it could hardly prevail against the evidence which the record affords, that for upwards of a century these Talooks have been treated as hereditary, and as such have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, the Talook of Beeshtodeb is expressly termed "hereditary."

What then are the objections to the proof offered by the Defendants? The first, and not the least formidable, is that based upon the fact, established, if [192] not admitted, that Syud Imamoodeen Mahomed died in 1192 B.E. or 1785 A.D. This applies directly only to the Furud, and to some of the Dakhilas. It affects the more material documents (the Bundobusts of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the Furud, if genuine, and to throw suspicion generally on the Defendants' case.

It is clear that the Furud bearing the seal and "Sri" signature of Syud Imamoodeen Mahomed has not been concocted recently, or for the purposes of these suits.

That it existed in 1806, and was filed with other documents in the suit before Mr. Winden, is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit, which was one between the Talookdars and their sub-tenants. On the other hand, it appears that the Perpetual Settlement of this Zemindary, the most important transaction in its history, was concluded several years after Syud Imamoodeen Mahomed's death, in his name, though possibly without the use of his seal. This was six years later than the date of the Furud. There is abundant evidence of the appearance of his seal and of his "Sri" signature upon other Zemindary documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon in others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. Kemp, that the date of Syud Imamoodeen Mahomed's death is not a fatal objection to the genuineness of the Furud, and the Dakhilas im-[193]-peached on the same ground; but that all may, nevertheless, be taken to have come from the Sharista or office of the Zemindar.

It is then objected, as a suspicious circumstance, that though the Furud was produced in 1806, the Bundobusts or settlements of 1174, to which it refers, were not then produced. The answer to this is, that their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of India without some risk; and of all men the dependent Talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing Zemindar, he may at some future time have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the Bundobusts of 1174 is that no mention of them is made in the copy of the Quinquennial paper for 1227 B.E., corresponding with A.D. 1820. That there is some foundation for this objection their Lordships do not deny; as that document is not very well authenticated.

Little, if any, weight seems to have been attached to it even by the Principal Sudder Ameen, whose judgment was in favour of the Appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence; and, indeed, there is in the last column of this Quinquennial return a general reference to papers other than those mentioned in the preceding columns. Whatever may be the force of this inference, it seems too slight to outweigh the corroborative proof of the existence of the Bundobusts long before 1820, which [194] is afforded by the Furud, and by the Zemindar's petition.

The evidence that has been given on either side, to prove or to disprove, that the enjoyment of the Talook has been consistent with the hypothesis that the tenures were Mocurrery, remains to be considered. The earlier Dakhilas produced (the objection to such of them as are subsequent in date to the death of Syud Inamooddeen Mahomed having already been disposed of) prove that for upwards of twelve years prior and up to the perpetual Settlement the Talooks were held and enjoyed at the fixed rents specified in the several Bundobusts. So far, then, the Defendants have given the proof which the Regulations require from them. But then it is objected that jumma wasil Bakee papers produced by the Appellant show that at a subsequent period the rents were variable. These papers are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the Zemindar, or by a lessee named Mozoomdar. They do not mention the Talook Sheeb-kant Chuckerbutty, which is the subject of the first suit; and the title of the Defendants in that suit is, therefore, unaffected by them. It is perhaps for that reason that so little notice of them is taken by Mr. Kemp in his judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the Defendants contend to be fixed or invariable were demanded and realized in respect of the other Talooks, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from [195] the Zemindar's petition, the Talookdars remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then Zemindar. There is no evidence that since that time the rent paid in respect of any of the Talooks has varied, and it is shown that for fourteen years after he had full notice in the proceeding before Mr. Knott, that the Defendants relied on the alleged settlement of 1174, the Appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is, that between 1768 and the date of the Perpetual Settlement the enjoyment of these Talooks was consistent with the Bundobusts of 1174, that it has been equally so since 1810, and that if higher and varying rents were exacted in respect of any of the Talooks during the period covered by the jumma wassil Bakee papers, such exaction was wrongful, and was remedied in 1810, when the recognition of the Zemindar remitted the Talookdars to their original rights. This argument assumes the genuineness of the jumma wasil Bakee papers, as to which there may be some doubt. They are certainly inconsistent with the Dakhilas for those years produced by the Defendants.

On the whole, their Lordships, though labouring under the disadvantage of having heard only the able, but at the same time candid, argument for the Appellant, have failed to find any sufficient grounds for disturbing the judgment of the Court below upon a pure issue of fact. The order, therefore, which they most humbly recommended Her Majesty to make is that this appeal be dismissed.

[See *Baboo Dhunput Singh v. Gooman Singh*, 1867, 11 Moo. Ind. App. 461, 462; *Rajah Suttosurrin Ghosal v. Moheshchunder Mitter*, 1868, 12 Moo. Ind. App. 263; *Forester v. Secretary of State for India*, 1872, L.R. Ind. App. Sup. Vol. 31.]

[196] MUSSUMAT JARIUT-OOL-BUTOOL.—*Appellant*: MUSSUMAT HOSEINEE
BEGUM,—*Respondent* * [June 19, 1865].

On appeal from the Sudder Dewanny Adawlut North-West Provinces.

Within six months after decree and prior to the admission of an appeal therefrom to England, the Sudder Dewanny Court upon an *ex parte* application, without notice, issued an execution Order putting the decree-holder in possession. This was done without calling for security as provided by sec. 4, Ben. Reg. XVI. of 1797. The Appellant, on the admission of the appeal, applied to the Sudder Court for security from the party in possession pending the appeal, but that Court held that as the decree-holder was in possession under an execution Order, which could not be appealed from, they had no power to interfere. On petition the Judicial Committee, in the circumstances, and upon affidavit of waste, made an Order, declaring that it was competent to the Sudder Court to require security to be given for protection of the property pending the appeal, notwithstanding execution of the decree had issued, and gave permission to the Appellant to apply to the Sudder Court with an intimation of that opinion.

This was an application by the Appellant for an order that the Respondent, who was in possession as a decree-holder, under an execution order of the Sudder Court, to give security for the protection of the property in suit pending the appeal to England.

The petition alleged, that the Respondent instituted a suit against the Appellant, claiming possession of an estate called Purlut, and certain villages; that a decree was made in favour of the Respondents; the [197] Petitioner appealed to the Sudder Dewanny Adawlut for the North-Western Provinces, and that Court affirmed the decree of the Civil Court, and dismissed the appeal; but allowed an appeal to the Privy Council, the transcript record of which appeal arrived in England on the 1st of February, 1865.

The petition set out the circumstances which gave rise to this application, from which it appeared that, prior to the admission of the appeal, the Respondent applied for execution of the decree of the Civil Court, as affirmed by the Sudder Dewanny Adawlut, and the same was ordered to be carried into execution, whereupon the Respondent was put in possession of the estate. This order was made and carried into effect without taking any security from the Respondent. The mode for proceeding, and the course to be pursued by the Sudder Court in case of an appeal, is prescribed by Ben. Reg. XVI. of 1797, which, by sec. 4 provides that—"In cases of appeal to His Majesty in Council, the Court of Sudder Dewanny Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed, for the due performance of such order or decree as His Majesty, his heirs or successors, shall think fit to make on the appeal, or to suspend execution of their judgment during the appeal, taking the like security, in the latter case, from the party left in possession of the property adjudged against him." Notwithstanding the provisions of the above-mentioned Regulation, the Sudder Dewanny Adawlut did not take security from the Respondent upon the admission of the appeal of the Petitioner; and [198] although the Petitioner caused several applications to be made to that Court, with a view to security being taken from the Respondent, such applications were rejected. The last of those applications was rejected by the Court on the 20th of November 1863, when the opinion of the Court was recorded in the following terms:—"The first point to be considered is, whether we can take this application into consideration. On this point we are of opinion that, as this application is preferred under sec. 4, Ben. Reg. XVI. of 1797, it is unnecessary to refer to the provisions of Act, No. VIII. of 1859, relative to reviews

* Present: Members of the Judicial Committee—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John T. Coleridge. Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

of judgments. The next point is, whether this application can be granted. On this point we are of opinion that, as execution of decree has been completed, the Court are not in a position to call upon the decree-holder to furnish security. Had the application been made in due time before execution of the decree had taken place, there would have been no difficulty in complying with it. The law above quoted does not contemplate the cases of decrees already executed. Sec. 92, Act No. VIII, of 1859, is, in our opinion, inapplicable. We accordingly reject the application."

The petition then alleged, that the Petitioner, finding it impossible to obtain redress in India in the matter of security from the Respondent, had been compelled to wait until an application could be made on her behalf to Her Majesty in Council, and that this application was made at the earliest date at which it was possible to have made the same; and it was insisted, first, that it was the duty of the **Sudder Dewanny Adawlut**, upon or after the admission of the Petitioner's appeal, to have taken security from the Respondent for the property which [199] had been transferred to her, by reason that the Ben. Reg. XVI. of 1797, so far as respects the taking of security, was imperative, and gave the Court no option or discretion in the matter. Secondly, that the opinion of the **Sudder Dewanny Adawlut**, to the effect that the Ben. Reg. XVI. of 1797, did not contemplate the cases of decrees already executed, was erroneous, and that, on the contrary, the Ben. Reg. V. of 1798, referring *inter alia* to cases of appeal under Ben. Reg. XVI. of 1797, and providing a mode of enforcing security by attachment of the property, expressly includes cases of executed judgments, and that thus a strong presumption was afforded that Ben. Reg. XVI. of 1797 (in the absence of any expressed exception) was intended also to include such cases; and the Petitioner submitted that, under the provisions of the Ben. Reg. XVI. of 1797, she, having lodged her appeal within the time fixed by that Regulation, was plainly entitled to the benefit of the security prescribed by the same. That as no appearance had yet been entered on behalf of the Respondent to the appeal, and as considerable time must necessarily elapse before judgment can be obtained upon the appeal, the Petitioner had good reason to fear that, unless security be taken from the Respondent, the property which has been transferred to the Respondent in execution of the decree appealed from would be almost entirely wasted pending the appeal, and the Petitioner unable to reap the benefit of the decision upon appeal, if the same should be in her favour; and the petition prayed that the Respondent might be ordered within six weeks from the service of an Order upon her to that effect, to give full and sufficient security to the **Sudder Dewanny** [200] **Adawlut** for the North-Western Provinces for the due performance of such decree as Her Majesty in Council shall think fit to make on the appeal, and that the amount of such security might be calculated and determined by the **Sudder Dewanny Adawlut**, and that in such calculations the mesne profits which have accrued from the property since the transfer thereof to the Respondent, as well as the value of the property transferred, may be taken into account; or that in default of the Respondent giving the required security within the before-mentioned period, then that so much of the property transferred to the Respondent as is now in her possession or power may be placed under attachment pending the appeal; that the requisite directions may be given for the purposes aforesaid, or for other relief.

Affidavits were filed confirming the facts contained in the petition, and of the waste committed by the party in possession.

Mr. W. H. Melvill, and Mr. Ahmaric Rumsey, for the Petitioner.—First: We are entitled to an Order directing the **Sudder Court** to obtain security from the Respondent pending the appeal. The affidavits show that the estate is being wasted. *In re Rajah Vassaveddly Lutchmeputty Naidoo* (5 Moore's Ind. App. Cases, 300) is a case which illustrates our position that the estate may be entirely lost by the Court below neglecting to take security. The **Sudder Dewanny Court** should not have allowed the Order for the execution to the decree-holder without taking security. Ben. Reg. XVI. of 1897, sec. 2, which embodies Statute, 21st Geo. III. c. 70, [201] sec. 21 of Ben. Reg. XIII. 1808, sec. 11, cl. 3: Circular Orders of the North-West Provinces, Vol. I, p. 513. [Sir John Coleridge: Why was not an application made to stay execution?] We had no notice that the Order would be applied for. When the appeal was admitted six months had not expired, therefore we were not too late in applying for security. Ben. Reg. V. of 1798, secs. 5 and 6, provides for additional

security after appeal. [Sir James Colville: Does not the Act, No. VIII. of 1859, provide that there shall be no appeal from an Order directing execution?] It may be that such Order was not appealable, but, notwithstanding, this Court can admit an appeal. *The East India Company v. Syed Ally* (7 Moore's Ind. App. Cases, 555). Secondly, if there is any doubt as to the power in this Tribunal to grant the prayer of the petition, we ask for leave to apply to the Sudder Court for security, with an intimation of your Lordships' opinion on the question of law, as *In re Muir* (3 Moore's P.C. Cases, 150). If an Order cannot be made in either of these forms, we are in the alternative prepared with a petition for special leave to appeal from the execution Order, and to have the question argued *nunc pro tunc*, as was done in *Erq. Minchin* (4 Moore's Ind. App. Cases, 220).

The Lord Justice Turner.—Their Lordships have felt some difficulty in dealing with this case, which in the circumstances is new. But, on examining the Regulations and considering the nature of the case, they are of opinion, that an [202] Order may be made upon this application. At the same time, they think the proper Order to be made should be one which should leave it, as far as possible, in the discretion of the Sudder Dewanny Adawlut as to what proceedings or what steps should be taken; and their Lordships propose, therefore, to make the Order in this form:—Their Lordships, being of opinion that it is expedient that sufficient security should be taken from the Respondent for the due performance of such Order and decree as Her Majesty may make on this appeal, and that it is competent to the Sudder Dewanny Adawlut to require such security to be given, or otherwise to provide for the protection and security of the property in question pending this appeal, notwithstanding that execution had issued before this appeal was allowed; and that the Appellant be at liberty to apply to the Sudder Dewanny Adawlut for such security to be given, or such provision to be made, as she may admit.

By the Order in Council made on the petition, it was ordered, that the Appellant be at liberty to apply to the Sudder Dewanny Adawlut for the North-Western Provinces for such security to be given, or such provision be made for the protection and security of the property in question pending this appeal as she may be advised. Whereof the Judges of the Sudder Dewanny Adawlut for the North-Western Provinces of Bengal for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

[203] SHAMA PURSHAD ROY CHOWDERY, and Others.—*Appellants*: HURRO PURSHAD ROY CHOWDERY, and Another.—*Respondents* * [March 3, 1865].

On appeal from the Sudder Dewanny Adawlut of Bengal.

Section 16 of Ben. Reg. III. of 1793, declares, "that the Zillah and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction." Held to apply only to a case in which the question to be determined in the suit was the same as had been already heard and decided, and not to a case where new circumstances had intervened and altered the nature and character of the question to be determined [10 Moo. Ind. App. 211]. Money realized under a decree, or judgment, cannot be recovered back in a new suit or action, while such decree of judgment under which it was recovered remains in force, as the original decree, or judgment, must be taken to be subsisting and valid until it has been reversed or superseded by ulterior proceeding [10 Moo. Ind. App. 211, 212].

* Present: Members of the Judicial Committee.—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The Appellants were the sons and heirs of Doorga Purshad Roy Chowdery, who had in his life-[204]-time instituted a suit in the Zillah Court of the Twenty-Four Purgunnahs against the original Respondent, Tara Purshad Roy Chowdery, who died pending the appeal, and was afterwards represented by the present Respondents. The object of that suit was to obtain a refund and recovery from the former Respondent of the sum of Rs. 23,294. 9. 16½, on account of principal and interest and costs; such principal money having been realized by him from Doorga Purshad Roy Chowdery, for interest which accrued on another principal sum, under a decree, dated the 12th of August, 1844, made in a suit instituted in the same Zillah Court. It appeared that this latter decree was contrary both in spirit and in terms to an Order of Her Majesty in Council of the 18th of July, 1819, made subsequently in an appeal (see *Doorga Pershad Roy Chowdry v. Tarra Pershad Roy Chowdry*, 4 Moore's Ind. App. Cases, 452), in another suit between the same parties involving substantially the same rights; raising the same questions of law and fact, and dealing with the same principal sum on which the interest claimed and recovered by Tara Purshad Roy Chowdery in the above-mentioned suit had accrued.

The principal questions raised by the present appeal were, first, whether as the sum sought to be recovered by Doorga Purshad Roy Chowdery was obtained by the original Respondent under a decree of the Zillah Court, such decree could be pleaded, under Ben. Reg. III. of 1793, sec. 16, as a bar to the suit, notwithstanding the before-mentioned Order in Council; and secondly, whether, independently of that section of the Regulation, the money having been paid under a decree of a Court of competent jurisdiction, he was precluded from recovering in a new suit, so [205] long as the decree under which it was recovered remained in force.

The material facts of the case are fully stated in the judgment.

At the hearing of the appeal, Mr. Leith appeared for the Appellants, and Mr. W. H. Melvill for the Respondents.

The case of *Doorga Pershad Roy Chowdry v. Tarra Pershad Roy Chowdry* (4 Moore's Ind. App. Cases, p. 452), was referred to in the argument of the Appellants; and Ben. Reg. III. sec. 16, of 1793, upon the question of the suit being barred by the previous decree, was referred to and insisted on by the Respondents.

Judgment was delivered by

The Right Hon. the Lord Justice Turner (March 29, 1865).—The facts of this case, so far as it is necessary to refer to them, lie in a narrow compass.

In the year 1821, Doorga Purshad, claiming to be entitled to the estate of his uncle, instituted a suit against Shama Purshad Nundy, a debtor to the uncle's estate, for a recovery of the sum of Rs. 23,024, principal and interest due upon a Bond. Pending this suit and in the year 1827, Tara Purshad Roy Chowdery, the original Respondent, sued Doorga Purshad for recovery of one-half of the estate of the uncle, to which he (Tara Purshad) claimed to be entitled.

In the year 1829, there was a compromise of the suit instituted by Tara Purshad against Doorga Purshad, under which compromise Tara Purshad became entitled to a six-anna share of the debt due from Shama Purshad Nundy. Subsequently to this [206] compromise, and on the 27th of July, 1829, Doorga Purshad obtained a decree in the Provincial Court against Shama Purshad Nundy for the amount of the principal and interest due upon the Bond. From this decree Shama Purshad Nundy appealed to the Sudder Court, and pending this appeal, and in the year 1831, there was a compromise of this suit also, which was affected by deeds, dated the 16th of May, 1831. The terms of this compromise were, that Shama Purshad should pay Rs. 24,217. 12. 17. at the end of three years, without interest, and that, in default of payment, Doorga Purshad should be at liberty to proceed and realize the amount. This compromise was, it appears, made without the privity of Tara Purshad, and the payment stipulated to be made by Shama Purshad Nundy at the end of the three years was not made by him.

In this state of circumstances, Tara Purshad, in the month of March, 1835, instituted another suit against Doorga Purshad, seeking to recover from him his (Tara Purshad's) six-anna share of Shama Purshad Nundy's Bond debt, and of the interest upon it up to the time of the commencement of the proceedings against Shama Purshad Nundy in the year 1821; and by the plaint in this suit, Tara Purshad

reserved to himself the right to bring another suit for his share of the interest on the Bond debt from the last-mentioned date up to the date of the decree of the 27th of July, 1829, which Doorga Purshad had obtained as above mentioned.

This suit was carried through the Courts in India up to the Sudder Dewanny Adawlut, and ultimately, by a decree of that Court, dated the 15th of April, 1841, Doorga Purshad was decreed to pay to Tara [207] Purshad the entire amount of principal and interest for which his suit was brought. From this decree of the Sudder Court, Doorga Purshad appealed to Her Majesty in Council, and upon this appeal being heard before the Judicial Committee in July, 1849 (4 Moore's Ind. App. Cases, 161), the Committee reported to Her Majesty, that the decree of the Sudder Court ought to be reversed, and that it ought to be declared that Doorga Purshad was liable to Tara Purshad for a six-anna share of what he, Doorga Purshad, had received, or might thereafter receive, and of what, if anything, he might at any time after the 16th of May, 1833 (being the expiration of the time limited by the deeds of compromise of the 16th of May, 1831), without his wilful default, have recovered or received from Shama Purshad Nundy, or in respect of the sum of Rs. 24,217. 12. 17., and the interest thereon, payable by Shama Purshad Nundy under the decree of the 27th of July, 1829, and the compromise of the 16th of May, 1831, and that the case ought to be referred back to the Sudder Dewanny Adawlut, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared, and that Tara Purshad should be at liberty to apply in the suit of Doorga Purshad against Shama Purshad Nundy for leave to enforce the decree in that suit, as he might be advised, for the recovery of his six-anna share of the Rs. 24,217. 12. 17., and interest, in so far as the same had not been already recovered.

By an Order of Her Majesty in Council, bearing date the 18th of July, 1849, this report was approved, and it was ordered that the decree of the Sudder Court of the 15th of April, 1841, should be, and the [208] same was thereby reversed, and that it be declared and done as in the report more fully set forth and recommended, and that the same be duly and punctually obeyed, complied with, and carried into execution.

In the meantime, pending this appeal to Her Majesty in Council, and on the 3rd of December, 1842, Tara Purshad instituted a further suit against Doorga Purshad to recover the sum of Rs. 4593. 12. 9., the interest upon his six-anna share of the sum secured by the Bond, from the year 1821, when the proceedings against Shama Purshad Nundy were commenced, up to the 27th of July 1829, when the decree against him was made, being the interest for which by the plaint in his original suit he had reserved to himself the right to sue. This suit was heard before the Principal Sudder Ameen on the 11th of August, 1843, and by his decree of that date he dismissed the suit; but, upon an appeal by Tara Purshad to the Judge of the Zillah Court, the decision of the Sudder Ameen was reversed, and Doorga Purshad was ordered to pay to the Respondent the Rs. 4593. 22. 9., with interest at 12 per cent. per annum, from the time of the commencement of the suit, with the costs in both Courts; and upon a special appeal by Doorga Purshad to the Sudder Dewanny Adawlut, that Court dismissed the appeal with costs. In consequence of these decrees Doorga Purshad was compelled to pay to Tara Purshad the sum of Rs. 11,217. 15. 3., which he accordingly paid as follows:—Rs. 8200. 7. 3. on the 28th of April, 1848, and Rs. 2927. 8. on the 4th of August, 1857.

Several attempts appear to have been made by Doorga Purshad after Her Majesty's Order in Council arrived in India to obtain a review of the [209] decrees made against him in the last-mentioned suit, and to have those decrees considered in connection with Her Majesty's Order in Council, but he failed in these attempts, and thereupon, on the 17th of August, 1857, he instituted against Tara Purshad the suit out of which the appeal before us has arisen. By his plaint in this suit he has sought to recover the sum of Rs. 23,294. 9. 16½., being the amount of the sums paid by him to Tara Purshad, and of the sums which he has paid for his own costs of the proceedings taken against him, with interest on such sums respectively from the respective times of the payment thereof at 12 per cent. per annum. Tara Purshad, by his answer to the plaint, has insisted that the decision of the Judge of the Zillah Court in his favour in the further suit brought by him, having been affirmed on appeal by the Sudder Court,

became final, and could not be set aside by a new suit, and he has relied upon section 16, Regulation III. of 1793, as a bar to the suit. On the 29th of June, 1858, the suit was heard before the Principal Sudder Ameen, and was by that Judge dismissed with costs. From this decision Doorga Purshad appealed to the Sudder Court, but that Court, by its decree, dated the 9th of May, 1859, affirmed the decision of the Principal Sudder Ameen.

The appeal now before us is from the decree of the Sudder Court of the 9th of May, 1859, and from the decree of the Zillah Court of the 29th of June, 1858. There is no appeal before us from either of the decrees made in the further suit instituted by Tara Purshad against Doorga Purshad, their Lordships having, in consequence of delay on the part of Doorga Purshad, refused an application made by him for leave to appeal [210] from those decrees. Doorga Purshad and Tara Purshad have both died pending this appeal, and the appeal has been revived and is now in force between their representatives, Shama Purshad Roy Chowdery and others, and Hurro Purshad Roy Chowdery and another.

The sole question to be considered upon this appeal is, whether Doorga Purshad was entitled to recover, in the suit instituted by him against Tara Purshad, the sums which had been recovered by Tara Purshad from him under the decrees in the suit which Tara Purshad had instituted against him: and in considering this question, it must be assumed that at the times when those decrees were made, Tara Purshad was rightfully entitled to recover the sums which were payable under them, there not being, as has been mentioned, any appeal from those decrees. Tara Purshad insisted in the Courts in India, and his representatives have insisted in the argument before us, that Doorga Purshad was not entitled to recover these sums for two reasons: first, that his right to recover them is precluded by section 16, Ben. Reg. III. of 1793; and, secondly, that, independently of that provision in the Regulation, money which had been paid under a decree or judgment of a Court of competent jurisdiction cannot be recovered in a new suit or action, so long as the decree or judgment under which it has been recovered is subsisting and in force. Upon the first of these points their Lordships have felt but little doubt. Section 16, Ben. Reg. III. of 1793, is in these terms:—"The Zillah and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall [211] appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction. If any doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the circumstances to the Sudder Dewanny Adawlut, and wait the instructions of that Court." Their Lordships think that this provision applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present in which new circumstances have intervened, and altered the nature and character of the question to be determined. The intent of the resolution, as it seems to their Lordships, is only to prevent the re-trial of the same question; and it is obvious that there is an essential difference between the question whether Tara Purshad was entitled to recover against Doorga Purshad before the Order of Her Majesty in Council was pronounced, and the question whether, after that Order was pronounced, he was entitled to hold the money which he had previously recovered.

Upon the second point their Lordships have felt more difficulty. There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force: but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been [212] so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded; and applying this test to the present case, their Lordships are of opinion, that the decrees

obtained by Tara Purshad against Doorga Purshad were superseded by the Order of Her Majesty in Council pronounced in the year 1849. It was plainly intended by that Order that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the Order to permit the decrees obtained by Tara Purshad pending the appeal on which it was made to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree which was reversed by the Order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of Tara Purshad, and the decrees under appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.

That the Sudder Dewanny Adawlut has not, as their Lordships think it might have done, dealt with the decrees now under appeal as falling within the direction given to that Court by Her Majesty's Order in Council, to ascertain, carry out, and enforce the [213] rights and liabilities of the parties, does not, in their Lordships' opinion, vary the case. This provision in Her Majesty's Order in Council gave power to the Sudder Dewanny Adawlut to deal summarily with the rights and liabilities of the parties, but it could not, in their Lordships' opinion, take away any rights which the law would give to Doorga Purshad independently of that power. For these reasons their Lordships are of opinion, that the decrees appealed from ought to be reversed, and that the sums of Rs. 8200. 7. 3. and Rs. 2927. 8. paid under them ought, so far as the assets of Tara Purshad will extend, to be repaid by the now Respondents to the Appellant, with interest at 12 per cent. from the respective times when such sums were respectively paid, and that the now Respondents ought also, so far as Tara Purshad's assets will extend, to pay the costs of this appeal; but under the circumstances of the case, and having regard to the delay on the part of Doorga Purshad, their Lordships do not think that his representatives are entitled to recover the costs incurred by him in the course of the proceedings taken against him by Tara Purshad. Their Lordships, therefore, will humbly recommend Her Majesty to make an Order upon this appeal to the effect which we have mentioned.

[214] MUSSUMUT CHUNDRABULLEE DEBIA,—*Appellant*; LUCKHEA DEBIA CHOWDRAIN,—*Respondent*.^{*} [June 19, 20, 1865].

On appeal from the Sudder Dewanny Adawlut of Bengal.

By a Pottah, in the nature of a lease in perpetuity, granted by an ancestor of A., in the year 1796, to the ancestor of B. of a piece of land, B. and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after the date of this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee or his heirs, A. without any demand for rent, or bringing a suit for assessment of the property, brought a suit against B. to recover six years' arrears of rent for the house, at the rate fixed by Ben. Reg. XIX. of 1793, sec. 10. Held, reversing the decree of the Sudder Court, that B., and those under whom she claimed, having been in undisturbed possession, and the cause of action having arisen sixty years before the institution of the suit, such suit was barred by cl. 3, sec. 3, of Ben. Reg. II. of 1805 [10 Moo. Ind. App. 217].

^{*} Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors. —The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Held further, that while that clause takes away the cognizance by any Court in Bengal of a suit, if the cause of action should have arisen sixty years before the institution of the suit, it distinguishes between the effect of the twelve years' limitation and that of sixty years, by precluding all inquiry into any original defect in the title under which the possession for the latter period obtain, and made it, in effect, unavailing to show that the possession of A. commenced under a grant made null and void by the Regulation of 1793.

Whether the twelve years' limitation provided by the Ben. Reg. II. sec. 3, cl. 1. of 1805, can be held applicable to such a suit. *Quære?*

Semble. That to maintain such an action, a demand for arrears of rent should have been preceded by a suit for assessment of rent under Ben. Reg. XIX. of 1793, sec. 10.

The facts and circumstances of this case sufficiently appear from the judgment of their Lordships:

The appeal was heard *ex parte*, the Respondent not appearing.

[215] The Attorney-General (Sir R. Palmer), and Mr. Leith, for the Appellant, argued.

First, that the grantor had power to alienate any portion of his estate, Ben. Reg. I. of 1793, sec. 9; and that the Portah conveying the house, under which title the Appellant claimed, was expressly sanctioned by Ben. Reg. XLIV. of 1793, sees. 6 and 8.

Secondly, that the Courts below had wrongly applied the provisions of Ben. Reg. XIX. of 1793, sec. 10, to the case; and

Thirdly, that the suit was barred by acquiescence, as well as by the rules of limitation, Ben. Regs. III. of 1793, sec. 14, and II. of 1805, sec. 3.

Their Lordships' judgment having been reserved, was now delivered by

The Right Hon. Sir John T. Coleridge (Dec. 1, 1865). This was an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, affirming a decree of the Principal Sudder Ameen of the Civil Court of Mymensing, which last had reversed a decree of the Sudder Ameen of the last-named Court in favour of the Appellant. The Respondent has not appeared, and this appeal has been heard *ex parte*.

The original suit was brought by the Respondent to recover arrears of rent for six years and nine months preceding its commencement, and the following may be taken to be the facts of the case:—The Appellant and those under whom she claims had been in peaceable and undisturbed possession of the property for more than sixty years; it is in the town of Nusseerabad, and within and parcel of a four-annas share of the Zemindary of Pergunnah Allapsing, of [216] which the Respondent, as mother and guardian of her son, a minor, is the proprietor in possession. The Appellant claims under a grant from the ancestor of the Respondent, which purports to have been made for the setting up an idol, and concludes thus—"Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this Bromuttur Pottro." The date of this instrument corresponds with the 10th of February, 1796 A.D. The idol has remained, and its worship has been continued uninterruptedly from that time. The Respondent's plaint, which was not filed until the 15th of April, 1857, was preceded by no demand of rent, nor any suit for the assessment of it; but the rent sued for is stated to be "in accordance with the rate of rent obtaining in lodging-houses at this place of Nusseerabad": this rate being fixed by the Ben. Reg. XIX. of 1793, sec. 10; on which, indeed, the Respondent's case entirely depends.

These are all the facts, and it sees clear that if the original grant has not been annulled by any Regulation, or if the possession has become unimpeachable by reason of the lapse of time, either of the twelve years or of the sixty years prescribed by the Bengal Regulations; or if, at all events, it was under the circumstances necessary that this action should have been preceded by a suit for assessment of the rent, or a demand of rent ascertained in some way or other; the original suit could not be maintained, and the two later decrees must be reversed. They were impeached by

the Appellant on all these grounds. Their Lordships, however, do not find it necessary in this case to give any opinion upon the first or third of these [217] points, or upon the question whether, under the circumstances of this case, the twelve years' limitation prescribed by the Regulations ought to be held applicable to it. They have reason to believe that questions of some importance, and possibly of some difficulty, have been raised, and that some cases which were not cited at the Bar have been decided in the Courts in India, bearing more or less directly on some, at least, of these points, and they think it would neither be prudent nor safe for them, more especially in a case which has been argued on one side only, to give any opinion which might affect these questions. Moreover, it is obvious that to decide this case upon the last of the grounds on which the Appellant relied, might only lead to renewed litigation. Their Lordships, therefore, abstain from giving any opinion whatever upon any of these points.

It may be assumed, for the purpose of argument, but for that purpose only, and without the expression of any opinion by their Lordships, that all these points ought to be decided in favour of the Respondent: but they are of opinion that the Appellant was entitled to have the suit dismissed upon the ground of there having been peaceable possession by her and by those under whom she claims for sixty years before the suit was commenced, and of the suit being, therefore, barred by the early part of the 3rd clause of the Ben. Reg. II. of 1805.

The first and second clause, and the second branch of the third clause, of this Regulation have reference to the twelve years' limitation which was previously in force, explaining and qualifying that limitation: and as their Lordships do not, as has been already said, rest their judgment on this limitation, [218] it is unnecessary to comment on these parts of the Regulation: but the first branch of this third clause provides that "nothing in the preceding clause, or in any part of the existing Regulations, shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of the suit: nor shall any plea on the part of the Plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognizance of any suit so preferred." This branch of the clause, therefore, in its very comprehensive language, embraces every then existing Regulation by which any Court in Bengal was authorized to take cognizance of any suit whatever: it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit: it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all inquiry into any original defect in the title under which the possession for the latter period commenced: it makes it, in effect, in cases in which the section applies, unavailing to show that the possession of the Appellant commenced under a grant made null and void by the Regulation of 1793.

The question then is, what is the cause of action in the present case, and when did it arise? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action.

The suit, indeed, may in some sense be likened to [219] what is of daily occurrence, the action to recover the later items only of a long account, which have become due within six years, although the Statute of limitations has barred the demand for the earlier items. The distinction, however, between such an action and the present suit, is obvious: the items of an account are independent of each other: each represents a distinct contract or a distinct debt. But the right to recover rent for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years.

It is the case of the Plaintiff in the Court below, that by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained, so long as a Plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of limitations be? A

man might be barred in an action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, for use and occupation, for a compensation for the fruits of the land: because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be: and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the [220] occupation—that occupation having been always of one and the same character; in fact, rent free.

Their Lordships being of this opinion, will, therefore, humbly advise Her Majesty that this suit was barred by the sixty years' possession of the Appellant, and those under whom she claims, and, therefore, that the original judgment of the Sudder Ameen dismissing it ought to be affirmed, and the two later judgments reversed, and the costs of all the proceedings below, with those of this appeal, be paid by the Respondent.

SREENANTH BHUTTACHARJEE.—*Appellant*: RAMCOMUL GUNGOPADYA, GOBIND CHUNDER MOZOOMDAR and Others.—*Respondents* * [June 20, 21, 1865].

On Appeal from the Sudder Dewanny Adawlut at Bengal.

By section 2 of Act, No. XIX. of 1843, it is enacted, that “every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed—and that [from the 1st day of May, 1843] every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding.” Held:—

First, that the words in the latter part of the section, “any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding” applied not only to deeds and certificates of mortgage, but also to deeds of sale or gift [10 Moo. Ind. App. 227]; and

Secondly, that the proviso, that “its authenticity be established to the satisfaction of the Court” pointed out merely the exclusion of a fraudulent deed from the benefit of the Act, as it was not intended that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as a *bona fide* deed [10 Moo. Ind. App. 228].

A registered deed cannot be deprived of the priority given by Act, No. XIX. 1843, unless it be proved that there was fraud on the part of the grantee.

The Appellant in this appeal brought a suit, in the nature of an action of ejectment, in the Zillah Court of the Twenty-four Pergunnahs against the [221] Respondents to recover possession of 28½ mouzahs, being a moiety of the Zemindary,

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge. Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

Pergunnah Haveleeshur, with mesne profits of the villages, then in the possession of the Respondent, Gobind Chunder Mozoomdar, as registered owner. The Zemindary had been conveyed to him by the Respondent, Ramcomul Gungopadya, a former mortgagee, who had acquired the proprietary right of the Zemindary under a foreclosure proceeding and suit for possession.

The question in the suit was one of title. The Appellant claimed the moiety of the Zemindary, under a Kabala, or Bill of Sale, dated the 27th of March, 1854, made by one of the Respondents, named Taraprosono Mookerjee, who, it was insisted by the Appellant, had previously purchased the moiety of the Zemindary from Ramcomul Gungopadya, and that a deed had been executed by him conveying to Taraprosono Mookerjee the moiety in consideration of certain pecuniary transactions subsisting between them in relation to Ramcomul Gungopadya's mortgage. The defence of [222] the Respondent, Gobind Chunder Mozoomdar, to the Appellant's claim was, that he was entitled to the whole Zemindary under a deed of conveyance in the English form, dated the 5th of April, 1854, executed by Ramcomul Gungopadya for a good consideration, which deed, as well as a deed of release of even date from Taraprosono Mookerjee, for the moneys advanced by him in respect of Ramcomul Gungopadya's mortgage, were registered on the 20th of April, 1854, in the proper office of the Registrar of deeds of the Zillah of the Twenty-four Pergunnahs, previous to the registration of the alleged Kabala, set up by the Appellant.

By sec. 2 of Act, No. XIX. of 1843 (see section set out, *post* [10 Moo. Ind. App.], p. 226), preference is given to a registered deed, over one, although of an earlier date, subsequently registered under the provisions of that Act.

When the cause came before the Principal Sudder Ameen (Baboo Tarucknath Sein), he dismissed the suit, on the ground, that the Appellant's title could not be maintained, as the deeds, including the Kabala, on which he founded his claim, were, in his opinion, forgeries, and upheld the title of the Respondent, Gobind Chunder Mozoomdar. The Appellant appealed from this decree to the Sudder Dewanny Adawlat at Calcutta. The decree of that Court (which consisted of Messrs. Raikes, Trevor and Loch), was to the effect, that there was no pecuniary consideration for the alleged conveyance from Ramcomul Gungopadya to Taraprosono Mookerjee, and in the absence of such consideration, the title of the Respondent, Gobind Chunder Mozoomdar could not be affected by that conveyance, and accordingly the appeal was dismissed with costs. Hence the present appeal.

[223] Mr. Holthouse, Q.C., and Mr. Cave, for the Appellant, contended, first, that Ramcomul Gungopadya's title being undisputed, the Bill of Sale made by him to Taraprosono Mookerjee, and the conveyance afterwards executed by the latter in the Appellant's favour, being genuine instruments for valuable consideration, passed the moiety of the mouzahs in suit to the Appellant.

Secondly, that the conveyance executed by Taraprosono Mookerjee in favour of the Respondent, Gobind Chunder Mozoomdar, was fraudulently concocted for the purpose of defeating the Appellant's claim, and, therefore, was not entitled under the Act, No. XIX. of 1843, secs. 2 and 3, by reason of its earlier registration, to be preferred to the prior deed of sale executed by Taraprosono Mookerjee in favour of the Appellant.

The Attorney-General (Sir R. Palmer), and Mr. Leith, appeared for the Respondent, Gobind Chunder Mozoomdar, but were not called upon to address their Lordships.

Judgment having been reserved, was now pronounced by

The Right Hon. the Lord Justice Turner (July 20, 1865).—In disposing of this appeal their Lordships do not think it necessary to enter fully into the details of the case. The view they take of it will be sufficiently explained by a mere general outline of the facts. Ramcomul Gungopadya was originally mortgagee of the entirety of the Zemindary, Pergunnah Haveleeshur. He subsequently acquired the full proprietary right to and possession of the Zemindary by a foreclosure [224] suit, and suit for possession consequent thereon, and after he had thus acquired the proprietary right in the Zemindary he applied for the mutation of names in the Collectorate, and was there registered as sole proprietor of the whole Zemindary. The Appellant, Sreenanth Bhuttacharjee, alleges that Ramcomul Gungopadya before

he had acquired the proprietary right in the Zemindary by an Ikrar, or agreement for sale, dated the 20th of December, 1852, agreed with the Respondent, Taraprosno Mookerjee, that in the event of his acquiring the proprietary right, he would transfer a moiety of the Zemindary to Taraprosno Mookerjee, and that after he had acquired the proprietary right, he, by a Kabala, or deed of sale, dated the 31st of July, 1853, transferred the moiety of the Zemindary to Taraprosno Mookerjee accordingly. The moiety of the Zemindary thus transferred to Taraprosno Mookerjee was, as the Appellant alleges, afterwards conveyed to him by deed, bearing date the 27th of March, 1851; but this deed was not registered until the 2nd of May, 1854. In the meantime, and on the 5th of April, 1854, Ramcomul Gungopadya, by a deed of that date, in consideration of the sum of Rs. 90,000, conveyed the whole Zemindary to Gobind Chunder Mozoomdar, and by a deed of even date, Taraprosno Mookerjee, in consideration of the sum of Rs. 15,000, also conveyed all his interest in the Zemindary to Gobind Chunder Mozoomdar, and on the 20th of April, 1854, both these deeds were duly registered.

After the execution of these deeds, Gobind Chunder Mozoomdar had possession of the whole Zemindary, and he was in possession of it when the suit out of which this appeal has arisen, was instituted.

This suit, which is in the nature of an ejectment [225] suit, was instituted by the Appellant against Ramcomul Gungopadya, Gobind Chunder Mozoomda, and Taraprosno Mookerjee, and several other persons, for recovering the moiety of the Zemindary alleged to have been conveyed to the Appellant in manner above mentioned. The plaint in the suit alleges, that Ramcomul Gungopadya, through fraudulent motives, had disposed of the whole Zemindary (including the moiety previously sold by him to Taraprosno Mookerjee) to Gobind Chunder Sein in the fictitious name of Gobind Chunder Mozoomdar, under a Kabala, dated the 4th of April, 1854, for consideration of Rs. 90,000, but the plaint contains no allegation whatever of any fraud on the part of Gobind Chunder Mozoomdar.

Gobind Chunder Mozoomdar by his answer wholly denies the title set up by the Appellant, and rests his case on the conveyance to him by Ramcomul Gungopadya. He sets up no title under Taraprosno Mookerjee, and, on the contrary, he says, that Taraprosno Mookerjee had no right or interest in the Zemindary, but it appears, both by the answer and throughout the proceedings in the suit, that Taraprosno Mookerjee had under his alleged Ikrar and Kabala set up claims to the property, and the answer, in effect, treats the release from him as obtained for the purpose of putting an end to those claims. There is a great deal of evidence in the suit, with reference for the most part, to the alleged Ikrar and Kabala set up by the Appellant; but on the hearing of the cause before the Principal Sudder Ameen, he dismissed the suit, and upon appeal this decree was affirmed by the Sudder Court. The appeal before us is from these decrees.

[226] The judgments, both of the Principal Sudder Ameen and of the Sudder Court, appear to have proceeded upon a full and careful examination of the facts of the case; but their Lordships, as they have intimated, do not find it necessary to enter upon this examination.

It appears that by the Act, No. XIX. of 1843, it is provided, "that from the first day of May last past, every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed—and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

Their Lordships are of opinion, that this case may well be decided, and ought to be decided, upon the provisions of this Act.

Two questions arise upon the Act: first, whether [227] the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such unregistered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in that part of the enactment which immediately precedes these words, or are to be taken to extend also to the deeds of sale or gift which are mentioned in the earlier part of the enactment; and, secondly, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships are of opinion, that upon the true construction of the Act, the words first above mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. This enactment, although divided into two branches, in consequence of the different effect which is given to it as to deeds of sale and of mortgage, was plainly intended to be a general enactment. The words we are considering are words of reference, and the terms used being general and comprehensive, their Lordships see no reason for confining their operation to one branch of the enactment rather than extending it to both. Had it been intended that they should be so confined there would have been no difficulty in expressing that intention. It would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee, but in the case of a sale the priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or [228] notice, by the registered vendee or donee. The too common practice in India of setting up forged and fraudulent deeds, and the security against this practice which is afforded by registration, are quite sufficient to account for this enactment extending both to sales and mortgages, and the policy of such enactments is not unknown in other countries. The Irish Registration Acts afford an instance of it.

Then as to the second question. The proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word "authenticity" would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bona fide* deed. They are not disposed so to construe the Act, but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee, and in this case no fraud is alleged, and certainly none is proved, on the part of Gobind Chunder Mozoomdar. It would be going much too far to impute fraud to a purchaser upon the mere ground that he had bought up a possible claim, and so far as their Lordships can find, there is nothing beyond this affecting Gobind Chunder Mozoomdar either in point of allegation or of proof. Of course it has not escaped their Lordships' attention that there is an allegation in the plaint which suggests collusion between Gobind Chunder Mozoomdar and Taraprosono Mookerjee, but their Lordships see no proof of this. Upon the whole, [229] therefore, they are of opinion that Gobind Chunder Mozoomdar's deed being first registered, must prevail over the subsequently registered deed of the Appellant, and they must, therefore, without entering further into the case, humbly recommend Her Majesty to dismiss this appeal, and with costs.

MURTUNJOY CHUCKERBUTTY. —*Appellant*: JOHN COCKRANE Official Assignee of the estate of Messrs. HICKEY, BAILEY, and Co., insolvents. *Respondent* * [June 23 and 24, 1865].

On appeal from the Sudder Dewanny Adaulut at Calcutta.

A manufacturer of silks in Bengal employed a firm at Calcutta as Factors for the sale of his goods on commission. Generally the shipments and consignments to England were in the name of the Principal, but as the market was depressed at Calcutta, the Factors on several occasions shipped a portion of the goods to England, consigning them in their own names. There was a loss on the sales in England of the goods so consigned: Held:—there being no peculiar custom of trade existing in Calcutta to qualify the general mercantile law of England, in respect to Principal and Factor: and in the absence of evidence of any special instructions by the Principal, that such consignments by the Factors was within the scope of their general discretion, and the loss was properly charged on account of the principal [10 Moo. Ind. App. 242-245].

By an agreement between Principal and Agents, 10 per cent. was to be allowed as commission. The Sudder Court, under Act. No. XXXII. of 1839, allowed 12 per cent. per annum from the date of the suit, on the amount found due to the Agents: such rate of interest disallowed on appeal, as that Act does not apply to an agreement between parties regulating the amount of interest [10 Moo. Ind. App. 251].

Where a partial alteration was made by the appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was affirmed, both parties were directed to pay their own costs of appeal [10 Moo. Ind. App. 251].

This suit was brought by the Respondent in the Zillah Court of Moorshedabad, to recover from the [230] Appellant the balance of a mercantile account stated to be due to the insolvent firm of Hickey, Bailey, and Co., for principal and interest at the time of their insolvency, amounting to Rs. 54,784. 4a. 9p. to which sum interest was added, calculated partly at 10 and partly at 12 per cent. per annum, during the subsequent period and up to the 31st of August, 1856, making the alleged debt Rs. 1,10,938. 4a. 6p.; but as the amount of interest more than doubled the amount of the principal money (which excess could not be recovered against the Appellant by a rule of the Courts in India), the Respondent relinquished a sum of Rs. 10,938 4a. 6p. from the amount alleged to be due as interest, and laid the amount sought to be recovered at Rs. 1,00,000, and interest thereon to the day of payment.

The facts were these:—

The Appellant was in and previous to the year 1840 a dealer and manufacturer of raw silk and silk piece goods, called "Corahs," at Junghypore, in the Presidency of Bengal, and in the latter year employed the firm of Hickey, Bailey, and Co., then carrying on business in Calcutta as Brokers, to act as his Agents, in receiving from him, from time to time, consignments of his goods and selling them on commission. The dealings between the parties continued up to a short period of the firm's being declared insolvent, which took place on the 17th of February, 1848.

Out of the above consignments shipments were made under the express authority of the Appellant by Hickey, Bailey, and Co., first to Messrs. Price, Griffiths, and Co., and afterwards to Van Notten and Co., as consignees in England for sale, during the years 1840, 1841, 1842, 1843, and 1845. The in-[231]-voices of those shipments were invariably made out by Hickey, Bailey, and Co., as directed, in the same form, stating that the goods therein mentioned were shipped by Hickey, Bailey, and Co. to London, for sale on account and risk of the Appellant: his name and manufactures

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

being well known both in the Calcutta and London markets; and his goods, by reason of the superiority of his manufacture, being sought after and bearing the highest price in those markets. The accounts, sales, and letters of advice respecting these shipments were made out and written by the consignees in England, in the name of the Appellant, to whom they were accordingly dispatched, and by whom they were received in India.

The Appellant, in the months of January, February, and March, 1846, had made considerable consignments of silk goods for sale on his account to Hickey, Bailey, and Co.

It appeared that, on account of the Calcutta market being depressed and unfavourable, certain goods remained in hand in the month of April, and could not be advantageously sold in Calcutta, and the Appellant gave permission to Hickey, Bailey, and Co. to ship the same for sale in England, as had been previously done.

The Appellant afterwards received a letter bearing date the 13th of April, 1846, from Hickey, Bailey, and Co., which contained the following passage:—"Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to London, the particulars of which will be forwarded to you in due course."

The Appellant insisted in the Court below, that he had not in the instructions given by him to Hickey, [232] Bailey, and Co. given any direction to alter or vary the established usage as regarded the shipments of his goods, which had been previously always made in his name, and that the goods last mentioned had been shipped on Hickey, Bailey, and Co.'s own account; and, in consequence, he disputed his liability in respect of such shipments.

The account sales of these shipments were made out, by the consignees in England, in the name, and on the account, of Hickey, Bailey, and Co.

The first information as to these shipments given to the Appellant, was by a letter sent to him by Hickey, Bailey, and Co., dated the 5th of August, 1847, and invoices sent with it.

By the decree of the Zillah Court (Mr. A. Pigou, presiding Officiating Judge) it was ordered that the Appellant should pay the sum of Rs. 1,00,000, with interest at 12 per cent. Upon appeal from this decision to the Sudder Dewanny Adawlut at Calcutta, that Court (consisting of Messrs. Trevor, Bailey, and Steer) decreed to the Respondent the principal sum of Rs. 54,784 4a. 9p., minus the differences between 10 per cent. on Rs. 89,584 and the rate of 12 per cent. calculated thereon in the account made up to April, 1847, the previous accounts showing the rate agreed to between the parties to be only 10 per cent. per annum, but the Court, under the Act, No. XXXII. of 1839, gave interest upon the principal sum from the date of the institution of the suit to the date of realization at the rate of 12 per cent.

On the appeal from this decree to the Privy Council, the principal point turned upon the accounts, which raised the question, whether the claim of the Respondent could be sustained in accordance with the mer-[233]-cantile custom and usage of Calcutta and the mode of dealing between the Appellant and the late firm of Hickey, Bailey, and Co. The material evidence upon this point is stated in their Lordships' judgment.

It was contended on appeal by the Appellant, first, that goods were delivered to the late insolvent firm for sale on commission on behalf of the Appellant, but that Hickey, Bailey, and Co. had consigned them to England, in their own names and at their own risk, and that the Respondent, as Official assignee, had failed to discharge that firm from the obligation of accounting for those goods and for the proceeds of the sale thereof in the usual manner as between Principal and Agents in taking the accounts; and secondly, that the decree of the Sudder Dewanny Court ought not to have decreed interest on the consolidated amount of principal and interest from the date the suit was brought, nor at the rate of 12 per cent. per annum, under the Act, No. XXXII. of 1839, when the rate agreed between the parties was 10 per cent.

The Attorney-General (Sir R. Palmer), and Mr. Leith, for the Appellant; and Sir Fitz Roy Kelly, Q.C., and Mr. Macpherson, for the Respondent.

Their Lordships' judgment was pronounced by

The Right Hon. the Lord Justice Turner (July 20, 1865).—The Appellant in this case is the owner of silk filatures, and a dealer in silk of Junghypore, a district in Bengal. The Respondent is the Official assignee of an insolvent firm that formerly carried [234] in business in Calcutta, under the style of Hickey, Bailey, and Co.

That firm from the year 1840 up to the end of 1847 acted as the Factors and Agents of the Appellant; selling some of the goods consigned to them by him in Calcutta, and shipping others to London for sale there; and the following seems to have been the course of dealing between them:—The Appellant was in the habit of drawing Hickey, Bailey, and Co., against the goods consigned to them, and they accepted and paid his drafts, charging him in account with the amount of them. If they sold the goods in Calcutta, they rendered the account sales to him, and credited him with the proceeds. Against the goods shipped to London they drew Bills in sterling money upon the consignees; but credited the Appellant in account with the proceeds of those Bills in rupees at the rate of exchange at which they were sold in Calcutta; and on receiving the account sales from London, they either gave him further credit for the profit, or debited him with the loss on each shipment, according to the final result of the transaction. The account current so kept was balanced on the 30th of April, in each year, and, from time to time, rendered to the Appellant. From the year 1840 up to a period which, as found by the Courts below, we may take to have been some time in 1845, the consignments to London were shipped by Hickey, Bailey, and Co., to the consignees “for sale on account and risk of Murtunjoy Chuckerbutty.” Examples of invoices appear in the record. About the year 1845, some change took place in the constitution of the firm of Hickey, Bailey, and Co., and either contemporaneously with, or shortly after that event, the shipments on account of the Appellant were made in [235] a different form; most of the invoices stating the goods to be shipped by Hickey, Bailey, and Co., and consigned to the London house for sale “on account of the concerned;” and one or two stating them to be consigned for sale on account of Hickey, Bailey, and Co. Examples of the first of these two classes of invoices appear in the record. All the latter invoices however continued to specify the mark or brand by which the Appellant’s silks were known in the market. It is upon the variation in the form of the consignments made in and subsequently to 1845 from that of the consignments made before that year, that the principal question on this appeal is raised.

The disputes between the Appellants and Hickey, Bailey, and Co. began in 1847, the year so disastrous to commerce in India. The letters of the 27th of November, 1845, and the 21st of February, 1846, show that from a date as early as the latter part of 1845, the silk market, both in Calcutta and in London, was in a state of great depression. On the 13th of April, 1846, Messrs. Hickey, Bailey, and Co. wrote to the Appellant: “Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to London, the particulars of which will be forwarded to you in due course.” And accordingly their letter of the 23rd of December, 1846, contains this passage: “We also inclose invoices of 64 bales silk, and 900 pieces of your good corahs shipped on your account to London; the sums drawn against these shipments, as per memorandum at foot, viz.: Rs. 54,816. 12a. 6p. have been carried to your credit under due dates.”

[236] It is not difficult from this memorandum, and by means of the quantities of silk, and the dates and amounts of the Bills there specified, to identify the shipments so advised with the shipments of 7 bales per *Oriental*, and 8 bales per *Tartar*, to Magniac Jardine, and Co., the shipment of 13 bales per *Kelso*, to S. Phillips and Co., the shipment of 18 bales per *Essex*, to H. J. Johnston and Co., the shipment of 18 bales per *Cressy*, to Cockerell and Co., and the shipment of 4 cases of corahs, also per *Cressy*, to Thorburn and Co., which are respectively mentioned in the accounts. The losses on these shipments are amongst those his liability to which the Appellant disputes; and many, if not all, of them must have entered into the accounts which were the subject of the correspondence that will be next mentioned.

In August, 1847, Messrs. Hickey, Bailey, and Co. wrote to the Appellant their letter of the 5th of that month. The most important passage in it is the first paragraph, which is in these words: “We beg to wait upon you with the following:—A statement of your account current exhibiting on the 30th of April last a balance in our favour of Co.’s Rs. 13,171. 3. 7., and a continuation of the same in open account

to date showing a balance against you of about Rs. 31,882. 6. 5. Four account sales from Messrs. Magniac, Jardine, and Co., Samuel Phillips and Co., and Cockerell and Co., of London, comprising 69 bales of your silk, and three account sales comprising 51 bales of theirs." This letter also expresses an unwillingness in the then state of the markets to receive any further consignments "drawn against;" [237] and presses the Appellant to place the house in funds either by remittances or goods.

The Appellant's answer to this communication was dated the 12th of August, 1847. After professing himself confounded by the letter of the 5th, he says: "The cost of the goods I consigned to you was Rs. 5000 or 8000 more than I drew on you, and I believed you owed me that sum at least, but in your letter you make me your debtor more than Rs. 31,000. I am ashamed to hear this. Your old house several years has sent silk and corahs to England on my account, and the London houses have ever sent account sales, etc., for every transaction in my name, and I have these accounts in my hand. Your new house, I don't know how, has taken a new manner of business, and all the account sales sent to me now are copies signed in Calcutta; this does not satisfy me at all, and, therefore, I want the London account sales as formerly. There are many particulars I want to know in these sales, because I see in your copies several sales on account of the concerned. Until I have the particulars I will not examine the account current, and I request you will send them to me as quick as possible."

In reply, Hickey, Bailey, and Co., on the 28th of August, 1847, sent a letter, in which they forwarded, though under a kind of protest, the original accounts demanded; complained of the tone of the Appellant's letter to them; and again pressed for payment of the balance due to them.

There is no evidence of any further correspondence between the parties until October, 1847. On the 11th of that month, Hickey, Bailey, and Co. wrote a letter to the Appellant, which is not in evidence. [238] From the references to it in the subsequent correspondence, we may infer that it contained an account corresponding more or less closely with that mentioned in the record as No. 1.

In answer to it the Appellant wrote the letter of the 25th of October, and in which he for the first time put forward distinctly the case on which he now relies. He says, "I am very anxious to settle my two years' accounts with you. I hereby send you the copy of the abstract of your letter dated the 11th of October, 1846, for your inspection. In your opinion my goods created a good name in the London markets, so relying on your statement I desired you to ship a quantity of my silk, but you in contravention to your practice shipped them in your own name instead of mine, and, therefore, owing to my name being suppressed, I hold you responsible for the loss. It is very easy to settle accounts. I will only debit you with the invoice cost of the goods shipped by you to London; likewise, I will debit you with amount of the account sales sent by you with interest. You may also, according to former practice, debit in my name the amount I received from you with interest, and also costs."

The reply of Hickey, Bailey, and Co. to this is dated the 30th of October. After explaining the letter of the 11th of October, 1847, they say, "Regarding the shipments, we must beg to observe that the invoices of your property have been uniformly worded according to the practice followed in Calcutta, 'on account of the concerned,' under your well-known filature mark, and not in our name as you pretend, which, however, would make no difference in the result of the operations. You were fully made aware [239] of those shipments by our letter of the 23rd of December, 1846, etc., and, therefore, cannot at this late hour, because the result has been a loss, pretend to have no personal interest, and decline all responsibility in shipments made on your account, and to which you have till now made no objections, you having on the contrary, in many of your letters, directed us to ship your goods on your own account, and not to sell them in Calcutta, evidently because you expected a more profitable realization of them by so doing. We, therefore, beg to hand you again a statement of your account closed 30th of April last, showing a balance in our favour of Company's Rs. 22,312. 9. 6., and a continuation of the same in open account, showing a balance against you up to date of Company's Rs. 48,547. 1. 0. This account, you will see, has been corrected, owing to a mistake in crediting you with a draft for Rs. 10,000, against a shipment which had nothing to do with your

account." The right to make this correction is also a material question on this appeal.

The Appellant replied to this letter by that of the 18th of November. The following are the material passages in it: "I am informed of the particulars from the contents of your letter dated the 30th of October, which reached me at a time when I was busily engaged in preparing your accounts, and consequently could not reply to it. I am now sending you the account for your inspection, bearing a balance of Rs. 1390. 12. 1. in my favour, which please let me have. The points treated by you in your letter may be true in your opinion, but in my opinion they are improper, for my goods were unjustly shipped to England. Notwithstanding this I have forwarded [240] Bills to you, and debited you with the cost price of them. I have credited you with the amount you paid to me, and entries have been made regarding your commission and discount according to the former practice."

Messrs. Hickey, Bailey, and Co. stopped payment early in January, and were formally adjudged insolvents on the 17th of February, 1848. In their schedule the claim against the Appellant was entered as "disputed." The Respondent afterwards became the Official assignee of this insolvent estate, and some correspondence appears to have passed between him and the Appellant touching the disputed claim on the latter in June and July, 1849. He continued to insist on his view of his rights, and, instead of admitting anything to be due from him to the estate of Hickey, Bailey, and Co., to contend that the sum of Rs. 1390. 12. 1. was due to him on the balance of the account as made out by him.

In July, 1857, after a delay not very satisfactorily accounted for, on the ground of the poverty of the estate and the complexity of the accounts, the Respondent, under the authority of the Insolvent Court, commenced an action in the Zillah Court of Moorshedabad against the Appellant for the recovery of Rs. 1,00,000, the balance alleged to be due on this disputed account. The plaint showed that the balance claimed to be due at the date of the insolvency, with the subsequent interest, amounted to Rs. 1,10,938 and a fraction; but relinquished all in excess of the Rs. 1,00,000, in pursuance of a rule which obtained in the Courts of the East India Company, and forbade a Plaintiff to recover more than double the amount of his principal debt.

[241] The judgment of the Zillah Court, which is dated the 2nd of February, 1859, decreed the whole amount claimed to the Respondent, with interest at the rate of 12 per centum per annum from date of suit to date of payment.

On appeal, the Sudder Dewanny Court by its judgment, dated the 24th of February, 1862, confirmed this judgment on all points except the calculation of interest. It held that the sum claimed as principal money and the balance due to the insolvent firm in February, 1848, being Rs. 51,784. 9., should be corrected by the deduction of the difference between 12 and 10 per cent. interest on the account between the 30th of April, 1846, and the 30th of April, 1847; it refused to allow the Respondent any interest on the sum so ascertained during the period in which he had delayed to bring his suit, but gave him interest on it from the date of the commencement of the suit to the date of payment, at the rate of 12 per centum per annum.

From these decrees the present appeal is brought; and the substantial questions to be determined upon it (some minor points that were raised on the pleadings have been given up in the Courts below or here), seem to be reduced to the following, viz:—

First, whether the Appellant is properly chargeable with the balance of the account between him and the late firm of Hickey, Bailey, and Co., taken on the principle on which this account has been taken, or whether he is now entitled to have that account taken on the principle asserted in his letters of the 25th of October and 18th of November, 1847, viz., that of treating all the later shipments to England as made by Hickey, Bailey, and Co. at their own risk, and of [242] debiting them with the prime cost, or other assumed value of the goods in Calcutta at the dates of the shipments?

Second, whether, assuming the shipments to have been made at the risk of the Appellant, it is proper, under the circumstances, to charge him with the amounts of the re-drafts from London?

Third, whether he is entitled to any, and what relief in respect of the item of Rs.

10,000, withdrawn by Hickey, Bailey, and Co., from the amount as mentioned in their letter of the 30th of October, 1847?

Fourth, whether the interest on the balance due by him has been correctly calculated?

The first question involves the inquiry, whether Hickey, Bailey, and Co., when they made the consignments of the Appellant's goods in the form in which they are shown to have made them subsequently to the year 1845, were guilty of any breach of the duty which either the general law, particular custom, or special contract between them and their Principal, imposed upon them as Factors. In the Court below evidence was given to show what are the general powers of Factors in Calcutta who are employed to ship goods for sale in England on account of their Principal. Their Lordships apprehend that this evidence was adduced not so much for the purpose of establishing that any peculiar custom of trade obtained in the port of Calcutta, as for that of showing what was the general law; the country Courts of India not being very conversant with questions of Mercantile law, and not recognizing the law of England as the *lex fori*. But, however that may be, their Lordships are of opinion, that the evidence altogether fails to show that any particular usage or custom qualifying [243] the Mercantile law of England, as between Principal and Factor, prevails at Calcutta. It is, therefore, by the general Mercantile law that the powers and duties of Hickey, Bailey, and Co., in making their consignments of the Appellant's goods, must be determined.

Again, their Lordships see no ground for dissenting from the exposition of the law which is contained in the careful judgment of the Sudder Court. They are of opinion, that Hickey, Bailey, and Co., as Factors, having an interest by reason of their advances in the Appellant's goods, were justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their Principal, or by contract. Of positive instructions or of express contract there is no proof. The existence of either, if to be inferred at all, is only to be inferred from the evidence of the course of dealing before 1845.

Again, their Lordships are of opinion, that even if there were nothing to set against the course of dealing so proved, the inference from it that the general discretion of the Factors in respect of all future consignments had been controlled, would hardly be safe or legitimate. But, in truth, the prior course of dealing is not the only fact from which their Lordships have to draw their conclusion on the point now under consideration. The letter of the 23rd of December, 1846, proves that invoices of the consignments of that year were then sent to the Appellant. All those invoices are not produced; but it is impossible to escape the conclusion that they must have shown in what form the consignments were made; since the losses on the shipments [244] to which they relate are unquestionably some of those which the Appellant, on the ground of the improper form of the consignment, is now seeking to throw on the estate of Hickey, Bailey, and Co., and he does not pretend that the invoices sent to him were not counterparts of the invoices sent to England. Nevertheless, on the receipt of that letter he made no complaint respecting the form of the consignments.

Again, when these transactions were known to have resulted in heavy losses, and he wrote this letter of the 12th of August, 1847, his chief complaint was that in the absence of the original account sales, he had not the proper evidence of what had been done with his goods in England; and it was not until October, 1847, that his present case was distinctly made. The correspondence thus tends strongly to negative the existence of instructions, contract, or understanding inconsistent with the acts of Hickey, Bailey, and Co. Their Lordships, therefore, think that the alleged breach of duty on the part of the Factors has not been established, and that as between them and the Appellant he was chargeable with the losses on all the shipments to England. The foundation of his case having thus failed, it is unnecessary to inquire whether, if it had been established, he would have been entitled to the particular relief which he claims. Their Lordships, however, observe, that in many important particulars, this case, if the Agent's breach of instructions had been proved, would have been distinguishable from that of *Bertram v. Godfrey* (1 Knapp's P.C. Cases, 381). There it was proved that the Agents who in breach of their in-

structions had neglected to [245] sell when the funds were at 85 per cent. and might have sold at that price; and consequently, the facts both gave the measure of the damages sustained, and afforded the means of compelling the Agents to put their Principal in the position in which he would have stood had they observed his instructions. Here it is quite certain what (if any) proportion of the loss is attributable to the form of the consignment. Nor is it easy to see upon what principle Hickey, Bailey, and Co. could be charged with the cost or invoice price of the goods; since it follows from the letter of the 13th of April, 1846, both that the Appellant had authorized the shipment of them for sale in England; and they must have been sold at a heavy loss, if sold at that time in Calcutta.

The next question is, whether the Appellant has been properly charged in account with the re-drafts. It is stated in the judgment of the Sudder Court, that no question had been raised regarding the good faith of these entries. They must, therefore, be taken to represent correctly the difference between the net proceeds of the Appellants goods and the amounts of the Bills drawn against them by Hickey, Bailey, and Co. Had Hickey, Bailey, and Co. remained solvent and paid the re-drafts, the propriety of these charges against the Appellant could not have been questioned. For he had already received credit in account for the sums for which Hickey, Bailey, and Co.'s Bills on London had been sold; and, therefore, to charge him with the re-drafts was only tantamount to writing back the excess of credit which he had received in anticipation of the realization of the proceeds of his goods. The question raised, however, is, whether Hickey, [246] Bailey, and Co., having failed, and having presumably paid, at most, a dividend on these re-drafts, they are entitled to charge the whole amount of them against the Appellant. The answer to this question depends on the further question, whether upon or after the insolvency of Hickey, Bailey, and Co., the consignees in England had any right of resort to the Appellant for the recovery of the difference between the sums realized by the sale of the goods and the amount of their acceptances against them; or the unpaid portion of such deficiency. If they had no such remedy, the Appellant, as the account stands, has received credit for all to which he is entitled, viz., the net proceeds of his goods; whereas, if he were to retain credit for the amounts for which the Bills on London were sold, without submitting to be debited with the re-drafts, he would charge the estate of Hickey, Bailey, and Co. with more than the net proceeds of the goods. On the other hand, if he remained liable to the consignees for the losses on the goods or for any part of such losses, his objection to a mode of stating the amount, which would have the effect of making him pay, or leaving him answerable for such losses, twice over, would be well founded.

It appears to their Lordships that in these transactions there was not that privity of contract between the Appellant and the consignees in England, which would render him liable for the sums represented by the re-drafts in question.

This is not the ordinary case of a contract made by an Agent for an undisclosed Principal, on which the contractee on discovering the Principal may at his election sue either Principal or Agent.

[247] The contract on which the liability, in respect of which the re-drafts were drawn, arose, was not a simple consignment of goods for sale by an agent on account of an undisclosed Principal; it was a contract of pledge by Factors having an interest in the goods pledged. Hickey, Bailey, and Co., being entrusted with the possession of the goods, and having advanced upon them, drew the Bills on London in their own names; they and not the Principal were liable as drawers on those Bills; and they probably sold the Bills with the shipping documents in the market. Had the Bills not been accepted by the consignees, the holders, though pledges, by means of the Bills of lading, of the goods, could have had no remedy for any deficiency against the Appellant. The acceptance of the Bills by the consignees, and the delivery of the shipping documents to them, made them the pledges, but did not alter the character of the transactions, which was one whereby Hickey, Bailey, and Co. had pledged the goods for the payment of Bills on which they, and not the Appellant, were liable as drawers for an amount exceeding the value of the goods. The re-drafts are for that excess. There seems on such a transaction to be no privity of contract between the consignees and the undisclosed Principal. How can such a privity be imported into it by the fact that, according to the course of dealing

between Hickey, Bailey, and Co. and the Appellant, the latter received credit on account for the sums for which the Bills on London were sold, subject to the final adjustment of the accounts of the different consignments?

Their Lordships are, therefore, of opinion, that the Appellant has been properly charged with the re-drafts.

[248] We have next to consider the disputed item of Rs. 10,000. In the account, No. 1, the Appellant is credited with this sum under date the 13th of April, 1846, as the proceeds of a draft of Hickey, Bailey, and Co., on Gougor and Stewart, of London, against sixteen bales of raw silk, shipped on Appellant's account per *Orient*; and under date, March 18th, he is on the other side of the same account charged with Rs. 541. 12. 6., as commission and shipping charges on the same consignment. It has already been stated that by their letter of the 30th of October, 1847, Hickey, Bailey, and Co. advised the Appellant that this shipment had been erroneously treated as made on his account; that he had in fact nothing to do with it; and that they had, accordingly, corrected the account by striking out the credit of Rs. 10,000.

It seems that, in the first instance, they omitted to strike out as they ought, on this view of the case, to have done, the charge of Rs. 541. 12. 6.; but this omission was afterwards set right by the Respondent. In the plaint and subsequent proceedings this shipment and the credit attached to it are stated generally and loosely to have been those "of another Merchant"; and the only case thus made by the Appellant on this point, was to the effect that no sufficient reasons had been assigned for withdrawing from the account a sum with which he had been once credited; and that the Respondent's looseness of statement concerning the transactions was an argument for holding that the deduction of the sum in question had been made fraudulently. On the trial in the Zillah Court, Mr. Morinet, the former book-keeper of Hickey, Bailey, and Co., was examined as to this item. His evidence was to this effect, [249] "The silk did belong to the Defendant originally, but was shipped by Hickey, Bailey, and Co., on their own account, they having purchased it, and rendered the account sales to the Defendant." No question was put to him by way of cross-examination on this statement, although he was cross-examined by the Appellant's Agents as to another part of his evidence. The contest in both the Courts below apparently continued to be confined, as before, to the propriety and *bona fides* of the alteration in the accounts. Their Lordships see no grounds for disturbing the conclusion of both the Courts below upon this point. They accept Morinet's statements as the true account of the transaction. He was not cross-examined upon it: there seems to have been no suggestion in the Courts below that the Appellant had not received credit for the proceeds of these bales of silk as sold in Calcutta. There is an item in the accounts which are in the record which seems to represent those proceeds; and the fact would probably appear even more clearly if we had the Bengalee account made out by the Appellant on the principle asserted by him which was before the Courts below. It is difficult to conceive that he would allow the account to be finally taken against him without seeing that in one way or other every bale of silk which was consigned by him to Hickey, Bailey, and Co. was accounted for.

The evidence of Morinet, however, suggests another question, which, although it has not been dealt with in the Courts below, their Lordships have been unwilling to exclude from their consideration. That question is, whether the transaction as described by Mr. Morinet is not one which the Appellant may impeach as a fraudulent purchase by an Agent on [250] his own account of his Principal's goods? In an ordinary case it might fairly be objected that this point was not taken upon the pleadings. The answer to that in the present case is, of course, that the Respondent, by speaking of the transaction as one of "another Merchant," has misled the Defendant, and thrown considerable suspicion on the *Bona fides* of his own case. On the other hand, it is to be observed that Morinet, if cross-examined, might have cleared up the transaction, and have shown that the purchase by Hickey, Bailey, and Co. was known to and sanctioned by the Appellant. Again: it was open to the Appellant, if he were interested in so doing, to raise the point now under consideration in the Indian Courts, where he was represented by an eminent English barrister, to whom the equity on which it is based must be familiar. That he failed to insist on this

equity, is a strong argument that it was not for his interest to do so. He could only have set aside this purchase by Hickey, Bailey, and Co., on the terms of writing back the sum for which he had received credit as the proceeds of the sale to them, and by taking to the shipment to England, with its loss or profit as the case might be. And there seems to be no reason why this particular shipment of sixteen bales should have escaped the common fate which on the evidence we must take to have befallen the other consignments of silk which were shipped from Calcutta about that time, and have realized a profit, instead of resulting in heavy loss. It may be added, that the point is not distinctly taken in the Appellant's case. On the whole, their Lordships see no sufficient ground for re-opening this account in respect of the item of Rs. 10,000.

[251] The only remaining question is that of the interest to be allowed. The Sudder Court, in the exercise of the discretion given to it by Act. No. XXXII. of 1839, has given interest from the date of the commencement of the suit, at the rate of 12 per centum per annum. There was evidence that the account current between Hickey, Bailey, and Co. and the Appellant bore interest at the rate of 10 per centum per annum only; and on that ground the Sudder Court reduced the interest allowed by the Zillah Judge before the commencement of the suit. Their Lordships are of opinion, that the same consideration should have determined the rate of interest to be allowed from the date of suit, and that the amount of this should also be calculated at 10 per centum per annum.

The order, therefore, which their Lordships propose humbly to recommend to Her Majesty as proper to be made on this appeal is, that the interest allowed from the date of suit to the date of payment be reduced by the difference between 12 per centum and 10 per centum per annum, and that in other respects the decree of the Sudder Court be affirmed. But having regard to this alteration in the amount decreed, and to the other circumstances of the case, they will also recommend that each party do bear his own costs of this appeal.

[252] MULKAH DO ALUM NOWAB TAJDAR BOHOO,—*Appellant*; MIRZA JEHAN KUDR, NOWAB MIRZA, ZUMAN ARA BEGUM and RUFAATOONISSA BEGUM,—*Respondents* * [March 3, 4, 1865].

On appeal from the Court of the Judicial Commissioner of Oude.

Lex loci of the Province of Oude.

The principles of law, as well as the rules of procedure of the Punjab Code of 1854, were introduced into Oude in 1856, on its annexation to the British Crown, to be adopted as the basis of the administration of the law in that province, and to be applied so far as they appeared to the Judicial Commissioners appointed for the administration of justice there not to be unsuited to the circumstances of the country, except so far, as they were founded upon local custom, varying the general law, whether Hindoo or Mahomedan, when the Code was not to be applied to Oude.

The Punjab Code of 1854, cl. 10, sec. VI., declares that:—"By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who has divorced his wife, without reflecting on the liability to which he was subject. Still, although

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband"; and the 11th section declares, that in the event of the husband's death "the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of clause (10), and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs."

A Mahomedan of the Soonee sect, domiciled in Oude, and a member of the Royal family there, on his marriage, by a deed executed in the year 1838, settled a crore of rupees by way of dower. This dower was not demanded during the lifetime of the husband, but at his death, which event took place after the annexation of Oude, in 1856, the widow claimed the whole amount, although it would exhaust the entire property of the settler, and totally exclude his heirs from succeeding to any part of his estate. The Judicial Commissioners of Oude, applied the provisions of the Punjab Code to the case; and held, that according to that Code the deed was to be construed to mean, not the absolute sum settled for dower, which was from the position of the settlor an extravagant dowry, but an adequate provision for the wife; and directed the estate of the husband to be divided in moieties between the widow and the husband's heirs. Upon appeal, such decision affirmed by the Judicial Committee, who held.

First, that the Commissioners were right in applying the Punjab Code to the case [10 Moo. Ind. App. 277, 278]; and

Secondly, that the Commissioners, under that Code, properly exercised their discretion in making an equitable division of the estate of the husband between the widow and the heirs [10 Moo. Ind. App. 277, 278].

This appeal was brought from three several Orders or decrees of the Deputy Commissioner of the Lucknow Civil Court, and the Judicial Commissioner of Oude disallowing a claim of the Appellant for payment of dower amounting to a crore of rupees out of the estate of her deceased husband, and directing the estate to be divided in certain shares amongst the Appellant and Respondents.

[253] The Appellant was the widow of Mirza Secunder Hushmut, a brother of the late King of Oude, and formerly a General in his service. The Respondent, Mirza Jehan Kudr, was the son, the Respondent, Nowab Mirza, an adopted son, and the Respondents, Zuman Ara Begum and Rufaatoonissa Begum, the daughters of the deceased. The late Royal family of Oude, and the parties to this appeal, were Mahomedans.

On the dethronement of the King of Oude, his brother, the late General Mirza Secunder Hushmut, proceeded to England, where he afterwards died, leaving the Appellant and Respondents surviving [254] him. The deceased General was at the time of his death entitled to immovable property situate in Oude, and to promissory notes of the Government of India for Rs. 120,000, and other movable property to a large amount.

When he proceeded to England, the Respondents, Mirza Jehan Kudr and Nowab Mirza, minors, were left at Lucknow in the care of General Outram, then in charge of the Province of Oude.

On the death of their father, they applied to the Judicial Commissioner of Oude for a division of the property of the deceased General, and for the relinquishment to them of the immovable property of the deceased, alleged to be in the possession of the Appellant. The Judicial Commissioner remitted the case to Mr. Perkins, the Assistant-Commissioner at Lucknow, to institute inquiries on the subject.

After a preliminary inquiry, the Assistant-Commissioner, being of opinion that the legitimacy of the Respondent, Mirza Jehan Kudr, was in dispute, referred him to his remedy by a civil suit: but on appeal to the Judicial Commissioner that Officer directed the case to be reported to himself.

On the 22nd of November, the case was brought before the Commissioner's Deputy

for trial, when arbitrators and an umpire were appointed by the parties to dispose of the case.

The arbitrators and umpire having been directed by the Deputy Commissioner to send their opinions separately, the Appellant's arbitrator, on the 11th of December, 1858, forwarded his Award, which was as follows: "It is evident from the proceedings that the dispute is regarding notes valued Rs. 230,000 belonging to General Sahib, jewels [255] valued at about 5 lacs, and landed property also valued about 5 lacs. The remaining property is in London. Now, the Mooktar of the Defendant states that of the above-mentioned notes, the General gave notes valued Rs. 110,000, which are deposited in the Treasury to Tajdar Bohoo (the Appellant). Of the other notes the Mooktar declared his ignorance; while the Mooktars of the Plaintiffs state that the remaining notes claimed are deposited in the Government Treasury. But the Mooktars give no detail of the jewels, and say that the Plaintiffs being minors know nothing about them; neither do they produce any satisfactory evidence. No one can part with the landed and immovable property, which has been saved from demolition. The other claims against each other deserve no consideration, because the Mooktar of Mulkah Do Alum Nowab Tajdar Bohoo, disputes the legitimate descent of the son of the deceased General. But Meer Wajid Ali, Trustee of Mirza Jehan Kudr and others, produced copy of an Order (the original of which is alleged to have been filed in the Judicial Commissioner's Office), addressed by Wajid Ali Shah to Mirza Jehan Kudr, in proof of the legitimacy of Mirza Jehan Kudr, and a letter from Mahomed Mirza, who accompanied General Sahib to London. Meer Wajid Ali then deposed, that in his journey to London, General Sahib had by his slave girl, Ameer Buksh, two daughters, of whom one is dead, but the other is still alive. But these points have not been established under the Mahomedan law; while the objections urged by the Mooktar of Mulkah Do Alum Nowab Tajdar Bohoo, being unsupported by any evidence of refusal from the General, deserve no consideration. In like manner, [256] the statement which Meer Wajid Ali makes, that Mulkah Do Alum Nowab Tajdar Bohoo had given up her claim to the dower, and to prove which statement he has produced a *muhzur* or document signed by the Begums or wives of the King, is contradicted by the Mooktar of Nowab Tajdar Bohoo on the ground of their being subject to the orders of Meer Wajid Ali. Now, I also do not consider that statement of Meer Wajid Ali as deserving of credit, because Mulkah Do Alum Nowab Tajdar Bohoo has still in her possession the dower deed for one crore of rupees, attested by the Moojtulids and the relations of General Sahib. Had Nowab Tajdar Bohoo, after she had lived together with her husband for a long time, relinquished her claim at the time of her husband's departure to Calcutta, the respectable citizens of Lucknow (as there was no interdiction with regard to its publicity) would have been acquainted with it, especially those who had attested the deed of dower, and then the objections urged by the Monkter of Mulkah Do Alum Nowab Tajdar Bohoo would have been useless. Under these circumstances I find it difficult to decide the case under the Mahomedan law; and, concurring with Mooeenood-dowlah Bahadoor, I consider it expedient to make some provision for the children of General Sahib, both those who are in Lucknow and those who are in London, or some other place; I, therefore, adjudge that the notes for Rs. 110,000, which, as alleged by the Mooktar of the Defendant, were given to her by the General when he was about to set out for Calcutta, and which are deposited in the Government Treasury, should entirely be made over to the Defendant; that the remaining notes, valued Rs. 120,000, claimed by [257] the Plaintiffs, be made over to them as traced out by them; that the landed property situated in Lucknow, and the goods which may be received from London, be equally divided among the children of General Sahib and Nowab Tajdar Bohoo; that in future neither party may bring forward any claim against the other; and that with the view of preventing dispute in future, Government should bind both parties by an agreement that neither party may molest the other."

The Umpire also forwarded his decision in accordance with the Award of the Appellant's Arbitrator, as did the Arbitrator for the two Respondents.

On the 26th of January, 1859, the Awards were taken into consideration by the Assistant-Commissioner, when he recorded his concurrence in the opinion of the Arbitrators and Umpire, but as they had not given a detail of the shares of the

parties in the estate of the deceased General, he directed the Arbitrators to specify the shares of the several claimants.

The Umpire reported on the 31st of January, 1859, as follows:—"That of the notes for Rs. 120,000, allotted to the Plaintiffs, one third, or Rs. 40,000, should be given to the minor daughter, which would suffice for the maintenance of her mother and her marriage expenses; the remaining two thirds, or Rs. 80,000, should be made over to the Mirza Jehan Kudr. As Nowab Mirza is not descended from the General, and is only an adopted son, he can claim no share under the Mahomedan law. But the General had a great regard for his maintenance and education, and beside this, Nowab Mirza is extremely poor. I would, therefore, allot to him one eighth, or Rs. 10,000, out of the two thirds, or Rs. 80,000. I would like-[258]-wise propose, that until the Plaintiffs attain to the age of majority, all the money should remain in deposit in the Government Treasury and payments should be made to them for their daily expenses as required. Of the landed property, the garden of Dwarka Dass cannot be divided; but I would suggest that it should be given out in farm, and the proceeds divided equally between Nowab Tajdar Bohoo and the descendants of General Sahib. The remaining houses, which may be released by Government, should be estimated by an Officer appointed by the Court, and divided equally."

The two first Respondents were satisfied with the Award, but the Appellant objected on the grounds, amongst others, that it was not proved that the Respondent, Mirza Jehan Kudr, was the legitimate son of the deceased General; that her claim for dower should be satisfied in the first instance; and that she should be allowed to retain possession of the whole of the deceased's estate to satisfy her dower, which estate was less than the amount settled by the deed of dower.

On the 7th of February, 1859, the Assistant-Commissioner finally adopted the Award, and directed a certificate of administration to issue in favour of the two Respondents, and the Deputy-Commissioner concurred in this decision.

From these proceedings the Appellant preferred an appeal to the Commissioner, who after hearing the case dismissed the appeal, and directed the Orders of the Assistant-Commissioner and the Deputy-Commissioner to be upheld, but reserved to the Appellant liberty to institute a suit to establish her claim.

Accordingly, on the 8th of April, 1859, the Appellant filed a regular suit, and by her plaint claimed [259] one crore of rupees on account of her dower, for which she submitted that the whole of her late husband's estate was liable.

The Respondents, Mirza Jehan Kudr and Nowab Mirza, were made Defendants, and by their answer alleged, that the case had been disposed of by arbitration, and that the Award was a bar to the suit, in which the claim for dower was not proved, for when the deceased General was going to England, the Appellant relinquished her claim to dower before witnesses, but that a deed of relinquishment could not be executed at that time; that the Respondent, Mirza Jehan Kudr, was the son of the General, and the Respondent, Nowab Mirza, an adopted son; that the mother of Mirza Jehan Kudr, was Nowab Hushmut Muhil Sahiba, whose claim to her dower was for fifty lacs of rupees, besides her claim to jewels and ornaments valued at Rs. 500,000 which the General, when going to London, left in charge of the Appellant.

The Appellant's deed of dower was filed, by which a crore of rupees of the current coin of Lucknow was fixed as the dower.

The Respondents then filed a petition, stating that the deed of dower was not genuine, but a forged one, and could not, under the Mahomedan law and usage of the country, be considered a trustworthy document.

Evidence was taken respecting the execution of the deed of dower and the right of the Appellant to have her dower satisfied in priority to any claim of inheritance. It was proved that the Respondent, Mirza Jehan Kudr, was the son, and the Respondent, Nowab Mirza the adopted son, and the other Respon-[260]-dents the daughters of the deceased General, Mirza Secunder Hushmut, and that the Appellant had not relinquished any claim to dower, and the opinion of the Mahomedan law officers and the Mujtahid, or Chief Priest, was taken as to the question of dower.

The case was heard on the 25th of August, 1859, before the Deputy-Commissioner

Carnegy and the Assistant-Commissioner Elliott, in the Lucknow District Court, when those Judicial Officers decided that the Appellant as the widow, and the Respondent, Mirza Jehan Kudr as the son, and Zuman Ara Begum and Rifaatoonissa Begum as the daughters of the deceased General, were the heirs of his estate, and that the Respondent, Nowab Mirza, as the adopted son of the deceased, should be recommended for a pension. That the special claims of the Respondents should be disallowed; that the deed of dowry was genuine; that the dowry was to be considered as a debt, and took precedence of claims of inheritance; but that by the Punjab Code the Court was at liberty to give instead of the dowry, a sum proportioned to the estate, and that after setting apart a sum sufficient for the maintenance of the other heirs, the remainder of the property should be given to the Appellant in lieu of her dowry. The Court cancelled the Order of the Summary Court, and allotted a monthly pension of Rs. 400 to the Respondent, Mirza Jehan Kudr, of Rs. 150 to each of the Respondents, Zuman Ara Begum and Rifaatoonissa Begum, and Rs. 40 to the other Respondent, Nowab Mirza.

The Appellant appealed from this decree to the Commissioner and Superintendent of Lucknow, objecting thereto, on the ground that the case had not been decided as regarded her claim to dower in accord-[261]-ance with Mahomedan law, and insisted that she was entitled to the whole estate of her deceased husband in satisfaction of her dower, and that the Respondents were not his lawful children.

Further inquiries were instituted by Mr. Campbell, the Judicial Commissioner of Oude, and questions put to the Registrar of the Sudder Dewanny Courts of the Punjab, and at Agra, Calcutta, Madras and Bombay, to ascertain the practice of those Courts in dealing with claims for dower, requesting that the Judges of those Courts would inform him, whether a Mahomedan deed of dower assigning to the wife an exorbitant sum far beyond the husband's means (the money not being paid or vested), was to be construed literally, or held liable to modification under an equitable construction whether it had been settled that dowers of different wives come upon the estate in order of date, one taking precedence of the other, or *pari passu*: and whether they precede, rank with, or follow *bona fide* debts for consideration as against the assets of an estate. The replies to those questions showed that much doubt and uncertainty prevailed on the subject.

The Commissioner and Superintendent of the Lucknow division, Mr. S. A. Abbott, on the 2nd of December, 1859, delivered judgment. The material part of which was in these terms:—"The Futwa has been received from Calcutta, and there can be no doubt but that in point of Mahomedan law, the Appellant is entitled to the whole estate within the stipulated amount of her dower. I regard these dowers as a very great evil. There is no doubt that large sums are specified in these dower deeds, with a view to preventing separation on trivial occasions. [262] Large sums are in these dowers specified which have no existence; no deposits are made or Trustees appointed; they are generally merely a wife's security for the good behaviour of her husband. By the Mahomedan law, however, there can be no doubt but that they take precedence of all claims of heirs, and must be satisfied before any claims of the sort can be admitted. They rank with debts, and would be paid in proportion to assets available. The Punjab Code makes a deviation from this, and leaves it in equity and justice to make some provision for the heirs. This is undoubtedly a most humane and just provision. It is also supported by a case which occurred in Lucknow, and we may fully assume it to be a *lex loci*, for there is the very best authority for it in the decision of the Mijtehudoollussur in the case of *Murramoolnissa v. Ruheemolnissa Ameer Begum Shumsoolnissa, Ingent-olla, and Tuffal Alle*, before Mr. Martin, Deputy-Commissioner, on the 14th of April, 1857, in which this High priest decided that a brother of deceased should get one-fifth share in the estate before satisfying the dower. In Oude we are not bound to law, but to equity and justice; and I think the arrangement proposed by the Deputy-Commissioner for providing for the members of this family is most just and reasonable. I consequently dismiss the appeal, with costs, and uphold the order of the Lower Court."

From this decree the Appellant appealed to the Judicial Commissioner of Oude. On the 23rd of March, 1860, the Judicial Commissioner, Mr. G. Campbell, decided that after the debts due from the deceased General were discharged out of his estate, the remainder of his estate should be divided, and be apportioned one moiety to the

Appellant as her [263] absolute property in respect of her dower under the deed, and the other half to his heirs, the Respondents.

The Appellant applied to the Judicial Commissioner for a review of this judgment, and the Respondent, Mirza Jehan Kudr, put in an answer to her application, asserting that the judgment of the Judicial Commissioner ought to be sustained, as it was in accordance with the award of the Arbitrators, and further that the Court was not bound to give effect to the deed of dower. On the 28th of May, 1860, Mr. E. C. Bailey, Officiating Judicial Commissioner, rejected the application for review.

The Appellant then presented a petition to the Judicial Commissioner of Oude for leave to appeal to Her Majesty in Council, but the Judicial Commissioner being of opinion that he had no power to admit an appeal to Her Majesty in Council (see 8 Moore's Ind. App. Cases, p. 274, and *Salik Ram v. Azim Ali Beg.* *ib.* 270), an application was made to Her Majesty in Council to admit this appeal, and the same was granted.

The appeal now came on for hearing.

The Attorney-General (Sir R. Palmer,) and Mr. Leith, for the Appellant.—This case is one of the greatest importance to the whole of the Mahomedan population in Oude. It involves the question whether the *lex loci* of Oude, the Mahomedan law, is to be superseded by the introduction of the Punjab Code, as between Mahomedan subjects, by determining their rights, at the option or discretion of the Judge of a fanciful equity of his own, instead of the known and admitted rule and principles of Mahomedan law.

[264] Our contention is, that the Kingdom of Oude being a Mahomedan country, and the Mahomedan law the *lex loci* at the time when it was annexed to the British dominions, the Judicial Officers appointed ought to have administered that law, and that the Government had no power to import into Oude a Code made for another Province in which the Mahomedan law is not in force, until such law was formally abrogated, and some other law substituted by competent authority. Now, it appears that the Governor-General of India in Council, on the annexation of Oude, and the establishment of Courts of Justice to be presided over by Judicial Officers, declared by a State Paper to Major-General Outram, dated the 4th of February, 1856, par. 45 (Parl. Pap. relating to Oude, 1856, p. 267), to the effect, that the *lex loci* of that Province should be observed and administered in such Courts; but such law, which was the Mahomedan law, was not applied in this case, although the parties were Mahomedans. The Kabeenamah, or deed of dower, sued on by the Appellant, was made in consideration of marriage while Oude was still a Mahomedan Kingdom; and so, even if, after the annexation by the British Crown, a new law had been introduced by competent authority, and substituted for the *lex loci*, which we submit it was not, it would have been unjust to the Appellant to give a retrospective effect to such new law, so as to deprive her of her rights as a Mahomedan widow, or so as to alter or limit the effect and operation of the deed under the *lex loci*, or Mahomedan law.

The opinions of the Judges at Agra and elsewhere, or other Officers in the Punjab, or any rule in the Code of that Province opposed to the [265] rules or principles of Mahomedan law, ought not to have any weight, and should not have influenced the decisions of the Judicial Officers in Oude in administering the law of that country, in a case like the present, where the parties were domiciled Mahomedans of that Province. Indeed, it was clearly established by the *futwas* of learned Mahomedan lawyers, and in fact acknowledged by the decrees appealed from, that the right of a Mahomedan wife to *deen mohur*, secured to her by deed on the celebration of her marriage, is declared by Mahomedan law to be paramount to the claims of the heirs of the husband, and equal to the rights of his creditors. Considering the high rank of the bridegroom, a member of the Royal family of Oude, and heir apparent to the Throne, the amount of dower, a crore of rupees, was not excessive. Macnaghten's "Prin. and Prec. of Moohummudan Law," pp. 287, 291; *Ameer-oon Nissa v. Moorad-oon Nissa* (6 Moore's Ind. App. Cases, 211). *Gholam Husun Ali v. Zeinub Beebee* (1 Ben. S.D.A. Rep. 48); *Mussumaut Banoo Beebee v. Fukherooddeen Hosein* (2 Ben. Sud. Dew. Rep. 180); *Sahib Jan Khatoon v. Diamut Beebee* (3 Ben. S.D.A. Rep. 12); *Ranee Buksh Beebee v. Nadir Beebee* (3 Ben. S.D.A. Rep. 61); *Mussumat Hoosèineer Begum v. Mussumat Oomdah Begum* (3 S.D.A. Rep. N.W.P. 52); and, therefore, the

Kebunamah of the Appellant ought to have been given effect to on the death of her husband, and enforced with respect of the whole amount of dower thereby secured against his estate, to the exclusion of the Respondents, even if they had proved themselves his heirs.

But another fatal objection exists; the Respondents utterly failed to prove their relationship to the deceased husband of the Appellant, as heirs according to Mahomedan law; neither was it proved that there was any other heir of the deceased except the Appellant as widow; and she was, therefore, under her deed of dower, and as heir, entitled to the whole estate of the deceased, subject only to the payment of creditors, if any.

Mr. Forsyth, Q.C., and Mr. Ayrton, for the Respondents. It cannot be disputed that the late kingdom of Oude is a conquered country. It was occupied by the British army, and by proclamation declared vested in the British Crown, which constituted a complete act of sovereignty. Parl. Papers relating to Oude, 1856, pp. 237, 255, 291. That being so, it is a cardinal principle of the law of nations, that the conquering power has a perfect right to alter the law of the conquered country. [The Lord Justice Turner: The old law remains in force till altered.] Yes. Here the Government of India in the Despatch of the 4th of February, 1856, par. 45, exercised the power of Conquerors in extending to Oude the provisions of the Punjab Code. Parl. papers relating to Oude, p. 267, and directed that the law to be administered by the Judicial officers in Oude should be the Punjab Code of 1854, except in certain cases of local usage. That Code has been acted upon in other cases in regarding questions of Mahomedan law.

By the Punjab Code of 1854, cl. 10, sec. 6, it is enacted, that as by the Hindoo law the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time; among Mahomedans it is usual, as a safeguard against capricious divorcees, to stipulate for an amount of dower far beyond the means of the bridegroom to pay, that as such contract if enforced [267] by a Court would ruin a Defendant, damages should be awarded to the wife in proportion to the means of the husband; and by sec. 11 of the same Code, in the event of the husband's death, the dower is to be treated as a debt, and take precedence of heirs, but not of other debts, and referring to the modifying powers of cl. 10, the Court is directed to award the widow a fair sum in reference to the assets of the estate and the circumstances of the heirs. Now, in no sense can the introduction of this Code affect this case, as this Code is similar to the Mahomedan law which prevailed in the Kingdom of Oude at the time of its annexation. According to the custom of Mahomedans in India, deeds like that under which the Appellant claimed are only nominal and illusory, and never intended to be enforced. Dower by the Mahomedan law is given as a safeguard to prevent a husband from capriciously divorcing his wife. Here the husband was a minor, and there are no Trustees to the deed as in an English marriage settlement. We admit it may be enforced after the husband's death, but the Court, having regard to the circumstances of the husband's estate, would only decree, what in equity would be a fair and reasonable sum; *Omduton Nisa Begum v. Mirza Asud Ali* (1 Ben. S.D.A. Rep. 276); Macnaghten's "Princ. and Pree. of Moohummudan Law," p. 274. If the Appellant's argument is carried out, a husband could so endow his wife as to defeat his creditors and his heirs. Here the sum settled, a crore of rupees, is beyond the means of the settler, and whether governed by the Mahomedan law or the Punjab Code, such a dower could not be enforced to the full amount.

The Respondents are the heirs of the deceased, and [268] entitled by law and equity to the share of his estate allotted to them by the decree of the Judicial Commissioner.

Their Lordships' judgment was delivered by

The Right Hon. Lord Kingsdown (March 29, 1865).—This is an appeal by the widow of the late General Sahib against certain decisions which have been pronounced by the Judicial Commissioners in Oude on a claim preferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our era, and by the settlement

made upon it, to which the father of the bridegroom was a party, the wife's dower was fixed at a crore of rupees, a sum equal to £1,000,000 sterling.

The father of the bridegroom was a son of the King of Oude, and at that time heir-apparent to the Throne.

General Salib came over to England after the overthrow of the Oude dynasty, and died here.

The Royal family of Oude were all Mahomedans.

The General left a son, an adopted son, and two daughters surviving him. These persons claimed to be coheirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the title of the other claimants as coheirs.

After some attempts to settle the matter by arbitration, which proved abortive, a suit was instituted, in order to determine the rights of the parties.

In the course of these proceedings an inquiry was directed with respect to the property which the General [269] had left at his death, and in the result it appeared that it amounted in all to about five lacs of rupees. The claim of the Appellant alone in respect of her dower amounted to a crore, or 100 lacs, exclusive of other debts, which are represented to be of very trifling amount.

The effect, therefore, of allowing the Appellant's claim would be, to a great extent, to defeat the claims of the other creditors, and to sweep away the whole property from the heirs.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship which may result from allowing them.

The case came first before two Assistant Commissioners in the Lucknow District Court in August, 1859; then on appeal before Colonel Abbott, the Commissioner Superintendent of the Lucknow division, on the 2nd of December, 1859; and, lastly, before Mr. Campbell, the Judicial Commissioner of Oude, on the 23rd of March, 1860. All these gentlemen were of opinion, that the claim of the Appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some degree as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of Mr. Campbell, made on the 23rd of March, 1860, it was directed that the debts of the General should be first paid; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs; but this decision was not to affect a sum of Rs. 110,000 in Com-[270]-pany's paper in the name of the Appellant, which was to be retained by her, as her absolute property. From this and the preceding orders the present appeal has been brought.

Great trouble appears to have been taken by the Commissioners to ascertain the general Mahomedan law upon the subject, and opinions were obtained from the Courts of the several Provinces of India, particularly with reference to the question whether, when extravagant sums far beyond the means of the bridegroom to satisfy were provided by settlement as dower, such sums were to be treated as *bona fide* debts to be paid *pari passu* with other debts on the death of the husband, though they might sweep away the whole property from the heirs, or whether they were to be treated as securities for an adequate provision for the wife. The reports from the different Provinces were not uniform—some being in favour of treating the sum fixed as an absolute debt; others in favour of a modification of the demand with reference to what might be considered the proper dower of the wife.

It is not necessary, in the opinion of their Lordships to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in Oude has been settled by specific Regulations issued by competent authority, in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of February, 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of Oude, addressed to Major-General Outram, who was appointed Chief Commissioner of the affairs of this Province.

[271] The facts as appearing in this letter are these: in the year 1847-8 a few rules for Civil judicature were drawn out by the Indian Government for the guidance of the officers employed in the Cis-and-Trans-Satlej States. These rules were in 1849 extended to the Punjab, and it was left to the Officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them as practical experience might suggest.

These rules thus amended were in 1854 reduced into a printed form, and circulated amongst the Judges of the Punjab. They are entitled "Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the Punjab." To which is appended a proposed form of procedure.

This Code, as its title imports, contains a statement first, of the principles of law to be adopted by the Judges; and second, of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure, introduces some alterations into the laws prevailing in the older Provinces.

This Code thus introduced into the Punjab had, in the opinion of the Government, been found to work well.

In February, 1856, the King of Oude was deposed by the Indian Government, and the whole administration, civil and military, of the Kingdom was assumed by its officers under its authority. To provide for the administration of justice, a number of Commissioners and Assistant Commissioners were appointed to act for different Districts into which the [272] country was to be divided, and the general rules to be observed in the administration of justice, as well as in the ordering of the Province in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of Oude to that of the Punjab appears in several passages of the letter. In paragraph 21 it is said,—"It has been already intimated to you that the administration of Oude is to be conducted as nearly as possible in conformity with the system which has been introduced into the Punjab."

After explaining the advantages which had arisen in that Province from the introduction of the new Code, and observing that the Kingdom of Oude resembled very closely in its population, language, creeds, and customs the North-West Provinces, the letter proceeds, "There is, therefore, every reason to believe, and good to doubt, that the system of administration as modified for the Punjab, and divested of all those forms and technicalities which delay justice and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of Oude, and more completely suited to the Province itself than it was to the Punjab, where, nevertheless, its success is undeniable."

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of civil justice, with respect to which, it observes that very material assistance is derived from the results of experience acquired in the Punjab.

Then follow the paragraphs on which the question as to the introduction of these rules into Oude, mainly depends.

[273] The 44th section, after giving the history of those rules which we have already read, proceeds thus:—"These rules now, for the most part, guide the proceedings of the Judicial Courts in the Punjab, and they have been found so well fitted to the requirements of a new Province and a simple people, so easy in their application, so acceptable to the population, no less than to the officers themselves, and so beneficial in their results, that the Governor-General in Council advises that they should be made the ground-work of the civil judicial system in Oude. Several printed copies of these 'Rules' will shortly be furnished to you for distribution."

"45. There appears to be no reason whatever for supposing that the Rules of procedure will not be as applicable to the Civil Courts in Oude as to those in the Punjab, and there can be no objection to their immediate introduction. It is believed also the 'Principles of Law' will be found sufficient, in the first instance, to guide the Judicial Officers in dealing with the various questions which will come before them in this branch of their duty. But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to

the *lex loci*, and that, especially in matters relating to inheritance, marriage, divorce, and adultery, adoption, Wills, legacies, and partition, as well as in all commercial transactions, a due regard to local usage has been enjoined. It cannot, of course, be supposed that the *lex loci*, or local custom, in Provinces differing so widely as the Punjab and Oude is in all, or even in many, respects identical, and it follows that those provisions of the 'Rules' which rest on [274] the *lex loci* in the Punjab cannot, with any propriety or without risk of injurious failure, be extended to the Province of Oude."

It appears to their Lordships that the effect of these clauses is, that the principles of law as well as the rules of procedure laid down in the Punjab Code are to be adopted as the basis of the administration of justice in Oude, and to be applied as far as they may appear to the Commissioners to be not unsuited to the circumstances of the country; but that, as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to Oude, where the local customs would probably differ from those of the Punjab.

The 46th section is in these words:—"While, then, the Governor-General in Council directs your attention to this collection of principles of law, as calculated to afford material assistance in the absence of any better or more appropriate Treatise, he refrains from requiring the strict observance of them, until it can be ascertained how far they are applicable to the peculiarities of the Province and the customs of its people. With this end in view, his Lordship in Council desires me to suggest that all the Commissioners and district Officers, and the most experienced of the Assistants, should be required to study the 'Principles of Law' in their daily application to the business brought before the Civil Courts, and, after the lapse of a twelvemonth or more, as may be hereafter determined, to report to the Judicial Commissioner the opinions which they may have formed of the applicability of the 'Rules of Law' to the [275] people of Oude, and to offer, at the same time, any remarks and suggestions which may have occurred to them. It may, perhaps, be advisable also to invite the opinions and observations of a few of the Native Extra Assistants, whose past career and official knowledge, and more immediate contact with the people, may have qualified them to form a judgment on those points which touch upon native customs, and to give sound advice. On receipt of all these reports, it will be the duty of the Judicial Commissioner to study the suggestions which they contain, and to recast the Collection of Rules of law. It is not anticipated that the Rules of Procedure will call for much, if any alteration, but it will rest with the Judicial Commissioner to give his consideration to these also at the same time, and to introduce such modifications as may appear advisable, provided they do not tend to introduce those complications and technicalities, the removal of which is the main as it is the most acceptable feature of the system successfully followed in the Punjab."

This section is perfectly consistent with those which precede, and shows that the rules were to be generally acted upon, though strict obedience to them was not required, until it had been ascertained how far they were applicable to the peculiarities of the Province and the customs of its people. With this view, its application is to be carefully watched by those who administer it, who, after a certain period, are to make a report upon the subject, with any suggestions which may occur to them for amending it.

The Indian Mutiny which broke out in the following year probably prevented any report being made by the Commissioner, in compliance with the [276] directions of the 46th section, as early as was there contemplated; but, after the restoration of the British authority, we find in the official report of the administration of the Province of Oude for the year 1859-60, that the Punjab Code is stated to be the basis of the Civil Law of the country, and allusion is made to some modifications which have been introduced in it, but it does not appear that any such modification related to the subject now in controversy.

On the whole, their Lordships entertain no doubt that the Articles of the Punjab Code generally were in force at the time of the date of these Orders, the first of which was made on the 25th of August, 1859, and the last on the 23rd of March, 1860.

Then on what grounds is the application of these rules to be excluded from the present case? If they are to be excluded, it must be on the ground that there is

some *lex loci*, of special custom, in Oude by which the law of dower in that country differs from the general Mahomedan law. But no such custom is pretended. The argument for the Appellant rests entirely on the general Mahomedan law.

The next question is, do the rules of the Punjab Code warrant a departure from the strict law, if law it be, by which in all cases a sum fixed as dower is to be enforced as an absolute debt? Upon this question no doubt can be entertained. They provide for a modification of the dower mentioned in a marriage-contract both in the case of a divorce and of the death of her husband.

The 10th clause, section VI., is in these words:—"By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subse-[277]-quent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who had divorced his wife without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband."

The 11th section provides for the event of the husband's death:—"At the husband's death, the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of Clause 8, and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs." The reference to clause 8 is either a mistake or a misprint for clause 10.

It appears by the proceedings in this case, that these rules have been and are acted upon in the Punjab in dealing with cases of dower, and, by the orders to which we have referred, they have been extended to Oude.

It was suggested that this was only to apply to future contracts, and not to contracts previously made. But their Lordships think it clear, that these sections provide for the mode in which all contracts of this description which might come before the Courts were to be treated. Upon the whole, their Lordships are of opinion, that the Commissioners were bound to apply the provisions of this Code to the case before [278] them, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs. As to the manner in which the discretion should be exercised, the Commissioner whose judgment is appealed from must be more capable of forming a correct judgment than their Lordships can be.

It may be proper to notice an objection which was taken, that in one of the Orders appealed from, a provision was made out of the estate for an adopted son, though it was admitted by the Commissioner making the Order, that such son was not properly one of the heirs. But this will be corrected by the decision of Mr. Campbell, which directs the division to be amongst the coheirs other than the Appellant; and at all events, it is a matter which relates to a fund in which she has no interest.

Their Lordships will humbly advise Her Majesty to affirm the Order of Mr. Campbell of the 23rd of March, 1860; but as the case is one of novelty and some difficulty, they will not give any costs.

[279] MUSSUMAT BHOOBUM MOYEE DEBIA.—*Appellant*: RAM KISHORE ACHARJ CHOWDHRY and CHUNDRABULLEE DEBIA.—*Respondents* * [March 6, 7, and 9, 1865].

On appeal from the Sudder Dewanny Adawlut of Calcutta.

In the year 1811, G. being childless, executed a deed of Onoomuttee puttro (*i.e.* of permission), by which he gave power to his wife, C., to adopt a son. He afterwards had a son B., by his wife, C. In 1819, two years after his son's birth, and while he was living, G. executed the following instrument:— "This is an Onoomuttee puttro to the following purport—Prior to the birth of a male child from your womb, I executed in your favour an Onoomuttee puttro on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race or from a different race, for the purpose of performing mine or your Sradh and other rites, and for the Sheba of the gods, and for the succession to the zemindary and other property, on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on failure of one, adopt other sons in succession, to avoid the extinction of the pinda; that dattaka son shall be entitled to perform your and my Sradh, etc., and of our ancestors." B., on coming of age, succeeded to the ancestral and other estate of his father who had died. On B.'s death, childless, his widow succeeded as heir to her deceased husband, taking a vested estate in the whole of his estate. Some time after B.'s death, C., his mother, exercised the power given her by the instrument of 1819, by adopting a son to G. The Sudder Dewanny Court held, first, that the above instrument was of the nature of a testamentary disposition, and secondly, upon its construction, that it created a limitation on failure of male issue of the Testator, in the lifetime of his wife, to the son to be adopted by her as a *persona designata*. Upon appeal, such decree reversed, the Judicial Committee holding:—

First, that the instrument was simply a permission to adopt a son, as in the absence of any devise it could not be considered as of a testamentary character [10 Moo. Ind. App. 309].

Secondly, that although a testamentary power of disposition by Hindoos in the Presidency of Bengal has been established by the decisions of the Courts, yet the nature and extent of such power, so far as relates to limitations in tail male, or executory devises, is not to be regulated or governed by any analogy to the law of England, which law applies to the wants of a state of society widely different from that which prevail among Hindoos in India [10 Moo. Ind. App. 308, 309].

Thirdly, that as an adopted son by the Hindoo law takes by inheritance, and not by devise, and as by that law, in the case of inheritance, the person to succeed must be the heir of the full owner, B., the son was the last full owner, and his wife succeeded at his death as his heir to her widow's estate [10 Moo. Ind. App. 311]; and

Fourthly, consequently, that the adoption by C. under the Onoomuttee puttro, was void, as the power was capable of execution [10 Moo. Ind. App. 307].

Whether, by the Hindoo law, G. could have restricted the interest of his son B. in his ancestral and other estate to a life interest, or could have limited it over, if his son B. left no issue male, or such issue male had failed, to an adopted son of his own.—*Quare?*

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner. Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The questions in this appeal were, first, whether the first Respondent, Ram Kishore, the adopted son of the late Gour Kishore Acharj Chowdhry, by his wife, Chundrabullee Debia, the other Respondent, was, as such, entitled to the ancestral and other estates of [280] Gour Kishore under the terms of an Onoomuttee puttro, a deed of permission to adopt, given by him to his wife, which instrument the Respondents contended, was, in effect, a testamentary disposition, constituting Ram Kishore, as such adopted son, sole heir; and secondly, whether an adoption by the Appellant, under an alleged deed of permission given by her husband Bhowanee Kishore, the son of Gour Kishore, was established.

Gour Kishore Acharj Chowdhry, a Hindoo and Brahmin by caste, was the Zemindar of four annas share of Pergunnah, Allaj Singh, in the Zillah of Mymensingh, in the Presidency of Bengal, and in the month of Magh, 1215 (February, 1808), having then no son, he executed a deed of permission in favour of his wife, the Respondent, Chundrabullee Debia, to adopt a son to him.

Afterwards, and on the 22nd Poos, 1224 (December, 1817), the Respondent, Chundrabullee Debia gave birth to a son, named Bhowanee Kishore.

[281] Notwithstanding the birth of Bhowanee Kishore, his father, Gour Kishore, executed a fresh deed of permission in favour of his wife, Chundrabullee Debia, on the 25th Kartick, 1226 (9th of November, 1819), which was as follows:—"This is an Onoomuttee puttro, to the following purport:—Prior to the birth of a male child from your womb, I had executed in your favour an Onoomuttee puttro on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (Gotra), or from a different race (Gotra) for the purpose of performing mine and your Sradh and other rites, and for the Sheba (service) of the gods and for the succession to the Zemindary and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the pinda (funeral cake or offering); that dattaka (adopted) son shall be entitled to perform your and my Sradh, etc., and that of our ancestors, and also to succeed to the property. To this end I execute this Onoomuttee Puttro." The original and compared copy of this deed of permission were registered on the 12th November, 1819, by that Registrar of deeds under Ben. Reg. XX. of 1812.

Gour Kishore died in 1821, leaving his wife, the Respondent, Chundrabullee Debia, and his son, Bhowanee Kishore, him surviving.

In consequence of the minority of Bhowanee Kishore, the Zemindary, and other property came under the surveillance of the Court of Wards; and on the 28th of [282] November, 1821, that Court passed an Order appointing the Respondent, Chundrabullee Debia, guardian of Bhowanee Kishore, during his minority.

Bhowanee Kishore, after attaining his majority, was put in possession of the Zemindary, and married the Appellant and died, without issue, on the 14th Bhadro, 1247 (28th of August, 1840).

At his death, the Appellant brought forward an instrument, alleged to be a Will executed by Bhowanee Kishore, authorizing her to adopt a son for him, but no steps were taken by the Appellant with a view to the adoption of a son under the provisions of this instrument until the month of November, 1843, when, disputes having arisen between the Appellant and the Respondent, Chundrabullee Debia, both of whom were in receipt of the income of the estate, the Appellant notified her intention to take in adoption one Rajendro Kishore, an intention which, as she alleged, she subsequently, in the month of December, 1843, carried out by adopting him in due form.

The Respondent, Chundrabullee Debia, afterwards, in the month of Bysack, 1251 (April—May, 1844), proposed to the father and mother of the Respondent, Ram Kishore, that he should be given to her, in adoption, in conformity with the deed of permission of the 25th Kartick, 1226; and under the provisions of another Onoomuttee puttro, dated 15th Bysack, 1251) given by the father of the first-named Respondent to his wife, and a dan puttro (deed of gift in adoption) and a grohen

puttro (deed of acceptance), both dated the 31st Bysack, 1251, the arrangements as to the adoption were laid down, and such adoption was afterwards completed.

Upon this adoption, the first-named Respondent, under the terms of the deed of 25th Kartick, 1226, [283] claimed to be entitled to inherit the whole of the property of Gour Kishore; but the Appellant, Bhoobun Moyee, and the Respondent, Chundrabullee Debia still continued to hold the property.

In consequence, a plaint was filed in the Court of the Principal Sudder Ameen of Zillah Mymensingh, on the 14th of August, 1851, on behalf of Ram Kishore, as the adopted son of Gour Kishore, by Goluck Kishore, his elder brother, as his next friend, against the Appellant, Bhoobun Moyee, for herself, and as guardian of the alleged adopted son, Rajendro Kishore, and Chundrabullee Debia, and two others, named Anund Moyee and Jugodumba, to obtain possession and recover the mesne proceeds of the Zemindary and other property, moveable and immoveable, held by the Defendants. The statements in the plaint were, in substance, that Gour Kishore granted to his wife, Chundrabullee Debia, the deed of permission, in the nature of a Will, dated 25th Kartick, 1226. That Gour Kishore died in Assin, 1228, leaving real and personal property as specified in a schedule to the plaint annexed. That under the management by the Court of Wards during the minority of Bhowanee Kishore, certain Zemindaries and other property specified in the schedule were purchased out of accumulated profits. That Bhowanee Kishore was in a state of insensibility on the 10th Bhadro, 1247, and continued in that state until his death on the 14th Bhadro. That Ram Kishore was duly adopted by Chundrabullee Debia, in accordance with the deed of permission of the 25th Kartick, 1226, and the proper ceremonies were duly performed. That Ram Kishore, upon such adoption, became the sole proprietor of all the estates and property specified in [284] the schedule. That after the death of Bhowanee Kishore, divers persons in collusion with Bhoobun Moyee, fabricated a deed of permission, purporting to be signed by Bhowanee Kishore and to bear date the 12th Bhadro, 1247. That such deed of permission was drawn in such terms as to render objections to the authenticity or validity thereof improbable on the part of Chundrabullee Debia and Anund Moyee and Jugodumba; and it was admitted that such deed of permission set up by Bhoobun Moyee was a forged and fabricated document.

The Appellant, by her answer to the plaint, after setting forth certain pleas in bar of the suit, in substance, pleaded, that no weight could be attached to the averments in the plaint as to the deed of permission given to Chundrabullee Debia by Gour Kishore, as Bhowanee Kishore, upon attaining his majority, became entitled to an absolute interest in the property which descended to him from Gour Kishore. That Gour Kishore could not have given a valid deed of permission to adopt in the lifetime of Bhowanee Kishore, and further, that the deed of permission given could not operate as a Will. That Bhowanee Kishore actually executed a deed of permission in favour of the Appellant on the 12th Bhadro, 1247, at which time he was well in health and in the full enjoyment of his faculties. That the genuineness of that deed of permission was established by the acts of the Respondent, Chundrabullee Debia, in conjunction with the Appellant, in conformity therewith, and by certain statements alleged to have been made by Chundrabullee Debia: that the son adopted by the Appellant on the 20th Aughran, 1250, agreeably to such deed of permission, was the rightful proprietor of the entire [285] property; that Ram Kishore was not taken in adoption by the Respondent, Chundrabullee Debia, under any arrangement with, or with the consent of his father; and that in consequence of impurity attaching to the mother of Ram Kishore after the death of her husband, Ram Kishore could not have been given and received in adoption; and, lastly, that Ram Kishore, in consequence of his age, could not have been adopted in conformity with the Hindoo law.

The Respondent, Chundrabullee Debia, by her answer, alleged statements to the effect, that the adoption of Ram Kishore had been duly effected by her in exercise of the power given to her by the deed of permission of the 26th Kartick, 1226, and that no deed of permission was ever executed by her son, Bhowanee Kishore, in the Appellant's favour, and that she had been fraudulently induced to act, or appear to act, in conformity with the fabricated deed of permission to adopt relied on by the Appellant.

As soon as the first Respondent came of age, he was substituted as Plaintiff in the stead of Goluck Kishore.

Evidence was entered into. As respected the genuineness of the Oomuttie puttro, of the 25th Kartick, 1226, the evidence given consisted of a certified copy from the Register Office of the copy of the original deed, which was filed in that office on the 28th Kartick, 1226, three days after the date of the deed, which was produced on behalf of the first Respondent, together with certified copies of two Vakalutnamahs executed by Gour Kishore and Chundrabullee Debia respectively, authorizing the Vakeels to attend for the purpose of the registration of the deed. The original deed of permission was called for by the Court from Chundrabullee Debia, [286] but was not produced. As soon as the first Respondent took upon himself the conduct of the suit, he applied to the Court for an Order calling upon Chundrabullee Debia to produce the original deed, but the principal Sudder Ameen declined to accede to that application. The three persons who were present at the time of the execution of the deed by Gour Kishore, deposed to the fact of such execution. As respected the fact of the adoption of the first Respondent by Chundrabullee Debia, under the power given to her by the deed of permission of 25th Kartick, 1226, evidence was given of his adoption, and that the ceremonies usual in a case of Hindoo adoption were duly performed in the case of his adoption. In opposition to this evidence in support of the fact of the adoption, the Appellant filed a copy of an Urzee of a testamentary character, purporting to be signed by Gokool Kishore, and to bear date the 28th Bysack, 1251, by which one Sheebnarain was appointed executor and guardian of the first-named Respondent, until he attained his majority; but to prove that this Urzee was a forgery, a certified copy of a petition of Sheebnarain, dated the 12th Jeyt, 1251, was produced, in which the Urzee was stated to have been prepared by the Appellant, and to be a forgery, and also by the deposition of Sheebnarain, who was examined as a witness. The Appellant also endeavoured to establish as a fact that, on the 31st Bysack, 1251, the first Respondent was too old to be taken in adoption, in accordance with the Hindoo law, and that consequently, the adoption at that time was invalid; but she failed to prove that the Respondent was older than he stated himself to be, or to show that the adoption was invalid, even if the Re-[287]-spondent were as old as alleged. The Appellant also objected that, on the 31st Bysack, 1251, Hurro Soondree, the first Respondent's mother, was under impurity, in consequence of the recent death of her husband, Gokool Kishore, and that, in accordance with the opinion of Pundits, she was incapacitated from giving the first-named Respondent in adoption, on that day.

As respected the alleged forgery of the deed of permission by Bhowanee Kishore relied upon by the Appellant, it appeared that the document was never registered, and the non-registration was not satisfactorily accounted for by the Appellant. From the evidence of witnesses called on behalf of the first-named Respondent, it appeared that the document was fabricated under the instrumentality of one Rughoo Dutt, who was in the service of the Appellant; that after a rough draft had been made, a copy was made upon a stamped paper of the value of Rs. 70; that in consequence of some mistakes in this copy, another copy was made upon a fresh stamped paper of the same value, and that after attempts to obtain the signatures of respectable persons as witnesses to the deed, Rughoo Dutt and his accomplices were obliged to be satisfied with the attestations of persons of the lowest class. In addition to the witnesses who deposed to these facts from personal knowledge, there were also many persons called on behalf of the first-named Respondent, who deposed to the forgery of the document having been a matter of general notoriety in the neighbourhood. Rughoo Dutt was not called by Appellant as a witness.

Witnesses who were in the service of Bhowanee Kishore, and in daily attendance upon him during the illness which terminated his death, deposed on behalf of the first-named Respondent, that Bhowanee Kishore [288] returned from hunting in a state of high fever, and that he was insensible for the four days preceeding his death, and consequently incompetent to give instructions for or to execute any document. Witnesses were called by the Appellant to rebut these allegations. Some of them deposed that Bhowanee Kishore was quite well at the time of the execution of the alleged deed in contradiction to the language of the deed itself.

which stated that he was ill. It was also proved that at the time of Blowanee Kishore's illness and death, at Mooktagachia, there were many of his relatives residing near that place, and that they and neighbouring Zemindars visited him daily until he died, but no relative, or friend, or medical attendant was present at the time when the Appellant's witnesses stated that the alleged deed was executed by Blowanee Kishore.

In opposition to the facts so established, the Appellant endeavoured to support the validity of the deed mainly upon the ground of Chundrabullee Debia's acquiescence in or non-objection to the provisions of that document, and in order to show the early assent of Chundrabullee Debia to the deed, the Appellant produced a copy of a written statement purporting to be signed by Chundrabullee Debia on the 26th of September, 1840.

The suit came on for hearing before the Principal Sudder Court Ameen (Syud Ahmad Buksh), in the month of April, 1855, and on the 20th of that month, that Judge passed a decree dismissing the suit with costs. The reasons for the decree stated in his judgment were, first:—that inasmuch as the original deed of permission of 26th Kartick, 1226, had not been filed, neither the authenticated copy from the Registry office, nor the duplicate copy filed with the original at the time of registration, [289] which had been called for him from the Registry office, were admissible as evidence; secondly, that the Onoomuttee puttro executed by Gokul Kishore, and the grohen puttro and dan puttro as to the first Respondent, were not proved; and, thirdly, that, although there was no necessity to enter into an investigation as to the validity of the deed of permission set up by the Appellant, the opinion which he had formed was that it had been satisfactorily proved by the evidence of the witnesses thereto; that it had been recognized by Chundrabullee Debia, who, by her acts and conduct, had established the validity thereof; and that there was a strong presumption in favour of its genuineness.

The first-named Respondent appealed from this decree to the Sudder Dewanny Adawlut.

The appeal came on for hearing on the 30th of January, 1858, before Messrs. Colvin, Sconce, and Trevor, three of the Judges of that Court, and a decree on that date was passed dismissing the appeal with costs.

Separate judgments were delivered by the three Judges. Mr. Colvin, in his judgment, held that it was unnecessary to go into the question of the execution of the different deeds relied on until the disposal of certain preliminary questions, stated by the Court as follows:—"Even supposing Gour Kishore to have given to Chundrabullee Debia the authority to adopt, asserted by the Appellant, could he by Hindoo law thereby precluded the exercise afterwards of the power of adoption by his son, Blowanee Kishore, and did the terms of the deed alleged to have been executed by Gour Kishore show that such was his intention?" And accordingly the arguments on the hearing of the appeal and the several judgments of the three [290] Judges, were confirmed to the questions thus stated by the Court.

As the decree of the 30th of January, 1858, was founded upon judgments which assumed that which was the chief point in dispute between the parties—viz., the validity of the deed of permission set up by the Appellant; the first Respondent moved for a review of that decree; and a review was admitted by Mr. Sconce, who expressed his reasons for such admission in his judgment in the following terms:—"My judgment was originally given on the presumption that the Onoomuttee puttro set up by Bloobun Moyee, widow of Blowanee Kishore, and the adoption of the Defendant under it, were legally valid; and being satisfied from the cause shown by the Plaintiff's Counsel, that they should have an opportunity of taking the opinion of the Court upon that matter, I admitted the re-entertainment of the appeal, that the issues not before gone into might be adjudicated upon."

The hearing of this review took place on the 7th of March, 1859, in the Sudder Dewanny Adawlut, before Messrs. Sconce, Trevor, and Colvin, and separate judgments were on that day delivered by those Judges.

Messrs. Sconce and Trevor in their judgments held, in effect, first, that the fact of the execution of the deed of permission of 25th Kartick, 1226, by Gour Kishore was proved, and that, although the original deed had not been produced, yet under the circumstances, such secondary evidence as had been adduced on behalf of the

first Respondent was admissible, and established the validity and terms of the deed: secondly, that Chundrabullee Debia had power under the deed of 25th Kartick, 1226, to adopt a son as heir of Gour Kishore, in the event of Bhowa-[291]-nee Kishore dying without issue, or without having taken steps with a view to his being represented by a legally-adopted son: thirdly, that the adoption of the Respondent as the son of Gour Kishore was such an adoption as was authorized by the deed of 25th Kartick, 1226, and that the adoption was valid according to Hindoo law: fourthly, that the alleged deed of permission set up by the Appellant was not executed by Bhowanee Kishore, but was a forgery: and lastly, that the acts of Chundrabullee Debia, in conformity with that forged deed of permission, could not prejudice or affect the rights of the first Respondent as the legally-adopted son of Gour Kishore.

With respect to the affect of the deed of permission to adopt being of a testamentary character, the following judgment was pronounced by Mr. Trevor on that point. "Having declared the deed propounded by a Plaintiff to be a genuine deed, the next point is as to its legal significance. It has been contended on the part of the Plaintiff by the Advocate General, that the deed of permission is in the nature of a testamentary instrument, or writing, by which an estate of the nature of a fee simple conditional, that is, upon condition that he had issue, was given to Bhowanee Kishore: that in the event of his having issue, the estate then became absolute: but that in the event of his having no issue, he was limited to a life interest in the property, and a future estate, in the nature of an executory devise, is created in favour of a son to be adopted by Gour Kishore's wife, Chundrabullee Debia. On the part of Defendant it was contended by Mr. Money that limited estates in land are unknown to this country, and are inconsistent with its revenue system: that as no Statute *de donis* here exists, or has ever existed, all estates created are in their nature absolute: [292] that consequently, under the law, Bhowanee Kishore's estate was a fee simple absolute: and on his death, after having succeeded to his father's estate, it descended first to his son, either natural or adopted, and afterwards to his heirs under Hindoo law: that, moreover, the words of the deed are sufficient to pass absolutely the estate, and under the principle laid down by the House of Lords in the case of *Howe v. Byns* (10 Cl. and Fin. pp. 508—533), as to personal property, which is identical with the rule which should be followed as to reality, it is impossible to give to a party a right to a thing out and out: to give an absolute interest in that thing, and then afterwards to restrict that absolute gift by limitation over: that consequently, under the deed of permission, admitting it to be genuine, the Plaintiff takes nothing. The estate to be taken under Gour Kishore's deed must be determined with reference to Hindoo law, and not to the general law of this country. It is consequently only necessary for me to mark that there is not the slightest ground for the position taken up by the Counsel for the Respondent, to the effect that limitations of estates are unknown to and are illegal according to the laws of this country. So far from this being the case, there being no Statutory enactment forbidding the same, it is competent to any one to limit and restrict future interests in land in any way that whim or ingenuity may suggest, though probably the exact terms used in the very learned work (Fearn on Contingent Remainders) to which we have been referred, may not be resorted to: and under the Hindoo law, limited or restricted estates are of daily occurrence. It is true that the hypothecation which Government has on every estate as security for its revenue, may have a tendency to check such dispositions, unless they [293] arise by operation of laws: as on the occurrence of an arrear caused by a party with a limited interest, if it be not paid by parties with either a vested or contingent interest in the property, the estate is brought to sale, and by such sale all future interest would be defeated. But the existence of this rule, however it may have a tendency to check the exercise of it, is not inconsistent with the power itself of limiting estates which undoubtedly exists both under the general law of the country and under Hindoo law. Looking, then, on the deed of Gour Kishore by the light of Hindoo law, it appears to me that it is a testamentary disposition of his property, by which he devised it absolutely to his son, Bhowanee Kishore, and his heirs general, subject to a power of appointment by the widow, to be exercised in the event of his son, Bhowanee Kishore, dying without leaving

a son either natural or adopted, or to be adopted, him surviving. This estate in the son was absolute, and permitted alienations which it could hardly have done were it only a fee simple conditional. Whatever interest, however, the heirs general of Bhowanee Kishore may have held under it, was subject to be destroyed by the exercise by the widow of the power of appointment when the executory devise in favour of the party so appointed would arise and displace it. By this means the direct succession to Gour Kishore and the performance of the necessary obsequial rites are effectively attained. Whatever objection might arise to such a disposition in other parts of India from the doctrine that the inchoate right of the son to property is from his birth, none such can arise in Bengal, where the above doctrine is not recognized, where, whilst the father lives and is free from defect, the sons have no right at all, and where by the power of making testamentary [294] disposition, the father, if so minded, can will away, even to a stranger, the whole of his ancestral property. It has been objected by the Respondent to the exercise of the power of adoption by the widow of Gour Kishore, that as Bhowanee Kishore had married, and had succeeded to the property, his widow had, by virtue of her marriage, a vested right in the property, and that any act done in derogation of that vested right, could not be upheld. I find no authority for this doctrine in Hindoo law books. If the power of appointment can be exercised in derogation of the right of other heirs of the son, it can be exercised in derogation of that of the widow: and the fact of the son of Bhowanee Kishore having reached his majority and succeeded to the estates is, in a case like the present, where the object of the Testator is to perpetuate direct heirship, of itself deserving, it appears to me, of no lengthened consideration. Of the soundness of the principle laid down in the case of *Hoare v. Byng*, cited by the Counsel of the Respondent, and its applicability to this country, as well as to England, when circumstances rightly call for its application, there can be no doubt. As, however, it appears to me that the terms of the deed executed by Gour Kishore a power of appointment, in certain circumstances, remains in the widow, Chundrabullee Debia, it is not applicable to the present case."

Mr. Colvin, the other Judge, differed in opinion from Messrs. Sounce and Trevor in some material points, and in his judgment, held, in effect, first, that there was no doubt that Gour Kishore did execute the deed of permission of the 25th Kartick, 1226, and that it was never revoked by him; secondly, that if no more were involved in the case than which of the [295] two adoption alleged was the most trustworthy, that of the first Respondent was to be preferred as the best supported by evidence; thirdly, that the intention of the deed of the 25th Kartick, 1226, was only to give power to Chundrabullee Debia to adopt a son in the event of Bhowanee Kishore dying in the lifetime of his father, Gour Kishore; fourthly, that Chundrabullee Debia had no authority to curtail the Appellant's enjoyment of the estate in succession to her husband, Bhowanee Kishore; and fifthly, that as there was no legal power in Chundrabullee Debia to adopt the first Respondent when she did, the appeal ought to be dismissed.

In conformity with the judgments of the majority of the Judges, a decree of the Sudder Dewanny Adawlut was passed on the 7th of March, 1859, in favour of the first Respondent, with costs of suit, and with wassilat from the commencement of the suit, and interest thereon up to the date of realization.

Before this decree was made, Rajendro Kishore, the adopted son of the Appellant, attained his majority and died, when the Appellant, as the widow of Bhowanee Kishore, and mother of Koylas Kishore, a minor, whom she alleged she had adopted on Rajendro Kishore's death, applied for leave to appeal to England.

The petition, together with the papers of the case, were brought up before Mr. Samuells, one of the Judges of the Court, on the 6th of June, 1859, and his proceeding of that date was recorded as follows:—The papers of this case have been laid before me in order that I might determine whether the fact of Bhoobun Moyee, who originally defends the suit as mother and guardian of Rajendro Kishore, having now preferred an appeal to the Privy Council as mother and guardian of another adopted son, Koylas [296] Kishore, can in any way affect his right of appeal. It appears that Rajendro Kishore appeared in Court during the pendency

of the suit, and alleging that he was of age, was allowed to plead. After the case was heard, but before the judgment was pronounced, he died. This circumstance was brought to the Court's notice at the time, but it did not appear to have been considered necessary to refer to it in the decision which was then given, and which turns entirely on the validity of the deed of adoption set up by Bhoobun Moyee. It seems that Bhoobun Moyee, who was appealed to the Privy Council against the decision which declared her deed invalid, has again asserted her right under that deed, by adoption of another son, named Koylas Kishore. As she claims to adopt under the deed of permission, and the validity of the deed is the chief point at issue, the appeal must go forward, and any questions which may arise out of the death of the first adopted son, will be decided by the Lords of the Privy Council. It is, of course, understood that the appeal goes on without prejudice to the rights of the Respondent, who protests against the recognition of the second adopted son, and denies the right of the widow to make any such adoption.

On the 3rd of January 1860, an Order was made by the Sudder Dewanny Adawlut, admitting the appeal of the Appellant as widow of the late Bhowanee Kishore, and mother of Koylas Kishore, a minor.

Before the last-mentioned Order was made, the Appellant applied for a review of the decree of the 7th of March, 1859, and stated several objections to that decree, and upon the hearing of that application on the 14th of January, 1860, before Mr. Trevor, a review was admitted for the determination of one of the points raised by the objections. The views of Mr. [297] Trevor in admitting such review, are stated as follows:—"It remains then to consider the sixth objection to the Court's ruling, which is, that even if the deed of permission executed by Gour Kishore be a testamentary disposition of his own and the ancestral property, yet that disposition cannot extend to property admittedly purchased on behalf of Bhowanee Kishore from the profits of the ancestral properties, while they were under the charge of the Court of Wards during his minority, and which can, in no sense, be considered as property covered by the Will of Gour Kishore. This point was not mentioned by the Vakeels of either side when the case was last before the Court, and it consequently escaped the notice of the Court; but on adverting to the plaint and to the schedules annexed thereto, it is clear that the property claimed by the Plaintiff is divided by him into two classes, the first including ancestral property, and the second properties purchased from the profits of the ancestral estates whilst they were in charge of the Court of Wards, during Bhowanee Kishore's minority. As the minor, during his lifetime, was absolute owner of the estates which, on his death without a son, either natural or adopted, were made by the Will of his father, Gour Kishore, subject to the power of appointment by his father's widow, Chundrabullee Debia, it seems to me that there can be no question that the widow of Bhowanee Kishore is entitled to retain possession of those properties which were purchased while the ancestral estates were under the Court of Wards during the minority of her husband, and from the profits of those estates belonging to her husband in the hands of the Court of Wards, and for the determination of this point alone I admit a review of the judgment of this Court."

[298] The hearing of the review took place on the 19th of April, 1860, before Messrs. Raikes, Trevor, and Loch, three of the Judges of the Sudder Dewanny Adawlut, and a unanimous judgment of the Court was then pronounced. Such judgment, after stating reasons arising from the construction to be put upon the deed of the 25th Kartick, 1226, and from Hindoo law, for holding that the first Respondent did not take under the terms of that deed the whole of the property possessed by or in the enjoyment of Bhowanee Kishore at the time of his death, but only the property which had descended from Gour Kishore, and was in the possession or enjoyment of Bhowanee Kishore, concluded as follows:—"Under the view of the case expressed above, we consider that the Plaintiff is only entitled under the testamentary disposition of Gour Kishore, to the property which descended from that individual, and that Bhoobun Moyee, the Defendant in the Lower Court, and the Petitioner before this, is entitled to retain possession of all the estates mentioned in the schedule filed by the Plaintiff as having been acquired by the Defendant's husband, Bhowanee Kishore, during the time the estates were under the Court of Wards during his minority. We, therefore, in variation of the decision of the

Court of the 7th of March, 1859, decree to the Plaintiff only those properties which are mentioned in the schedule at the end of the plaint as being ancestral property, and formerly in possession of Gour Kishore, with mesne profits, to be ascertained in execution from the date of suit, and interest on the amount so ascertained, from the commencement of the year following that on which the wassilat accrues, up to the date of realization, and we dismiss his claim to the properties purchased from the profits of the estates of Bhowanee [299] Kishore while they were in the hands of the Court of Wards during his minority. The costs of both Courts will be borne by the parties in proportion to the amount decreed or dismissed."

From this decree, so far as it negated the right of the first-named Respondent to the properties purchased from the profits of the estates of Bhowanee Kishore, while they were in the hands of the Court of Wards, that Respondent preferred an appeal to Her Majesty in Council. The present Appellant also lodged a petition of appeal to Her Majesty in Council, in which she claimed as widow of the late Bhowanee Kishore, and mother and heiress, according to Hindoo law, of Rajendro Kishore, the adopted son and heir-at-law of the former; and such petition submitted that the decree on review of the 7th of March, 1850 (except so far as the same had been reversed and altered by the decree on review of the 19th of April, 1860), should be reversed, and that the previous decrees of the Sudder Dewanny Adawlut, and of the Principal Sudder Ameen, be affirmed.

The appeal and cross were heard together. It was arranged that the Appellant should open first.

The Attorney-General (Sir R. Palmer) and Mr. Leith, for the Appellant.—If the adoption by the Appellant is not established, she, as widow of Bhowanee Kishore and heiress of her husband is entitled to his estate; but as the Plaintiff, as the next friend of the first Respondent, sued in his character of adopted son of the late Gour Kishore, and alleged that such adoption had been made by Chundrabullee Debia, his widow, he was bound to prove strictly his case, which, we submit, he failed [300] to do. He failed to produce the original Onoomuttee puttro, which was alleged to contain the authority for such adoption, and upon which and its due execution, the Plaintiffs alleged adoption and consequent title and right to sue were entirely founded. A copy of the deed was improperly admitted by the Court below without proof of the execution of the original, or of its loss or destruction which was requisite to entitle it to be let in as secondary evidence. *Syud Abbas Alli Khan v. Yadeen Ramy Reddy* (3 Moore's Ind. App. Cases, 156), Ben. Regs. XX. of 1812, sec. 2, cl. 5, XXXVI. of 1793, sec. III. and Act No. XIX. of 1853.

Then with respect to the alleged adoption of the first Respondent by Chundrabullee Debia, we contend, that such adoption was invalid, both with reference to the rules and requirements of Hindoo law, and according to the opinion of Mr. Colvin, the dissentient Judge, to the proper interpretation of the deed of permission to adopt, having regard to the circumstances under which, and the particular time, that the alleged power was exercised by Chundrabullee Debia; but the most important objection is, that Mr. Trevor, one of the Judges, of the Court below, has wrongly imported principles of the English law relating to executory devises, in construing this permissive deed to adopt into an executory devise; nothing of the kind being known to the Hindoo law. No instance can be found in the Hindoo authorities of an adoption being good under such a devise, as this is improperly called by the Court below, where the son has attained full age and married. The deed purports to give the widow permission to adopt. It is not a power in the sense of the English law. No authority to support it can be found in the Hindoo law. W. H. Macnaghten's [301] "Hindu Law," Vol. I. p. 66. It is only in default of male issue that adoption is allowed. Strange's "Hindu Law," Vol. I. p. 78 [2nd Edit.]. It is true that two of the Judges of the Court below concurred in opinion that the Respondent, Ram Kishore's, adoption was good, and not affected by the question of ceremonial impurity, and that although being 12 or 13 years of age as we allege at the time, and tonsure had been performed, he was not above the legal age for adoption, being a Brahmin by caste; yet the important question arises, whether as such adopted son of the late Gour Kishore, the father of the Appellant's husband, Bhowanee Kishore, who survived his father twenty-three years, and left the Appellant his childless widow, and as such, his admitted heiress by the Hindoo law, could displace

and supersede the Appellant as such heir in the possession of the estates which devolved on her husband as an absolute estate of inheritance. We submit that such a power of appointment, if exercised by a mother, was invalid, if the son left a widow, as her vested rights, Strange's "Hindu Law," Vol. I. p. 134, would be defeated by its exercise. An adopted son takes as a posthumous son. W. H. Macnaghten's "Hindu Law," Vol. I. ch. vi. p. 70; *Gunga Mya v. Kishen Kishore Chowdhry* (3 Ben. S.D.A. Rep. 128). After-born sons' rights are declared in the Daya-Bhaga, ch. vii., secs. 11 and 12. Another ground of invalidity of such adoption is, that by Hindoo law, a second adoption, the first son being alive, is illegal. *Rungama v. Atchema* (4 Moore's Ind. App. Cases, 1); 1 W. H. Macnaghten's "Hindu Law," p. 70. Bhowanee Kishore succeeded to the ancestral estate and property by operation of law, as his father's sole heir, and not under any devise or be-[302]-quest from him, and the estate and property being in him, as admitted by the decree, as an absolute estate of inheritance, vested, on his death, in the Appellant, as his widow and heiress, therefore her title and interest therein could not be displaced or divested by the act of Chundrabullee Debia subsequently adopting a son, so as to vest the estate and property in such son as heir-at-law, not of the Appellant's deceased husband, but of his father, whose interest in the same ceased and determined on his death.

Although we were not bound to do so, in consequence of the Plaintiff's failure in proof of his title, yet we submit that the Appellant satisfactorily proved the execution of the deed containing the authority of her deceased husband to adopt a son or sons to him, under which instrument she adopted Rajendro Kishore, according to the requirements of the Hindoo law, as decreed by the Principal Sudder Ameen, and after his death, Koylas Kishore.

Mr. Forsyth, Q.C., and Mr. W. H. Melvill, for the Respondent, Ram Kishore.

It was satisfactorily proved that Gour Kishore executed the deed of permission to adopt, dated the 25th Kartick, 1226, and in pursuance of such deed, Chundrabullee Debia adopted the first Respondent, who thereby became entitled to the estates in dispute. This deed was sufficiently proved by an authenticated copy from the Registrar's Book. The case of *Syud Abbas Alli Khan v. Yadrem Rama Reddy* (3 Moore's Ind. App. Cases, 156) does not apply. There was no proof of the original deed in that case, and the fragments produced evidently bore marks of being fabricated. Here the duplicate deed coming out of the proper place of [303] custody, the Registry of deeds, was properly received in evidence, Ben. Regs. XXXVI. of 1793, sec. III.; and XX. of 1812, sec. II. cl. 5.

Such deed of permission to adopt was of a testamentary character, and good by Hindoo Law, F. Macnaghten's "Cons. on Hindoo Law," p. 168, and as a Will is recognized in Bengal, with the English law of limitations engrafted on the Hindoo law, *Sonatum Bysack v. Sreemully Juggutsoondue Dossee* (8 Moore's Ind. App. Cases, pp. 66, 78), it operated as an executory devise, and was sufficient to prevent Bhowanee Kishore executing an instrument which would have the effect of defeating the disposition of Gour Kishore under such deed of permission. The objection to the validity of Ram Kishore's adoption is unfounded: first, he was of proper age, F. Macnaghten's "Cons. on Hindoo Law," pp. 142-3-6; 1 W. H. Macnaghten's "Hindoo Law," p. 71; secondly, a widow can adopt a son to her deceased husband, 1 Strange's "Hindu Law," p. 79. The Mitachara, ch. i. sec. xi. p. 1. The consequence of adoption is that the adopted son becomes an alien from his family. The adopted son cannot be deprived of his adopted father's estate. But we contend, that the instrument giving permission to adopt, which the Appellant alleges to have been executed by Bhowanee Kishore, is palpably a forgery, and that no valid or legal adoption could have taken place in pursuance of such instrument. [Lord Kingsdown.—Their Lordships have arrived at the conclusion that the alleged Will, or deed of adoption, relied upon by the Appellant, is a forgery, so you may relieve yourself of that part of the case.] Even if the forged deed was genuine, the claim of the Appellant to her widow's rights was negatived by the [304] alleged adoption of Koylas Kishore on Rajendro Kishore's death.

Their Lordships' judgment, having been reserved, was now pronounced by

The Right Hon. Lord Kingsdown (May 26, 1865).—The appeal in this case arises out of a suit brought by the Respondent, Ram Kishore, to recover certain estates in

Bengal, which were claimed by and were in the possession of the Appellant and of Rajendro Kishore, whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our judgment intelligible, are these:—

Gour Kishore Acharj, being the owner of considerable estates in Bengal, died in the year 1821. He left surviving him a widow named Chundrabullee Debia and an only son named Bhowanee Kishore.

At the time of his father's death, Bhowanee Kishore, who succeeded as his heir, was about four years of age. He attained, however, his majority, and married the Appellant, Bhoobun Debia. He died in the month of August, 1840, being then about twenty-four years old. He left no issue, and Bhoobun Debia, his widow, became the heir of his property, as well ancestral as of other estates which had been purchased with his own money during his life.

Immediately upon the death of Bhowanee Kishore, an instrument was set up, as being his Will, by Chundrabullee Debia, his mother, and Bhoobun Debia, his widow. By this instrument, power to adopt a son was given to Bhoobun Debia, and until such adoption was made, the income of the estates was given to Chundrabullee Debia and Bhoobun Debia.

Under this alleged Will, these two ladies took possession of the estates of Bhowanee Kishore, and [305] remained in the enjoyment of them for nearly four years.

In December, 1843, Bhoobun Debia professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called Rajendro Kishore.

Upon this, a quarrel appears to have arisen between Chundrabullee Debia and Bhoobun Debia, and Chundrabullee Debia alleged that the supposed Will of Bhowanee Debia, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death, and that Bhoobun had no power of adoption. She further set up an instrument called an Onoomuttee puttro, or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband, Gour Kishore, in his lifetime, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the Respondent, Ram Kishore, as the son of Gour Kishore, her late husband.

Bhoobun Debia, on behalf of Rajendro Kishore, her adopted son, having obtained possession of all the property of Bhowanee Kishore, the suit in which the present appeal was brought, was instituted in 1852, in the Zillah Court of Mymensing, by a next friend of Ram Kishore, on his behalf, against Bhoobun Debia and Rajendro Kishore, and certain other persons, the Plaintiff claiming, as the adopted son of Gour Kishore, the whole property, ancestral and acquired, of Bhowanee Kishore. To this suit Chundrabullee Debia was made a Defendant, instead of suing as a Plaintiff, on behalf of her son; that course being adopted probably with a view to avoid any prejudice [306] which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the Sudder Ameen, he was of opinion that the Plaintiff must recover upon the strength of his own title, and that if such title failed, it was unnecessary to decide upon the case of the Defendants.

He was of opinion that the Plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favour of the Defendant's adoption.

He awarded the costs of the suit to the Defendants, with the exception of Chundrabullee Debia, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the Sudder Dewanny of Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro Kishore was invalid, and that the Will of Bhowanee Kishore, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the Onoomuttee puttro of Gour Kishore was a genuine and valid instrument, and that if the power to adopt continued at the time when Chundrabullee Debia professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of

the Plaintiff as to the ancestral property of Bhowanee Debia, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

[307] The case now comes before us on appeal by Bhobun Debia, as representing her own rights and the rights of a son, whom she had adopted in lieu of Rajendro Kishore, who is dead, and on a cross-appeal by Ram Kishore, complaining that the decree in his favour ought to have included the self-acquired property as well as the ancestral property of Bhowanee Kishore.

On the hearing of these appeals, we expressed a clear opinion, without calling on the Respondent's Counsel, that the Court below was right in holding that the alleged Will of Bhowanee was a forgery. The evidence is irresistible that it was contrived by the different members of the family after his death, in order to give effect to an arrangement which they considered would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of Rajendro Kishore and of the son now substituted for him, must of course be held in this suit to be invalid.

The next question is, as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the Onoomuttee puttro of Gour Kishore is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when Chundrabullee Debia professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

[308] It appears that some years before the birth of Bhowanee, and in the year 1811 of our era, Gour Kishore being then childless, and anxious, as Hindoos generally are, to provide a son by adoption, if he should have no natural-born son, executed an Onoo-muttee puttro on the 30th of March, 1811, by which he gave power of adoption to Chundrabullee, his wife.

In 1819, two years after the birth of Bhowanee, he executed the instrument on which the present question depends, which is in these words. [His Lordship read the deed, *ante*, p. 281.]

The first question which arises is as to the construction of this instrument. It seems to have been considered by the two Judges of the Sudder Court, who decided in favour of the Respondent (certainly by one of them), that the document was to be regarded as a Will, and as containing a limitation, on failure of male issue of the Testator in the lifetime of Chundrabullee Debia, of the estate of the Testator, to a son to be adopted by Chundrabullee Debia, as a *persona designata*; and one of the Judges, in a very elaborate argument, refers to Mr. Fearn's celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing as far as possible from that which prevails amongst Hindoos in India.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the lifetime of the maker; it contains no word of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail,

and this instrument must be construed, and its effect must be determined, in just the same way as if it had been made in one of the Provinces of India, in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some [310] limits must be assigned. It might well have been that Bhowanee had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the lifetime of Chundrabullee Debia. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if Bhowanee Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundrabullee Kishore would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case, Bhowanee Kishore had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of Bhowanee Kishore, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had had any. She took a vested estate, as his widow, in the whole of his property. It would be singular if a [311] brother of Bhowanee Kishore, made such by adoption, could take from his widow the whole of his property, when a natural-born brother could have taken no part. If Ram Kishore is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether under his testamentary power of disposition Gour Kishore could have restricted the interest of Bhowanee Kishore in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done or attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

This seems contrary to all reason and to all the principles of Hindoo law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore.

If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power [312] of adoption, she would have divested no estate but her own, and this would have brought the case within the

ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of Luckinarain Tagori, reported by Sir F. Macnaghten, "Cons on Hindu Law," p. 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The Will of Luckinarain Tagori is set forth in full in No. 5, p. 9, of the Appendix to Sir F. Macnaghten's work. It is termed a Will; it appoints an Executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of Gour Kishore to have made the disposition now insisted on by the Appellant by devise of his estates, but we find no such devise in the instrument which he has executed.

An additional difficulty in holding the estate of the widow of Blowance Kishore to be divested may, perhaps, be found in the doctrine of Hindoo law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

[313] Upon the whole, we must humbly report to Her Majesty our opinion on the original appeal that the Plaintiff's suit ought to be dismissed; but, inasmuch as the main expense of it has been occasioned by the Appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the Respondents, which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several Orders and decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

[See *Juttendromohun Tagore v. Ganendromohun Tagore*, 1872, L.R. Ind. App. Sup., Vol. 70.]

MUTUSAWMY JAGAVERA YETTAPA NAIKER,—Appellant: VENCATASWARA YETTIA,—Respondent * [Nov. 27, 1865].

On appeal from the High Court at Madras.

Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject matter at issue exceed in value the appealable amount.

This was a petition for leave to appeal from a decree of the High Court at Madras, dated the 3rd [314] of January, 1865, which affirmed a decree of the Civil Court of Tinnevely of the 31st of March, 1864, awarding to the Plaintiff (the Respondent), as the illegitimate son of the Appellant's eldest brother, a former Zemindar of Yettiapooram, an annual maintenance of Rs. 2500 from the villages forming the

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

private property of the present Zemindar's family. The Defendant (the present Appellant) disputed the Plaintiff's claim, alleging that he was not the illegitimate son of the late Zemindar, that his mother was a dancing woman (wearing Botter on her neck) attached to a Pagoda at Kalugumalia, situate within the Zemindary; this Botter being different from Tally (nuptial mark), worn by married women among Hindoos, and he insisted that she was a Dasee, or woman of caste, cohabiting with several men.

It appeared that the suit was originally instituted by the Respondent in the Court of the Principal Sudder Ameen of Tinnevely, praying that a decree might be passed, awarding to him and his heirs, on account of their maintenance, Rs. 8400 per annum, to be paid from the income of the Zemindary. That Court, on the 11th of November, 1863, dismissed the suit with costs, whereupon the Respondent appealed to the Civil Court of Tinnevely, which reversed that decision and decreed to the Respondent an annual sum of Rs. 2500 for maintenance, being the largest sum that Court had jurisdiction to award, which decree was affirmed on appeal by the High Court at Madras. The present Petitioner, the Zemindar of Yettiapooram, applied to that Court for a review of the decree of the 3rd of January, 1865, which application was rejected with costs.

No application was made by the Petitioner to the High Court for leave to appeal to Her Majesty in [315] Council, inasmuch as he was advised that, the judgment being only for Rs. 2500 (though the real value of the annuity was much beyond that sum, and exceeded Rs. 10,000, the appealable value), applications for leave to appeal had, under similar circumstances, been refused both by the Sudder and High Court, on the ground that those Courts were bound by the actual amount of the judgment. The Petitioner, therefore, now applied direct to Her Majesty in Council for special leave to appeal, stating various points of law involved in the suit, which affected the caste, or *status*, of the parties; he, moreover, urged that the suit having been originally brought in the Court of the Sudder Ameen, which Court was prohibited from entertaining any suit where the sum at issue exceeded Rs. 2500, he was precluded from availing himself of important evidence in that Court, or bringing the same before the High Court, and submitting to that Court many questions of fact and law affecting both the *status* and claim of the Plaintiff, and from bringing the same ultimately on appeal before Her Majesty in Council; and he insisted, that it was worthy of the gravest consideration, whether a Plaintiff by instituting a suit in an inferior Court for a sum below the appealable value, Rs. 10,000, to Her Majesty in Council, when the amount at issue was really of much greater value, as in this case, should by such means be enabled to exclude an appeal against a judgment of the High Court, if the case should be carried there.

The Attorney-General (Sir R. Palmer, Q.C.), with whom was Mr. W. W. Jackson, for the Petitioner.—This is a very important application. The circum-[316]stances disclosed in the petition show abundant grounds for the allowance of the indulgence we ask for. The question at issue involves important points of law, affecting not only the interests of the parties claiming and disputing the right to the annuity sued for, but questions of caste and *status* of the utmost importance in India. In the case of *Rogers v. Rajendro Dutt* (8 Moore's Ind. App. Cases, 103), though the amount was under the appealable value, this Court gave special leave to appeal on the ground that an important point of law was involved. It did not there appear that any application for leave to appeal had been made to the Court below, the Supreme Court at Calcutta. In the cases of *Maharajah Sutteeschunder Roy v. Guneschunder* (*Ib.* 164), *Gooroopersad Khoond v. Juggutchunder* (8 Moore's Ind. App. Cases, 166), the principles upon which the Courts in India are to estimate the appealable value prescribed by the Order in Council of the 10th of April, 1838, were distinctly stated by this Court; in both these cases it was held that where interest was by the decree to be added to the principal sum decreed, and the aggregate amount exceeded Rs. 10,000, the case was within the appealable value, and leave to appeal to Her Majesty in Council was given. But that course could not be followed in this case, because there was nothing to add to the decree which would raise it to the appealable value. In the case of *Sree Mutty Ranee Surnomoyee v. Maharajah Sutteeschunder Roy* (*Ib.* 165), an estate, the subject of the suit, was charged with a fixed annual quit-rent of Rs. 64, with the Sudder Court decreed with a declaration

of the right of the Plaintiff to an enhanced rent of Rs. 822. 13a. It was held by the Court that the value of the subject-[317]matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000; and upon special petition leave was given to appeal. That is exactly our case. The annuity charged by the decree of the High Court upon our Zemindary, though of the annual value only of Rs. 2500, is, in the aggregate, of far greater value than Rs. 10,000, the appealable value under the Order in Council. There is another consideration which ought, we apprehend, to entitle us to the indulgence asked for. The suit was originally instituted in the Court of the Sudder Ameen; the jurisdiction of that Court is limited by Mad. Reg. III. of 1833, sec. 4, to suits under Rs. 2500. The appeal from that Court, is to the Sudder, now the High Court, but the sum claimed and decreed being under the appealable value from that Court, no appeal can be granted by the High Court to Her Majesty in Council, and thus, though the aggregate amount at issue is far above the appealable value, the suit being really of the value of an annuity of Rs. 2500, yet by suing but for one year's annuity, and in a Court not having jurisdiction above the sum of Rs. 2500, the Defendant in the Court below is ultimately precluded from bringing an appeal to Her Majesty in Council, though the decision against him involves not only an amount exceeding in value the requisite sum, but concludes questions of title and law which cannot be satisfactorily raised before the inferior Court or brought before the High Court.

Sir Hugh Cairns, Q.C., and Mr. C. P. Phillips, opposed the application.

There are no grounds for this application. The question before the Courts below was one of fact and [318]not of law; and the only question that can be brought here, if this appeal is allowed, is a question of fact upon the evidence. The facts lie in a very narrow compass, taking them even from the statement for the petition. The Respondent, the Defendant in the original suit, is the Zemindar of Yettiapooram, inheriting immediately from his brother Venkataswara, the last Zemindar. In 1854 the Petitioner's mother brought a suit in the Court of the Sudder Ameen of Tinnevely against the Respondents, on behalf of her son, to recover possession of a village, part of the Zemindary, which she claimed as a gift from Kumura, a previous Zemindar. This gift was, however, declared void for want of registration, and her claim was defeated. In September, 1863, the Petitioner brought the present suit against the Respondent for an allowance of Rs. 8400 for maintenance. The defence pleaded was that already stated, and the only issue raised was as to the *status* of the Petitioner's mother and his paternity. No other issue was stated or applied for, and upon that issue the suit was dismissed. On the appeal to the Sudder Court the Petitioner raised no objection to the issues, but adduced further evidence of his claim, and no fresh point was raised or insisted on, as was open to him before that Court. The High Court, when the appeal came before them, proceeded on the same grounds. There is, therefore, no pretence for saying that there are important questions of law which could not be raised in the Courts below, and can be determined here. If there had been any decision by the Court of the Sudder Ameen contrary to law or usage, it might, and, for aught we know, was brought before the High Court, under the provisions of the Code of 1859, art. viii. ch. x. sec. [319]372-5. Then, with regard to the sum at issue not being of sufficient value to allow of an application to the High Court for leave to appeal, if the Petitioner is right in his calculation, it was much above Rs. 10,000, and at least the fact of such value ought to have been brought before the High Court, and an application made to that Court for leave to appeal, the omission to make which, under the circumstances, is fatal to this application. The observations regarding the institution of the suit in the Court of the Sudder Ameen cannot prevail to the prejudice of the Respondent. The Court of the Sudder Ameen was the proper and only Court in which the claim could be made in the first instance, and it is no ground for applying for liberty to appeal here that that Court, which is limited by law to claims of a certain amount, took cognizance, as it was bound to do, of this claim, and rejected it.

The Right Hon. Lord Chelmsford. Their Lordships have had considerable difficulty in coming to a conclusion in this case. They consider, under the peculiar circumstances, that leave to appeal ought to be given. They have no doubt that substantial questions of law are involved in the case, and therefore, upon that ground,

if there were no other, their Lordships might be disposed to come immediately to a conclusion in favour of the application now made to them. But the great difficulty of the case arises from the rule with regard to the necessity of applying to the High Court in India before coming here for leave to appeal. Some years ago various petitions came before their Lordships asking for leave to appeal where that preliminary form of applying to the Court [320] below had not been pursued, upon the ground that the Sudder Court had expressed an opinion with regard to the mode of estimating the value of the subject of dispute, confining the parties to the actual sum claimed, and intimating that they would certainly adhere to such estimate; applications were, therefore, made direct to Her Majesty in Council, the Petitioners alleging that they were precluded from applying to the Court below, because in such circumstances that Court would certainly consider the subject-matter under the appealable value of Rs. 10,000.

In the case of *Maharajah Sutteeschunder Roy v. Guneschunder*, that was cited from 8 Moore's Ind. App. Cases, 164, which was a judgment given by Lord Justice Turner, upon several applications similar to that now before us, their Lordships gave leave to appeal, but they stated that it must be understood in similar circumstances that application ought always to be made to the Court below, and that that Court was bound to give leave to appeal in cases in which the specified amount of Rs. 10,000 could be reached, though only as it there appeared by the addition of interest subsequent to the decree; and it was essential that such an application should be made to the Court below before coming here. Since those decisions, and very recently, an application was made to this Court for leave to appeal, where there had been no previous application to the Sudder Court below, and their Lordships expressed very strongly their determination to adhere to the rule so laid down by them, and not to grant leave to appeal in future, unless there had been such previous application made to the Court in India, and they refused that application. That decision would of course be binding upon their [321] Lordships now, and would compel them to say on the present application that, as there had been no application for leave to appeal to the High Court, therefore the Petitioner's application to this Court ought not to be entertained, and no leave given to appeal. But there are very peculiar circumstances in this case. The suit was instituted in the Sudder Ameen's Court, which has no jurisdiction in any demand above Rs. 2500. Supposing that, upon the face of the plaint, it appeared the demand was really beyond the value of Rs. 2500, it was competent to the Defendant to have pleaded to the jurisdiction of the Court; but no such course was taken, and a decision having been given, and an appeal made to the High Court, both parties proceed on the footing and upon the admission that the sum in dispute is under Rs. 10,000, the appealable amount to Her Majesty in Council.

Supposing, therefore, that an application had been made to the High Court for leave to appeal, it would not have been competent to the parties, in this state of circumstances, to turn round and say the value was above Rs. 10,000; and if not so, the High Court would have no power to give leave to appeal.

Therefore, under these very peculiar circumstances, which distinguish this case from those which have been previously determined, their Lordships grant leave to appeal here, reserving of course to the Respondent liberty to apply upon the subject of costs, in case the appeal should not be prosecuted.

[As to special leave to appeal, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125. For subsequent proceedings see 12 Moo. Ind. App. 203.]

[322] NAWAB SIDHEE NUZUR ALLY KHAN. *Appellant*; RAJAH
OOJOODHYARAM KHAN. *Respondent* * [Nov. 28, 1865].

On appeal from the High Court of Bengal.

Application to stay proceedings in a cause in which an appeal from an Order in the nature of an interlocutory Order is pending before Her Majesty in Council, ought satisfactorily to show that a serious injury will be the result to the party applying, unless the delay asked for be granted, and that the party applying has come promptly to make the application.

Where, therefore, an Appellant from an Order of the High Court of Judicature which remitted a cause, appealed to that Court from the Zillah Court, back for the trial of issues framed in accordance with the provisions of Act No. 8, of 1859, s. 139, having failed in obtaining an Order from the High Court to stay proceedings in the Zillah Court, pending the appeal, but not having appealed from that decision; presented a petition to Her Majesty in Council praying that all proceedings in the remanded suit might be stayed till the appending appeal had been heard; the Judicial Committee, without determining the question of their right to interfere in such circumstances, held that the Petitioner had not shown any such injury, or used such expedition as entitled him to ask for a stay of proceedings.

Quære, whether, where an Order has been made by the Superior Court below refusing to stay proceedings, and such Order is not specially appealed from, the Judicial Committee have any authority to interfere, though an appeal is pending before them from a previous Order of the Superior Court made in the same suit, remitting the cause back to the inferior Court before which it is pending.

This was an application to stay proceedings in a suit instituted in the Zillah Court of Midnapore, in which an appeal had been interposed from an interlocutory Order, to the Sudder Court (afterwards the [323] High Court of Judicature) at Fort William, Bengal, and that Court, after a hearing and rehearing, remanded back to the Zillah for trial on the merits.

The circumstances as they were stated in the petition of the Appellant, were these: On the 30th of May, 1860, a plaint was filed in the Civil Court of Zillah, Midnapore, by the Respondent against the Appellant and others to recover possession as mortgagor of certain Pergunnahs, therein specified, charging the Appellant and other Defendants with fraud and collusion in obtaining possession of the Pergunnahs, and for the sum of Rs. 2,27,000, the alleged mesne profits.

The Defendants put in answers to the plaint, and on the 10th of November, 1860, the cause came before the Zillah Judge, who framed issues of law and fact in pursuance of the provisions of s. 139, Act No. 8, of 1859. On the 19th of November, 1860, the first hearing of the suit took place before the same Judge, who gave judgment on the issues directed, in favour of the Appellants, and dismissed the plaint.

The Respondent appealed from this judgment to the Sudder Court at Calcutta, and on the 1st of June, 1863, the High Court, having been substituted for the Sudder Court, reversed the judgment of the Zillah Court at Midnapore and remanded the suit back to that Court for trial upon the merits.

The Appellant applied for and obtained a re-hearing by the High Courts, which, on the 12th of January, 1864, affirmed its previous judgment and decree: whereupon the Appellant petitioned for and obtained leave to appeal to Her Majesty in Council from such decree and judgment. The Appellant, in his petition to the High Court for leave to appeal against the before-mentioned decree and judgment, [324] prayed that until his appeal (for leave to present which he was then petitioning) should be heard, or decided, or until the further Order of the High Court, all further proceed-

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ings in the High Court and in the Zillah Court of Midnapore should be stayed ; and on the 16th of June obtained an order *nisi* calling on the Respondent to show cause why the hearing of the suit under the aforesaid order of remand should not be postponed, pending the result of the appeal to Her Majesty in Council, which Order, on cause being shown, was discharged on the 25th of August, 1865. No appeal was asked for or interposed from this Order of dismissal, but the Appellant, believing, as he stated in his petition, that he would be put to great trouble and inconvenience, and would be forced to incur great expense in and about obtaining the evidence, which he had been advised and believed, would be necessary to give on his behalf at the trial, and being advised and believing that the determination by the trial of the issues in fact raised in the suit would be wholly immaterial as regarded the result of the suit, if he succeeded in his appeal to Her Majesty in Council, which he had been advised and believed he should do, and believed that the trial of the remanded suit would be proceeded within the Zillah Court, pending the hearing of his appeal, presented a petition to Her Majesty in Council, praying that an early day might be appointed for the hearing of the appeal, and that all proceedings in the remanded suit might be stayed until the pending appeal should have been heard and decided.

The Attorney-General (Sir R. Palmer) with whom was Mr. A. Stevenson, now moved to stay proceedings.

It is necessary to state shortly the facts of this case. [325] The suit is one for possession by redemption of certain mortgaged Pergunnahs which have been sold at a sale purporting to have been a revenue sale, which, as we say, by reason of collusion and fraud, was a fictitious sale. We claim to redeem these Pergunnahs, and for an account of mesne profits. The sale is alleged to have been for Government arrears of revenue, which we say were purposely allowed to fall in arrear, and the sale, instead of being a public, was, by the fraud and collusion of the parties, really a private one. It was urged against us that we were barred by the Ben. Regulation of Limitations, III. of 1793, sec. 14 ; but as we allege fraud and collusion, we claim exemption from that Regulation, and insist on our right to come in under cls. 1, 3, sec. 3, Reg. II. of 1805, which allows sixty years to bring an action. The issues directed by the Zillah Judge go directly to these points, and if determined on the appeal in our favour, will dispose of the case ; that, therefore, is a reason sufficient to induce this Court to stay the proceedings below. The issues of fact, moreover, if found against us at the trial, would, on the points there stated, exclude us from any benefit we may derive from a decision in our favour on the appeal. We only ask that the trial may be postponed till the appeal has been heard ; we are ready to proceed with the appeal immediately.

Mr. Rolt, Q.C., and Mr. Leith, opposed.

This is an unprecedented application. It is quite irregular for the other side to go into the facts or merits of the case. Neither is this Court, nor are we ourselves, sufficiently informed of the facts to come to any conclusion. We know nothing of the merits, and this Court has no materials before it to enable [326] your Lordships to say on what grounds you could order a stay of the proceedings. What claim has the Appellant to such an indulgence ? The decree of foreclosure which is now sought indirectly to impeach was pronounced so long ago as on the 16th of November, 1852, there was no appeal from that judgment, and the present proceedings are long subsequent. Even admitting the dates as stated by the Appellant in his petition, the final judgment on the rehearing was pronounced on the 12th of January, 1864, and though appealed, the appeal was not prosecuted ; nor was the Order *nisi* which is now sought to be incorporated as part of the proceedings applied for, or obtained before June in the same year ; there has been no diligence, therefore, if that could be urged as a ground for granting this application. But the consequences to the Respondent, if the proceedings are stayed, may be more unjust and injurious. Evidence both oral and documentary may be lost, witnesses may die, and all the other casualties that impede a cause may intervene. There is, moreover a fatal objection, as we apprehend, to the application. It is an appeal against an Order of the High Court which discharged the Order *nisi* of the 16th of June, 1864, from which no appeal was either asked for or asserted. The only appeal pending in this Court is from the decree of the 1st of June, 1863, confirmed by the judgment of the 12th of

January, 1861, and we submit that independent of the want of merits, this Court has no jurisdiction to review an order not appealed from.

The Right Hon. Lord Chelmsford.—Their Lordships have not entered into the consideration of the merits of this case, nor will they [327] decide any question with regard to the right or authority which they may have to interfere by ordering a stay of proceedings in the circumstances of these cases: but they decide upon this petition entirely upon these grounds: that any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application: first, that a serious injury will be the result to the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.

Now, with regard to any suggested injury which may arise to the Petitioner in case the delay asked for is not granted, there is no ground whatever for supposing that any such injury will be sustained. All that he can allege is, that he may be put to costs upon the trial of these issues of facts remitted to the Zillah Court, supposing ultimately the decision of their Lordships on the appeal now pending in this Court should be in his favour, upon the questions of law which it is said are raised therein. But the answer to that objection, if it be one, is, that if the Petitioner is put to costs improperly, those costs will ultimately fall on the Respondent; while, on the other hand, the situation in which the Respondent would be placed, if their Lordships were to grant this application, must be considered, because there might be very great danger of his losing evidence, parol and documentary, if the delay asked for were granted. Therefore, with respect to any supposed injury which would arise from the cause being allowed to take its course, and the issues of fact allowed to be tried in due form in the Zillah Court of Midnapore, there is no pretence for saying that any such injury will arise.

[328] Then, has the Petitioner come promptly with his application? which is another essential requisite of an application for delay or for a stay of proceedings in any case.

The appeal to the High Court of Judicature was decided finally on the 12th of January, 1861: and on the 10th of February, 1861, there was a petition for leave to appeal, and no application to stay proceedings made till the month of June, 1865. The delay was endeavoured to be accounted for from the Respondent having objected to the leave to appeal, on the ground that the six months ought to be dated from the date of the original decree, and not from the order on review: but that really appears to their Lordships to be no explanation at all, at least no satisfactory explanation of the delay which has taken place, of sixteen or eighteen months before this application to stay proceedings is made.

Under these circumstances, there being no proof of any serious injury which would be sustained by the Petitioner, by their Lordships, supposing they have the power to interfere, not interfering to stay the proceedings, and on the other hand, the Petitioner not having come, as rightly and properly he ought to have done, promptly with this application to stay the proceedings below, their Lordships think this petition ought to be dismissed, and with costs (see upon this point, *Rajah Perludh Sein v. Baboo Bhoodoo Singh*, 10 Moore's Ind. App. Cases, 78).

[For subsequent proceedings see 10 Moo. Ind. App. 540.]

[329] MAHARANEE INDERJEET KOOAR,—*Appellant*; MUSSUMATH ISMUDH KOONWUR and SOONNETT KOONWUR,—*Respondents* * [Nov. 30, Dec. 1, 1865].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

By a Razinamah executed in the year 1824, a compromise of a suit was entered into, whereby the respective rights of A. and B. in their father's (C.'s) real and personal estate were declared. C. was entitled to a tax levied on Pilgrims resorting to a Temple situate on his estate. This tax was abolished by Government in the year 1840, and a perpetual annual money payment awarded by the Government to C. as compensation. On the death of C. a partition of his estate was made between A. and B., by assigning to each certain Mehals according to their supposed value, in respect of their proportions of the shares provided by the Razinamah of 1824. This partition did not include the compensation for the pilgrim tax. Government in dealing with the annual compensation money deducted the amount from the jumma paid by A. and B. for the Mehals, which led to disputes as to the value of the Mehals so taxed and apportioned between A. and B. Held (1), that the annual compensation-tax was to be treated as part of the assets of C., and to be received by A. and B., in the proportions agreed to by the Razinamah [10 Moo. Ind. App. 332, 333]; and (2), that the mode of remission by Government from the jumma, in respect of the Mehals, by the appropriation of the compensation-money, did not affect the rights of the parties [10 Moo. Ind. App. 337].

The facts of the case are sufficiently stated in the judgment.

As the Respondents did not appear, the appeal was heard *ex parte*, and was argued by Mr. Rolt, Q.C., and Mr. W. H. Melvill, for the Appellant.

[330] Their Lordships' judgment was pronounced by

The Right Hon. Lord Chelmsford.—This is an appeal from four decrees of the Sudder Court of Calcutta, reversing four decrees of the Principal Sudder Ameen of Zillah Behar in favour of Maharajah Hetnarain Singh, whose widow and heiress is the Appellant. The Respondents are the widows and heiresses of the late Modnarain Singh, who was the brother of Hetnarain Singh, and the Plaintiff in one and Defendant in three of the suits in which the decrees now under appeal were made.

The four suits involved the same question, which is shortly and accurately stated in the Appellant's case as follows:—

“Whether Hetnarain Singh and Modnarain Singh were entitled to the annual sum of Rs. 17,212 9a. 5p., in the proportions of 9-16ths and 7-16ths respectively, in accordance with the contention of Hetnarain Singh, or in the proportions of the amounts of Sudder jumma payable by them respectively on account of the nineteen Mehals in the pleadings mentioned in accordance with the contention of Modnarain Singh.”

The two brothers were sons of the Maharajah Mitterjeet Singh, who died on the 3rd of October, 1840. During the lifetime of the Maharajah an agreement was entered into for a division of the property between his two sons after his death. The particulars of this agreement are stated in a former suit between the brothers, which was brought by appeal before their Lordships and is reported in Moore's Ind. App. Cases, Vol. 7, p. 312, to this effect:—“Family dissensions having arisen during the lifetime of Mitterjeet Singh, certain proceedings [331] were instituted, and on the appeal to the Sudder Dewanny Adawlut in a suit in which Mitterjeet Singh and the Appellant and Respondent were parties, a compromise was entered into and a Razinamah and Iknarnamah, dated the 7th of February, 1824, was filed by Mitterjeet Singh, which instrument was to the effect, that the real and personal estates held by

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessors,—The Right Hon. Sir Lawrence Peel.

him after his death were to be divided between the Appellant and the Respondent. The former was to take a 9 annas share and the latter a 7 annas share. Partition deeds of the same tenor were also filed, and on the 4th of March, 1824, the Sudder Court decreed that the parties should act up to the terms entered into by them in the above-mentioned instruments."

The Maharajah was entitled to a tax levied upon Pilgrims resorting to the Temple at Gya. This tax was abolished by the Government in the month of January, 1840, and a compensation was awarded to the Maharajah in lieu of it in the shape of a perpetual annual payment of Rs. 17,212, 9a. 5p. The grant of this compensation was the subject of a Government letter of the 16th January, 1840, which, unfortunately, is not printed in the proceedings.

On the death of the Maharajah, his property, whether moveable or immoveable had to be divided between the sons according to the proportions of ninesixteenths and seven-sixteenths, settled by the agreement and decree of 1824. And the compensation tax, as part of that property, was divisible in these proportions. His immoveable property, which was very extensive, consisted partly of nineteen Mehals which were held by him in severalty, and partly of Mehals which he held conjointly with other persons.

Disputes arose between his sons immediately [332] after his death. The Commissioner of the District intervened and induced them to make a partition of the immoveable property. Under his advice, and with his approbation, deeds of partition were executed on the 30th of December, 1840, and that which was executed by Modnarain specifies the different villages which fell to the lot of Hetnarain and Modnarain respectively; and also the sums which each, as between him and his brother, was bound to pay in respect of the Sudder jumma, or Government revenue. The partition, however, was not made upon the principal of dividing each Mehal, with the burthen of the public revenue assessed thereon, in the proper proportions, but of assigning certain villages and parcels according to their real or supposed value to each share, so as to give to Hetnarain nine-sixteenths in value, and to Modnarain seven-sixteenths in value of the whole immoveable property. In consequence of this mode of division, in six out of the nineteen Mehals which had been held by Mitterjeet Singh in severalty, Modnarain took more than a nine annas share (his share in some of them being absolutely much larger than that of his brother), with the liability of having to pay a corresponding share of the public revenue assessed on those Mehals. This deed of partition, which was confined to immoveable property, made no mention of the compensation for the Pilgrims' tax; and the jumma, or revenue, stated therein to be chargeable on the different Mehals, and to be apportioned between the brothers as therein mentioned, was the full amount of jumma assessed upon them under the perpetual Settlement. It follows, then, that as far as this partition went, the compensation [333] for the Pilgrims' tax was not included therein, and presumably continued to be part of the assets of Mitterjeet Singh divisible between his sons in the proportion of nine to seven annas.

In Mitterjeet Singh's lifetime the payment of this annuity would have been very simple; he had annually to pay a very large sum (upwards of three lacs of Rupees) for Government revenue, and would naturally have retained the Rs. 17,212 by way of deduction or set-off. It would seem, however, that in his life-time, or very shortly after his death, the Revenue authorities of the District entertained the notion of putting, in some way or other, this payment against the Sudder jumma, in respect of the nineteen Mehals held by him in severalty, distributing the whole sum of Rs. 17,212 amongst the different Mehals according to the jumma assessed upon them respectively. This appears from the letter of the Accountant of the Revenue department, which purports to be in answer to a letter from the Collector of the 22nd October, 1840, which is not in evidence. The Accountant's letter is dated the 26th December, 1840, and is in these terms: "I have the honour to acknowledge the receipt of your letter No. 344 of the 22nd October last, and with reference to the seventh paragraph thereof, I beg to acquaint you that on examining the items rateably distributed by you among the several Mehals in your statement, trifling errors have been discovered to exist in almost every item. I accordingly transmit herewith a copy of your statement with an additional column added to it, showing the calculations made in this office, agreeably to which you will have the goodness to allow the remissions in favour

of the several Mehals. I have [334] used the term remissions, though, as far as the course of entry is concerned, with the settlement with the Rajah will render necessary, no remissions in account will appear; for the compensation in question to the Rajah's heirs you will be pleased to recollect will have to be charged under the head of sayer compensation, subordinate to pensions, the charge being balanced by a distinct credit *per contra* to land revenue (the estates being in your District Towjee). This course of entry you will observe will prevent you from exhibiting the transaction in account as a 'remission.'"

By a proceeding, dated the 23rd of March, 1841, the Collector directed that effect should be given to the letter of the Accountant, and that the Rs. 17,212. 9a. 5p., should be credited on the 1st of April of the current, and of every future year, to the Mouzahs of each lot, as was specified in the letter of the Accountant, that is, on the list of Mehals annexed to it; but it appears that in April, 1841, and again on the 31st of March, 1842, a warrant was written for the whole sum of Rs. 17,212. 9a. 5p., and this settlement of accounts was, therefore, in the nature of a set-off of one independent demand against another, and did not imply the permanent remission or deduction of part of the jumma originally assessed on the several Mehals.

On the 6th of June, 1842, the Secretary of the Government wrote to the Accountant that the remission of the Rs. 17,212. 9a. 5p. was to be adjusted by reduction of the jumma. The letter is in the following terms:—"With reference to the communication made to your office from this department under date the 16th of January, 1840, I am directed to inform you that the Honourable the Deputy-Governor [335] of Bengal has this day been pleased to determine that the remission granted to Rajah Mitterjeet Singh shall be adjusted by a reduction of the Sudder jummas of the estates, recorded in his name on the Behar Collector's Towjee." And a letter to this effect, of the date of 14th of June, 1842, was sent to the Collector of Behar. Whether that Court was right in this statement, their Lordships, not having the letter of the 16th of January before them, are unable to determine.

This order of June, 1842, for adjusting the remission by a reduction of the jumma, apparently rendered a change in the mode of stating the accounts necessary: but, in fact, no alteration was made in them down to the year 1850. This appears from a letter to the Collector of Behar of the 17th of September, 1850. Part of that letter is in these terms: "As regards the mode of adjusting the remission still observed by you, I beg to remark that instructions from this office based upon the orders of Government of the 6th of June, 1842, were, under date the 14th idem, issued to you, wherein you were requested to account for the remission by a reduction of the Sudder jumma of the estates recorded in the name of Rajah Mitterjeet Singh on the Towjee of your District, which instructions apparently set aside those contained in letter, No. 426 of the 26th December, 1840. It would seem that after this communication the Government accounts were kept in accordance with the Government letter of the 6th of June, 1842, which is obviously treated as having introduced a mode of accounting for the compensation for the Pilgrims' tax differing from that established by the Accountant's letter of the 26th of [336] December, 1840, in that it proceeded less upon the principle of set-off, and more directly upon that of remission of revenue. Assuming, however, that the order so to deal with the compensation was within the competence of Government, as a direction to their Officers for the more convenient mode of keeping their accounts, or otherwise, how could that affect the rights of Hetnarain Singh and Modnarain Singh, *inter se*?

The Government might keep their accounts in any manner they pleased, but the Rs. 17,212, would still continue to be the property of the brothers in the settled proportions, unless they acquiesced in the course adopted by the Government, and acted upon it in such a way as to indicate a fresh agreement between them. Now, there is no evidence that Hetnarain Singh ever assented to this arrangement, or that he ever agreed to alter the proportions in which the property was originally divided. On the contrary, on the 15th of April, 1843 (and no action can have been taken on the letter of June, 1842, until the 1st of April, 1843), he presented a petition to the Collector, in which he complained of his being called upon to pay a larger sum than was due from him for the jumma, and praying relief. That petition was rejected. He then appealed to the Commissioner, and the Commissioner, in refusing to interfere said: "It appears that the Malikanah allowance has been rateably credited

to the revenue of the Mehals of both the parties. If there is a diminution in their respective shares as opposed to the fixed allotment of share, let them adjust the differences among themselves: Government has nothing to do with this. The Collector is to communicate this to both the parties."

[337] Accordingly, from the date of this order until the commencement of these suits in 1853, Hetnarain Singh continued to assert his right to nine-sixteenths of the Rs. 17,212. Ja. 5p., by retaining so far as he could, out of the sums which under the partition he was bound to pay as his share of the jumma assessed in the different Mehals, his proportion of the remission allowed in respect of each particular Mahal. The suit of Modnarain Singh is brought to recover the sums which, according to his contention, were in this manner improperly retained by Hetnarain Singh in satisfaction of his full proportion of the remissions allowed in respect of three of the Mehals, whilst the three suits of Hetnarain Singh are for the recovery from Modnarain Singh of the differences between the sums actually returned by him, and his full nine-sixteenths of the remissions allowed in respect of three other Mehals. The deed of partition, as has already been shown, made no alteration in the original rights of the parties, and the observations of the Principal Sudder Ameen in this respect are perfectly correct. It is to be observed also that Modnarain Singh, in his plaint filed on the 8th of April, 1853, as to the three Mehals of which Hetnarain Singh had received his nine-sixteenths, does not found himself upon any new agreement between them, but upon the authority of the Government order of June, 1842. The ground upon which the Sudder Court proceeded in overruling the decree of the Principal Sudder Ameen in the Appellant's favour was, that the parties were aware that the remission of the jumma had been made, and that there was a deduction from certain specified Mehals, and that the amount of remission from each of these Mehals had been ascertained and [338] determined, and that it was, therefore, a reasonable inference from the silence of the deed of partition on the subject, that the parties believed and were willing, that the amount of remission on each state, should be apportioned to the amount of Jumma, for which each of the contracting parties was responsible. There is, however, not the slightest proof that when the deed of partition was in preparation (the consent to an amicable adjustment in which it resulted having been given on the 24th December, 1840), or even at the time of the execution of the instrument on the 30th of December, 1840, the parties were aware of the mode in which the Government accounts had at that time been made out. The letter of the Revenue Accountant of the 26th of December, 1840, can hardly have reached the Collectorate of Behar before the 30th of December, and the proceeding of the Deputy-Collector shows that that letter was not taken into consideration by him until the 4th of January, 1841, and that no final orders were passed thereon until the 23rd of March, 1841. But even if the parties at the time when the deeds of partition were executed, had known of the letter of the 26th of December, 1840, they would have had no notice of the determination on the part of the Government to settle the account by way of reduction or remission of jumma. The arrangement was effected by the letter of Government of the 6th of June, 1842, and it is treated throughout the proceedings as differing materially from that contemplated in the letter of December, 1840. It is in the letter of 1842 that Modnarain Singh in his plaint founds his claim, and the sums which he sought to recover were those retained by Hetnarain Singh after the date of it.

[339] The Sudder Court puts the case of the sale for arrears of revenue of one of the lots on which a reduction of jumma had been allowed, and the danger of the Government revenue suffering from a doubt, whether the parties would consider themselves obliged to give up so much of a remission which they now enjoy, or would expect the Government to submit to the loss of revenue, consequent on treating the jumma on the Mahal as permanently reduced by the amount of the remission now allowed. But it is difficult to understand how, because in a supposable case the Government may be thrown into a state of uncertainty with respect to the mode of dealing with the reduction, this can have any influence on the rights of the parties between themselves.

Their Lordships are of opinion, that the view of the case taken by the Sudder Court cannot be adopted, but that the Rs. 17,212, was divisible between the brothers in the proportion of nine-sixteenths and seven-sixteenths, and that, in whatever mode

the Government may think proper to deal with this sum with reference to the jumma, the rights of the parties cannot be affected without their consent, but will continue to be adjusted according to the proportions originally established.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the decrees of the Sudder Court in all the four suits, and to affirm the decrees of the Sudder Ameen in all those suits, with costs of the Court below and here.

[340] ALEXANDER JOHN FORBES,—*Appellant*; AMEEROONISSA BEGUM,—*Respondent* * [Dec. 7, 8, 9, 1865].

On Appeal from the High Court at Calcutta.

The law under the Bengal Regulations, and practice of the native Courts, in foreclosure proceedings, reviewed and considered.

Anterior to the year 1806, the rights of a holder of a Bye-bil-wuffa (Conditional sale), were enforceable according to the strict terms of the agreement. It was then necessary to pay the amount when due. By Ben. Reg. XVII. of 1806, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The 7th section gives the Mortgagor a right of redemption within one year after an application by the Mortgagee to the Court under the 8th section of that Regulation. After such an application the Mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal has been discharged, and if the Mortgagee has not been in possession, any interests that may be due, or he must make a deposit pursuant to Ben. Reg. I. of 1798, sec. 2.

The general effect of these Regulations is, that if anything be due on the Mortgage, and the Mortgagor make no deposit, or an insufficient one, the right of redemption is gone at the expiration of the year of grace. But the title of the Mortgagee is not completed, he must bring a suit to recover possession, if he is out of possession, or obtain a declaration by the Court of his title if he is in possession, and in that suit the Mortgagor may contest the validity of the Conditional sale, or the regularity of the proceedings taken under Regulation XVII. of 1806, in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, so far as the right of redemption is concerned, will be whether anything remained due to the Mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that is found against the Mortgagor, the right of redemption is gone [10 Moo. Ind. App. 350, 351].

Held, upon the construction of sec. 11, Ben. Reg. XV. of 1793, that the production of accounts by a Mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due.

The necessity for a Mortgagee in possession to produce his accounts arises:—

First, when the Mortgagor has deposited the principal money, leaving the question of interests to be settled by an adjustment of the account.

Secondly, when the Mortgagor has deposited all that he admits, or alleges, to be due; and,

Thirdly, when he pleads and undertakes to prove, that the whole of the principal and interests has been liquidated by the usufruct of the mortgaged premises.

It is not necessary to appeal from an Interlocutory Order which does not dispose

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chebnsford, the Right Hon. Sir John Taylor Coleridge, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor.—The Right Hon. Sir Lawrence Peel.

of the cause. Such order can be impeached on appeal from the final decree [10 Moo. Ind. App. 359, 360].

This was a suit brought by the Appellant, a Mortgagee, for possession of a Talook and other real estates, which had been mortgaged to him by deeds of absolute sale and defeazance, constituting a Bye-bil-wuffa, or Conditional sale in the nature of a mortgage. The acting Judge of the Court of Zillah Purneah dismissed the suit, on the ground that the Mortgagee had failed to file and swear to accounts of his gross receipts [341] from the estates mortgaged and also of his expenditure for the management of it, while he was in possession as Mortgagee, and had the usufruct of the mortgaged estates according to the provisions of Ben. Regs. XV. of 1793, sec. 11, and I. of 1793, sec. 3; and that consequently the Court could not adjust the accounts between the parties and ascertain whether the mortgage loan and interests had or had not been liquidated from the rents and profits received by the Mortgagee within the prescribed time limited by the Bengal Regulations. The High Court at Calcutta affirmed this decree. Hence the present appeal.

The principal question raised by the appeal was, whether the proceedings taken by the Appellant under Ben. Regs. XV. of 1793, and XVII. of 1806, for the purpose of foreclosing the mortgage were regular.

In the Courts in India the Appellant contended that [342] he was not obliged to produce such account, first, because the lands mortgaged to him were not in his possession, but in that of his son, under a lease from the Mortgagor and a Kabooleat (counter lease) bearing even date with the mortgage deeds executed by the latter, and secondly, because he had only received as Mortgagee, under an assignment from the Mortgagor, the rent agreed to be paid by his son under the Kabooleat, in liquidation of interest, and that he had complied with the requirements of the Regulations by filing an account of the amounts received by him, from time to time, in respect of such rent.

The Bengal Regulations bearing upon these points are these:

By section XI. of Reg. XV. of 1793, it is enacted, that "For the adjustment of the accounts, in the cases of mortgages specified in section 10, where the Mortgagee shall have had the usufruct of the mortgaged property, the Mortgagee is to be required to deliver in the accounts of his gross receipts from the property mortgaged, and also of his expenditures for the management or preservation of it. The Mortgagee is to swear, or (if he be of the description of persons whom the Courts are empowered to exempt from taking oaths) to subscribe, a solemn declaration, that the accounts which he may deliver in are true and authentic. The Mortgagor is to be permitted to examine the accounts, and, after hearing any objections he may have to offer, or any evidence that either party may have to adduce respecting them, the Court is to adjust the account."

Section III. of Reg. I., 1798, enacts that, "In all instances wherein the lender on a Bye-bil-wuffa, or [343] similar Conditional sale, may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account to the borrower for the proceeds of the estate whilst in his possession, on the principles prescribed with regard to mortgages and interest in Regulation XV., 1793, as far as the same may be applicable to the nature of the case. But such part of section X. of the above Regulation, as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed, whenever the principal sum, with the simple interests due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the Mortgagee, being inapplicable to the Conditional sales referred to in this Regulation, it is hereby declared not to apply thereto."

The course to be pursued with a view to the redemption or foreclosure of mortgages and Conditional sales is prescribed by Regulation XVII. of 1806, sec. 7. In addition to the provisions made in the Provinces of Bengal, Behar, Orissa, and Benares, by Regulations I., 1798, and in the Ceded and Conquered Provinces by Regulation XXXIV., 1803, for the redemption of mortgages and Conditional sales of land, under deeds of Bye-bil-wuffa, Kutubaleh, or any similar designation, it is thereby provided, "that when the Mortgagee may have obtained possession of the land, on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such

deed or mortgage and Conditional sale, or of the balance due if any part of the principal amount shall have been discharged; or when the Mortgagee may not [344] have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year (Bengal, Fusily, or Willaity, according to the era current where the mortgage may take place) from and after the application of the Mortgagee to the Zillah or City Court of Dewanny Adawlut for foreclosing the mortgage and rendering the sale conclusive in conformity with section 8, of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and Mortgagee or his legal representative; or that the amount due deposited within the time above specified, in the Dewanny Adawlut of the Zillah or City in which the mortgaged property may be situated, as allowed for the security of the borrower and Mortgagor in such cases, by section 2, Regulation I., 1798, and section 12, Regulation XXXIV., 1803, the whole provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation."

The Section VIII. of the same Regulation enacts, "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent [345] before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorized Vakeels of the Court to the Judge of the Zillah or City in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the Mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him, by a Perwannah under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive."

The general facts of the case sufficiently appear in their Lordships' judgment.

The Attorney-General (Sir R. Palmer, Q.C.), and Mr. W. H. Melvill, for the Appellant, contended, first, that as the mortgage had been foreclosed, and the sale to the Appellant had become absolute prior to the institution of the suit, the Appellant was entitled, as of course, to a decree for possession of the mortgaged estates; and secondly, that, under Ben. Reg. I. of 1793, sec. 3, it was not necessary for him as mortgagee to produce an account to entitle him to a decree for possession after foreclosure had taken place, under Ben. Reg. XVII. of 1806, secs. 1, 7, and 8.

Mr. Rolt, Q.C., and Mr. Leith, for the Respondent, submitted, first, that the decree appealed from was [346] right, and that the Appellant was properly declared by the decree of the Zillah Judge to have been in possession and enjoyment of the usufruct of the lands mortgaged to him, and secondly, that he had failed to file attested accounts of his gross receipts and expenditure as mortgagee in possession, as required by Ben. Reg. XV. of 1793, secs. 2, 8, 9, 10.

The authorities referred to in respect to the above points were, 7 NW. S.D.A. Rep. pp. 60, 65, 68 (1852); 10 *ib.* p. 580 (1855); 7 Ben. S.D.A. Rep. p. 92; *ib.* p. 506 (1857); *ib.* p. 131 (1859); *ib.* p. 320 (1856); *ib.* p. 727 (1858); *ib.* pp. 492-4 (1859); Circular Order, 22nd July, 1813, No. 37.

As to the necessity of appealing from an interlocutory decree, which it was insisted could be opened on appeal from the final decree, *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. Cases, 283; and see upon this point *Jones v. Gough*, 3 Moore's P.C. Cases, N.S., p. 12, where the cases on this point are collected) was cited.

Their Lordships' judgment was delivered by

The Right Hon. Sir James W. Colvile (Feb. 1, 1866).—On the 13th of March, 1850, Shah Ally Reza, the late husband of the present Respondent, executed an instrument which, upon the face of it, purported to be an absolute Bill of sale of the Talook and lands therein described to the Appellant, in consideration of the sum of Rs. 39,500. On the same day the Appellant executed to Shah Ally Reza an Ikrah, or agreement, importing that on payment of the sum of Rs. 39,500 with interest at 12 per centum per annum on the 13th of March, 1851, the sale should be void; but that in the event of the seller's not paying the principal and interest according to his engagement, the Ikrah was to [347] be null and void, and the purchaser (the Appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the Appellant to Shah Ally Reza with interest on the day named, by means of that kind of mortgage which is known in India as Bye-bil-wuffa, or Conditional sale.

The transaction between the parties, however, included something more. On the 12th of March, the day before the date of the Bill of sale, Shah Ally Reza had granted a lease of the mortgaged premises for three years ostensibly to Mr. Alexander Demetrius Forbes, the son of the Appellant, and had taken the corresponding Kabooleat from him.

The latter shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor by way of rent for the Bengali year 1258, the sum of Rs. 2000; for the year 1259, Rs. 2332 9a. 6p.; and for the year 1260, Rs. 2399. 2a. 6p.

And, it appears on the face of the Ikrah, that Shah Ally Reza had given an order to the lessee to pay by instalments out of this rent to the Appellant the sum of Rs. 2101, in part satisfaction of Rs. 4740, which would become due on the 13th of March, 1851, for one year's interest on the Rs. 39,500.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was, what is called in India, a Benamee transaction; that though taken in the name of his son, it was really a lease to the Appellant, who under colour of it obtained possession of the mortgaged premises.

In April, 1851, the time fixed for the repayment of the mortgage money having expired, the Appellant [348] commenced the proceedings which must be taken in order to foreclose a mortgage of this kind, and make the Conditional sale absolute.

And the question on this appeal is, whether these proceedings have been effectual, or whether his suit has been properly dismissed by the decree of the Zillah Judge, confirmed by that of the Sudder Dewanny Adawlut.

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable before going further to state what, in their Lordships' apprehension, the law of foreclosure as established by the Regulations and the practice of the Courts in Bengal, is.

Up to the year 1806, the rights of the holder of a Bye-bil-wuffa were enforceable according to the strict terms of the contract. It was necessary for the Mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII. of 1806, first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgages in this country. The 7th section of that Regulation extended the period within which the Mortgagor might redeem, to any time within one year from and after the application of the Mortgagee to the Zillah Court under the following section; the 8th, which provides that a Mortgagee desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or [349] at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower, or his representatives, apply for that purpose by a written petition to the Zillah Judge, who should cause the Mortgagor to be furnished with a copy of the application, and notify to him that if he did not redeem the property in the manner provided by the preceding section, within one year from the date of the notification, the mortgage would be finally foreclosed, and the Conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the Mortgagor to take within the year the steps towards redemption which are prescribed by the 7th section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the Mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I. of 1798.

The enactment, of which the object was to relieve Mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be. "When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has [350] been in possession." In either of these cases the deposit preserves to the borrower his full right of redemption and entitles him to immediate possession of the land, if it is in the possession of the lender, subject to the adjustment of the accounts. A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed; and if the amount so deposited be admitted by the lender, or be established on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands, until it be admitted or established that he has paid the full amount due from him." The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regulations is, that if anything be due on the mortgage and the Mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the Mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII. of 1806, sec. 8, are purely ministerial, and that a Mortgagee, after having done all that this Regulation requires to be done in order to foreclose [351] the mortgage and make the Conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the Mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the Mortgagee, and if so, whether the necessary deposit had been then made. If that be found against the Mortgagor the right of redemption is gone.

It has been stated that the Appellant commenced his proceedings to foreclose under Regulation XVII. of 1806, the 5th April, 1851.

On the 31st of August, 1852, the Principal Sudder Ameen of the Zillah, in whose Court these proceedings had been had, made an Order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the Mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore, considering that Regulation XVII. of 1806, has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of January, 1853, the [352] Appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the

lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of March, 1851, calculated upon the rent reserved by the lease.

The answer of Shah Ally Reza, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence, that the Appellant before filing his petition for foreclosure in the Zillah Court had not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the Appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the gross revenue of the various portions of the mortgaged property, amounting in all to Rs. 9601 7a. 2p., and the charges thereon amounting in all to Rs. 3931 9a. 4p., proceeds thus, "There remains Rs. 5666 13a. 10p., as annual profits. Out of this amount, deducting Rs. 4740 as interests due on the principal, the remaining sum of Rs. 926 13a. 10p. must have been annually received by the Plaintiff on account of the said amount of principal." The answer also insisted, that the Appellant was bound to render an account in conformity with sections 10 and 11 of Regulation XV. of 1793, and that the Bye-bil-wuffa had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the Appellant was bound to render [353] an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the Judge were: - First, whether the Plaintiff had performed the conditions prescribed by section 8 of Regulation XVII. of 1806, and was entitled to possession. Secondly, whether Plaintiff was or was not in possession. Thirdly, whether the claim for mesne profits was correct. Fourthly, whether the receipt by Plaintiff of interest on the purchase money invalidated the Bye-bil-wuffa.

The cause was tried by Mr. Loch, the Civil Judge of Purneah, on the 18th of December, 1854.

The principal point contested on the first issue was, whether there had been a sufficient demand, and this issue was found in the Plaintiff's favour. On the third and the last issues the Judge found that the lease was, in fact, taken by the Plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property: but that, inasmuch as it was not attempted to show that the collections realized by the Plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under section 8 of Regulation XVII. of 1806 was filed, a balance was due, and that there was nothing to show that the Defendant had paid any part of it, the Bye-bil-wuffa was not invalidated, and that the Plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The decree was for possession with the mesne profits claimed.

The Defendant, Shah Ally Reza, appealed to the Sudder Dewanny Adawlut. That Court by its Order, [354] dated the 22nd of January, 1857, held that the Civil Judge of Purneah had been wrong in decreeing wassilat, or mesne profits; and further, that as the Appellant had been found to have been in possession, he was bound, before he was entitled to have his Conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the Plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the Plaintiff produced accounts, in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. Brodhurst) held, that the accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the Plaintiff, and accordingly by his decree, dated the 29th of March, 1859, dismissed the suit.

Against this decree the Appellant appealed to the Sudder Dewanny Adawlut, but that Court by its Order of the 21st of April, 1862, dismissed the appeal with costs; refusing to remand the cause again, in order to give the Appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January, 1863.

The present appeal is from the decrees dismissing the suit.

[355] The learned Counsel for the Respondent in the course of their able argument maintain the propriety of this dismissal upon various grounds, of which some do and some do not directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. Rolt insisted, that inasmuch as it had been conclusively found that the Appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits; the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the Respondent's appeal from Mr. Loch's decree, which, though not set out *in extenso* in the record, are noticed by the Sudder Court in its judgment of the 22nd of January, 1857. The objection, if made, was certainly not treated as a valid one by the Sudder Court; which did not dismiss the suit, but remanded it for re-trial on the production of the account. That remand implied that the Appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it; because, under an erroneous view of the effect of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the Bye-bil-wuffa, the Ikrar, the lease, and the Kabooleat must be taken together as one transaction; that the effect of the two latter so qualified that of the two former, that the mortgage [356] must be taken to have been in its inception, one for the term of three years, and that until the expiration of the term the Appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The Respondent cannot both repudiate the obligations of the lease and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, viz., to save the Appellant from the liabilities, whilst it gave him the advantages of a Mortgagee in possession. Still less can it be taken to do what it was never meant to do, viz., modify the terms of the Conditional sale.

It was further urged, that the proceedings in the Sudder Ameen's Court under section 8 of Regulation XVII. of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause when it was before Mr. Loch, was, whether the Plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favour. As far as appears from the printed record, the Respondent did not appeal from that finding. He had undoubtedly raised in the Zillah Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not [357] necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a Mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—

First, whether the Sudder Court was right in requiring the Appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by the Order of the 22nd of January, 1857.

Secondly, whether if it were wrong in so remanding the cause, the Appellant is not now bound by that decree, against which he did not appeal.

Thirdly, whether the Zillah Judge and the Sudder Court were right in dismissing the suit, because the Appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the Order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but [358] there was an express admission on the face of the Defendant's answer that even on his mode of stating the account, the principal sum of Rs. 39,000 had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than Rs. 927. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favour of the Appellant. And the Order of remand can be supported only on the principle that, in all cases, it is imperative upon a Mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Regulation I. of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on the Bye-bil-wuffa may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account," etc. Two conditions are expressed, the possession of the Mortgagee, and the necessity of an account. And a comparison of this with the preceding section, and with Regulation XVII. of 1806, shows that that necessity arises, and need only arise, first, when the Mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; secondly, when he has deposited all that he admits or alleges to be due; thirdly, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that [359] the Mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the Sudder Court in its judgment, and now relied on by the Respondent, are reported in the decisions of the Sudder Dewany Adawlut of Bengal for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of Conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that there being no averment in the answers that the Plaintiff had paid himself by the usufruct of the property, the objection that the Mortgagee had not produced his accounts could not be entertained on the appeal.

The question, therefore, cannot be said to have been concluded against the Appellant by authority; and their Lordships have already intimated their opinion, that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the Appellant is so bound by the Order of the 22nd of January, 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the Order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. [360] Cases, p. 283), upon which their Lordships have very recently acted in a case from Oude (*Sheonath v. Ramnath*, post [10 Moo. Ind. App.], 413), the Appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned Judges of the Sudder Court, by their judgment of the 21st of April, 1862, treated the latter point as still open to the Appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships had taken of the questions already considered

renders it unnecessary to determine whether the Appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavit filed by him on the application for a review are, when contrasted with his grounds of appeal, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are, therefore, not prepared to say, that if the production of the accounts required had been necessary, those delivered were sufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated [361] principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion, that this appeal should be allowed, and they will humbly recommend Her Majesty to reverse the decrees appealed against, and also the order of remand of the 22nd of January, 1857, and to vary the decree of the 18th of December, 1854, by declaring that the Appellant was entitled to the possession of the mortgaged premises as absolute owner, by virtue of the Conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to all costs of the suit below, up to and including the costs of the Order of the 22nd of January, 1857.

Considering that he might have appealed against that order, and that his conduct in the subsequent proceedings in the Court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.

[See *Shah Mukun Lall v. Bahoo Sree Kishen Singh*, 1868, 12 Moo. Ind. Appi. 185, 186.]

[362] SHAH MUKHUN LALL, GUNGADEEN and BOODHOO JEE, *Appellants*:
NAWAB IMTIAZOOD DOWLAH and HAJEE ALI,—*Respondents* * [Dec. 14,
16, 1865].

On appeal from the Court of the Judicial Commissioner at Oude.

The Limitation of suits Act, No. XIV., of 1859, sec. I. cl. 9, limits the right to recover money lent, or interest, to three years, from the time when the debt became due, unless there is a written engagement to pay the money lent or interest. By section XXIV. of that Act, it is provided that such Act should not take effect in non-Regulation Provinces, until it shall be extended thereto by public notification by the Governor-General in Council, and when extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if the Act had not been passed. This Act was not extended to the Province of Oude until July, 1860. In a suit brought in January, 1862, to recover a balance of money lent with interest, the last advance of which was made more than three years before the commencement of the suit, it was held by the Courts in Oude to operate as a bar to the suit. Upon appeal, such finding reversed, as it fell within the exception provided by that section, and was to be determined as if the Act had not been passed.

A letter written by a debtor in answer to a demand for payment of a debt and

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

interest, in which he promised to pay the debt by instalments, and begging to be let off payment of interest, is an ample acknowledgment within section IV. of the Limitation of suits Act, No. XIV., of 1859, to take the case out of the operation of that Act.

The appeal in this case was brought from a decree of the Judicial Commissioner of Oude, which dis-[363]-missed an appeal brought by the Appellants against a decree of the Judge of the Civil Court of Lucknow, by which decree, in effect, he was nonsuited in an action instituted by the Appellants to recover a balance of Rs. 11,278. 3a. 0p., for principal and interest due from the Respondent, Nawab Imtiazood Dowlah, on account of loans of money made to him through the other Respondent, Hajee Ali.

These two decrees were based on the provisions of Act No. XIV. of 1859, entitled an "Act to provide for the Limitation of suits," sec. I., cls. 9 and 10, which are as follows:—"9. To suits brought to recover money lent or interest, or for the breach of any contract, the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorized agent," "10. To suits brought to recover money lent or interest, or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

The same Act, in section IV., provides for a revival of the right to sue, by an acknowledgment in writing, as follows:—"If in respect of any legacy or debt, the [364] person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided, that if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them."

And section XXIV. provides, that the act "shall not take effect in any non-Regulation Province until it shall have been extended thereto by public notification by the Governor-General in Council, and that whenever it shall be so extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed."

The debt was denied by the first Respondent, but both decrees were in favour of the Appellants on the merits, and they proceeded entirely on the provisions of the above Act of Limitation of suits, deciding, in effect, that the suit of these Appellants to recover the debt was barred by effluxion of time; and that there was not a sufficient acknowledgment to revive the right to sue.

The facts of the case were as follows:—

The first Appellant in, and previous to, the year 1852, carried on business at Lucknow, in the Province of Oude, as a Banker and Merchant, using the names of the other two Appellants, his sons, Gungadeen and Boodhoo Jee, as the name of his firm. The first Respondent was also an inhabitant of Lucknow, [365] and he as well as his ancestors before him had pecuniary transactions with the Appellant. Previous to the year 1852 he went to Calcutta in attendance upon the King of Oude, and there remained, leaving his wives and the greater number of his domestic servants behind him in his residence at Lucknow.

On his departure from Oude, the first Respondent appointed the other Respondent, Hajee Ali, his Mockhter, to manage during his absence his pecuniary affairs in Lucknow, and in particular he was authorized to receive and remit the first Respondent's salary, pay for the maintenance of his wives and servants, and for that purpose to borrow money from the first Appellant, Shah Mukhun Lall's firm, when required.

It appeared that the allowance made by the first Respondent for the maintenance

of his wives and servants was at this time Rs. 500 *per mensem*, and that the Appellant, Shah Mukhun Lall, being desirous of reducing the amount, wrote to the former asking for his sanction to make the monthly payment Rs. 150.

To this communication the first Respondent wrote a reply in a letter, bearing his seal, and dated the 22nd Shabun, 1272 Hijree, corresponding with the month of May, 1855, c.e., in which, after referring to this proposal, he stated, that he was himself unable to make a greater reduction than to one-half the original sum—viz., to Rs. 250 *per mensem*—as he considered they would not be able to manage their expenses on a smaller sum; but he at the same time wrote as follows:—"You and Mirza Hajee Ali Beg are at [366] liberty to make any reduction you can," and then added, "I wish you will pay monthly whatever sum you fix upon." The Appellant, Shah Mukhun Lall, acted upon this request, and continued to make advances through the Respondent Hajee Ali.

The Appellants subsequently delivered their account to the first Respondent, through their Gomashita, at the same time demanding payment; and he acknowledged the account by a letter written from Calcutta, dated the 20th Suffer, 1277 Hijree (September, 1860). It was neither signed nor sealed, but bore on the envelope the following words:—"To Shah Mukhun Lall from Imtiazood Dowlah Bahadoor," and in referring to the account received by him, he lamented the revolution in Oude as having ruined him, but mentioned his salary as being still enjoyed by him, and then expressly engaged to pay the debt due to the Appellant, Shah Mukhun Lall.

It appeared that only two of the promised instalments, in respect of the debt, were ever paid, and that these amount only to the sum of Rs. 1700, for which credit had been duly given in account.

The Appellant, Shah Mukhun Lall, having been unable to obtain any further payment, brought a suit in the Lucknow Civil Court, on the 13th January, 1862, at first in his own name alone, against the first Respondent as Defendant, to recover the balance remaining due (after crediting the above payments), viz., Rs. 11,278. 3a. 0p. The plaintiff stated the principal facts before mentioned, and, amongst others, the settlement of accounts, the balance then struck, and the amounts subsequently advanced, and by the plaint he charged that the moneys were received [367] through the Hajee Ali, as the Defendant's agent, and that it was due from the latter, but remained unpaid, notwithstanding repeated demands.

A summons was served upon the first Respondent, who wrote a letter to the Court, bearing his seal, in which he acknowledged such service, but stated that he had been in Calcutta seven years, and represented that he had no occasion to borrow money from the Appellant, Shah Mukhun Lal, whose person he stated he did not even know.

On the 6th of June, 1862, proceedings were had by the Civil Judge of Lucknow, when the letters and other documentary proofs of the Plaintiff were produced. An Order was then made by the Judge, to the effect, that the Plaintiff should amend his plaint by adding to the record the names of his two sons (the Co-Appellants) as parties Plaintiffs, because the business had been carried on in their names, and that the Respondent, Hajee Ali, should be made a Defendant, as the first Respondent had transacted his business through him.

The issues settled and recorded by the Judge were as follows:—First. Limitation. Secondly, whether Hajee Ali had the requisite powers from the Defendant to contract debts? Thirdly, whether the letters produced by the Plaintiff as those of the Defendant were really letters by the Defendant, and whether they amounted to an acknowledgment of the present claim? And, fourth, to what amount, principal and interest, the Plaintiffs were entitled?

The Civil Judge also sent a letter to the agent of the Governor-General with the King of Oude, in Calcutta, enclosing written interrogatories to be put [368] and answered by the Defendant, the first Respondent, on oath; and directing that his large seal, as well as his signature, should be attached to his answers when taken down in writing. The Judge also forwarded with the interrogatories the letter of the first Respondent, dated the 5th Zehy, in the Hijree year 1272, corresponding with the Christian year 1855, and above particularly mentioned in order that the same might be put before him and examined too.

A supplemental plaint was filed on the 16th of June, 1862, in order to carry out

the last-mentioned Order as to parties; and the Respondent, Hajee Ali, was duly served with a summons as a Defendant in the suit.

On the 29th of July, 1862, another proceeding in the suit was had and recorded by the Civil Judge, when the interrogatories, with the answers of the Nawab, were filed. In these answers he denied that he had ever any money transactions with the Plaintiffs, or that he ever permitted any one to have such transactions; and he stated that he never heard before of such transactions, but he admitted that the Respondent, Hajee Ali, was his Karindah (agent), although he denied that he ever wrote "to Sahjee," or to the Appellant, Shah Mukhun Lall, to advance money to him on his account, and then swore that he was not aware that money was so advanced, and that nothing was due to Plaintiffs for either principal or interest. To an interrogatory, asking whether the last-mentioned letter (at the time of his examination shown to him) was his letter bearing his seal, he answered as follows:—"The seal is mine, but not the letter. Hajee Ali, my Karindah, had the charge of my [369] seal when I was in Lucknow, but when I came to Calcutta I brought my seal with me. I gave away some blank pieces of paper impressed with my seal to be used when required. The sign 'Sawd' attached to the end of the letter is not my signature." The Respondent, Hajee Ali, was examined as a witness. He proved the payment of the moneys through himself, the execution of his Mooktearnamah, and the authenticity of several of the letters and documents above-mentioned, of the first Respondent; and as to the last-mentioned letter, denied by the latter as aforesaid, he said it is Defendant's, and was given (to Plaintiffs) through himself, and that he had received it through the Nawab's friend, Fuzul Ali. He also produced and proved two additional letters addressed to himself, and bearing the first Respondent's signature.

Among the letters put in evidence were the following:—Translation of a letter (B) to the address of Sahjee in these terms:—"Dear Sir,—After compliments, I beg to inform you that I have received the account through your Gomashah, Lalla Shah Soonder, and become acquainted with its contents. But, dear Sahjee! it is known to the world how we have been ruined; and you also are well aware of my circumstances, that no private property has been left to me, and I am obliged to manage my expenses (out of my salary which is allowed to me) the best way I can.

"A friendly intercourse and money transactions have been carried on between you and me for a long time, and there never took place any disagreement of any kind, and even now, please God, no difference will arise. I am every way willing to pay off your [370] money, and have no objection on that head. But I wish you will, under present circumstances, receive from me the principal due to you by instalments; my means do not enable me to pay you the interest, and I will not be able to pay it. I have no hesitation or objection to pay you the principal sum. I shall suffer inconvenience, but, please God, I will pay you your debt by instalments; but I certainly demur to pay the interest, because I do not know how to pay it. Under such circumstances, it becomes you also to give up your claim to interest, because you and I having been on friendly terms for a long time, it is nothing but proper that you should show me such consideration. After the revolution that has taken place in our affairs, may God enable me to pay off your principal debt! I will consider myself very fortunate, and thank God if I succeed in liquidating it.

"D/20th Suffer, 1277 Hijree.

"Postscript.—Having stated above that I am ready to pay you by instalments, I take this opportunity to let you know that I can arrange to liquidate your debt by monthly instalments of Rs. 200 each, to be paid to you, please God, monthly, through your agent, when I receive my allowance from the British Government."

Translation of a letter (D.) to the address of Shah Mukhun Lall:—"Dear Sir,—After compliments, I beg to inform you that before this I wrote to you that I could pay the principal by instalments, but that you would excuse me for the interest, but you have not yet sent me any satisfactory answer. I therefore write to you again that a friendly communication and money dealings have existed between you and me for a long time, and that no disagree-[371]-ment ever arose, nor did I make any objection in my dealings with you. I did whatever you told me. But my objection to pay you the interest now arises from my being involved in ruined circumstances, which is known to the world, and even you yourself are well aware that I have been robbed of all the private property I had, and that nothing is left to me. My salary

was stopped for a long time: but as it is now allowed, I am ready to pay off your principal without any hesitation, although I shall suffer much inconvenience even by paying your principal, because God knows how I manage my expenses in so small a sum. Hence, under the present state of affairs, when times have been so much changed, it is nothing but proper that you should have a regard to the friendly intercourse which has subsisted for a long time between you and me, and not demand the interest. You should show me some consideration, and receive the principal due to you by instalments. Pray do not withhold your kindness in this respect, and under present circumstances consider it a booty if you have your principal debt liquidated. I am unable to pay the interest, and can by no means pay it. Otherwise I would have made no objection to discharge the interest, and would have paid it. You should send me an early answer."

Translation of a letter (F.) to the address of Shahjee:—"Dear Sir,—I wrote to you frequently asking you to return me the whole of my bonds, and to have one drawn in lieu of them; that I can pay you interest at the rate of 8 annas per cent; that you should make up your account and have one bond executed for the aggregate sum, and that you should receive payment from me by monthly instalments of [372] Rs. 200, each, and I told the same to your agent; but I am surprised to find that neither you have written to me anything on the subject up to this time, nor has your agent given me any answer.

"I am, therefore, under the necessity of writing to you again, and request you will send all my papers, consisting of bonds, etc., which you have in your possession, to your agent here, who may return them to me and have one bond executed in lieu of all of them. I also wish that your agent may be allowed to receive from me the instalments of Rs. 200 a month promised by me, which I am ready to pay. Please send me, without any hesitation, an immediate and complete reply as soon as you receive this letter."

By the decree of the Civil Judge at Lucknow (Mr. E. G. Fraser), the suit was dismissed. His judgment, dated the 29th of July, 1862, was as follows:—"That the Defendant was largely indebted to Plaintiff, through his old Karindah, Hajee Ali, there can be no doubt, and there is much perjury on that score in the Defendant's deposition taken by commission in Calcutta. But therein he makes important admissions, such as that Hajee Ali was really his Karindah, had his seal, and moreover used to be entrusted with *carte blanche*, bearing impressions of the seal made by Defendant. In different papers, bearing his acknowledged seal, he alludes to the debt; in one he authorizes Hajee Ali to treat with Plaintiff for advances, and proposes that £4000 be paid to him, and in one he binds himself to Hajee Ali, his factor, to liquidate all Plaintiff's claim. All this is sufficient to prove the falsity of the Nawab's deposition on oath. But none of the papers alluded to constitute a written acknowledgment, such as will [373] bar limitation, being all much above three years old. The letters B and F, alleged to be from Defendant, and sent from Calcutta, are written within the term of three years, but they prove nothing; neither of them contains seal or mark to prove that they came from Defendant; indeed, do not mention his name. A cover of one is referred to, to show that one of these letters was covered by it. But it merely mentions Defendant; is evidently not in his hand, and there is nothing to connect him with it. We can go into no inferences in such a matter, or, instead of inferring that he caused the unsigned and unsealed letter to be sent, we might infer that Plaintiff had got his own Calcutta agent to send it by way of supplying what would be inferred evidence. Bearing on this point, I would remark that it is alleged that Plaintiff held a Bond which is said to have been lost; but a mem. K, certifying to the fact that such a Bond was given, is produced by Plaintiff, as written by Hajee Ali, on the same day as the missing Bond, such a certificate, given in addition to a Bond, and saved while the Bond is lost, is a curious substitution for a Bond. It professes to be a mere mem. unwitnessed, and signed by the agent. This, at the best, cannot have the same weight as if a formal Bond, signed by the Defendant, had been produced. But even such a Bond produced, unless duly witnessed, would be out of date, because even to it only a three year's run would be allowed. The mem. in question is marked K, and states that all previous vouchers were then reduced to a single Bond, the one lost. Now, there was admittedly no other Bond executed by Defendant, or on his

account, and under his seal, after that date. Yet the letter F, with its envelope, [374] on which Plaintiff relies to save limitation, proposes that all previous Bonds be reduced to a single one. This had already been done, if K be authentic and true; and in this case the letter F is open to suspicion of being a mere manoeuvre to support the plaint, or if it really came from Defendant, then the story of K, and the missing Bond, would seem to be apocryphal. Either way, it shows how improper it would be to rest on such papers as Plaintiff relies on to cure the legal defect of this case. As I can find no sufficient ground to recognize any part of Plaintiff's claim as taken out of the Act of Limitation, the several transactions being of older date than three years, and unsupported by any Bond, and without any such voucher or written admission as would give the case the benefit of a six years' term of cognizance, I feel obliged to dismiss the suit, with costs."

The Appellants appealed to the Judicial Commissioner of Oude.

The hearing of the appeal took place on the 26th of March, 1863, before Mr. G. Couper, the Judicial Commissioner, when by a decree of that date he dismissed the appeal, delivering the following judgment:—"The question to be decided in this case is simply whether the Appellants hold any reliable Bond binding on the Respondents of later date than three years. The only two notes which fall within the period are B. and F. The original letter A. contains no promise to pay; B. is unsigned and unsealed, and it is obvious that it will never do to admit such a document in evidence against the alleged writer. F., too, is not sealed; but the Judge is mistaken in saying that it does not even mention the Nawab's name. At all events, there is his name now on the [375] note. I perceive, moreover, that the Judge says that the Bond K. states that all previous vouchers were then reduced to a single Bond—the lost one. I cannot find any statement in K. All that is said in K. is, that on a certain day accounts were struck, and a balance of Rs. 7003 appeared against Nawab Imtiazood Dowlah. The witness, Hajee Ali, however, states that all the sums due to the Plaintiff are included in one Bond up to the date of 1st Shaban, 1273; and that is sufficient to support the Judge's argument that F. is probably not genuine, seeing that it prefers the same request—viz., that all former Bonds be brought in, and a new one executed. Before me, the Appellant's Vakeel pleaded that the period of limitation should be calculated from the date of the payment of the last instalment of the debt, which, according to his account books, took place on the 14th of June, 1859; but a period of limitation cannot now be renewed by a payment, unless it be made at a time specifically conditioned. The Appellants must take the consequences of not having had recourse to the ordinary legal precautions for the protection of their interests. It is impossible to admit his claim on the strength of unsealed and unsigned papers, or on the entry of the payment of an instalment in his account books, and the appeal, therefore, must be dismissed."

The present appeal was from this decree.

The Attorney-General (Sir R. Palmer, Q.C.), and Mr. Leith, for the Appellants.—First, there has been a miscarriage of justice. The Judicial Commissioners in the Court below were entirely wrong in supposing that the Limitation of suits Act, No. XIV., of 1859, applied at all to the case. [376] The last section of that Act expressly provides, that it is not to take effect in a non-Regulation Province like Oude, until, first, a notification has been issued by the Governor-General entrusting its operations to such non-Regulation Province, and secondly, when so extended, it further provides, that all suits within such Province which should be pending at the date of the notification, or should have been instituted within a period of two years after the date thereof, should be tried as if the Act had not been passed. Here the suit was instituted in January, 1862, therefore it falls within the exception provided by the Act, and the question of limitation must be governed by the law as it existed before the passing of that Act. This construction with respect to the question of limitation was so decided by this Tribunal in *Saligram v. Mirza Azim Ali Beg* (*ante* [10 Moo. Ind. App.], p. 114) upon the operation of the Circular Order, No. 104, of 1860, issued by the Judicial Commissioners of Oude, which introduced the rule of three years' limitation to simple interests debts and six years to registered Bonds.

Secondly, even if the limitation of three years by the Circular Order, No. 104,

of 1860, applied, the case was taken out of operation of the rule. There has been a revival of the right to sue. The Respondent, Nawab Intiazood Dowlah, the debtor, by an acknowledgment in writing, in the letter F. signed by him, as required by sec. 4 of Act No. XIV., of 1859, admitted that the debt for which the suit was brought was due. Therefore, the period of limitation of three years, computed from such admission, had not expired when the suit was commenced. In that letter he distinctly recognizes the debt, and he promises to pay it by instalments [377] of Rs. 200 a month, and so again in the letters B. and D. he acknowledges the debt. The case falls within the rule laid down by Baron Parke in *Tippets v. Heane* (1 Crom. Mee. and Ros. 253), that in order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of a debt for which the action was brought, and that it was made as a part payment of a greater debt, which was the case here.

Lastly, we were debarred from giving evidence to prove these letters. The lower Court appears to have thought that letter F. should have had the seal of the first Respondent, and he stopped the case. The appeal Court, under section 55 of the Code, could have called for further evidence. Upon all principles of justice the case ought to be remitted to the Court below to admit further evidence.

Mr. Rolt, Q.C., and Mr. T. D. Archibald, for the first Respondent.—The real points are, first, upon the genuineness of the three letters B. D. and F. put in evidence, and secondly, if they are genuine, whether there is any acknowledgment to take the case out of the operation of the rule of limitation of suits, under Act No. XIV., of 1859, or by the Punjab Code, introduced by the Circular Order, No. 104, of 1860.

First, there is not sufficient evidence to prove that Nawab Intiazood Dowlah was ever liable at all in respect of the claim in question, but even if the debt was proved, the right to recover was barred by Act No. XIV., of 1859, for the Limitation of suits, as held by the Court below.

[378] Secondly, the objection of the Appellants' Counsel urged here for the first time that the case is taken out of the operation of that Act, by an acknowledgment in writing by the Nawab, as provided by sec. 4 of Act No. XIV. of 1859, cannot now be entertained. It should have been pleaded. Here, however, the letters relied on were not proved to be in the Nawab's handwriting, nor do they, if proved, make a sufficient acknowledgment of the debt to take it out of the Act, by analogy to the English cases on the Statute of Limitations. Lord Tenterden's Act, 9th Geo. IV. c. 14, sec. 1, requires an "acknowledgment in writing" to take the case out of the Statute of Limitations, 21 Jac. I., c. 16. In this case the same construction should be put on the word "admission" in the fourth section of the Limitation of suits Act as "acknowledgment" in the English Statute. The "admission" there mentioned must show an inference to pay on request. That principle is correctly laid down in *Tanner v. Smart* (6 Bar. and Cr. 603). The case of *Hart v. Prendergast* (14 Mee and Wels. 741), is similar to the present. There a letter in answer to an application for the payment of a debt, was in these words, "I will not fail to meet Mr. H. on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance;" but the Court held that it was not sufficient to defeat a plea of the Statute of Limitations.

If the Appellants felt aggrieved by the refusal to hear further evidence, they should have appealed from such refusal, and not now at the last moment raise such an objection.

[379] Judgment was delivered by

The Right Hon. Lord Chelmsford.—The printed cases both of the Appellant and Respondent assume that the question upon the appeal is to be governed by the new law of limitation in the Act, No. XIV. of 1859. But the last section of that Act provides that the Act "shall not take effect in any non-Regulation Province (to which class Oude belongs) until it shall be extended thereto by public notification by the Governor-General in Council, and that whenever it shall be so extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be

tried and determined as if this Act had not been passed." In the recent case from Oude, *Saligram v. Mirza Azim Ali Beg.* (10 Moore's Ind. App. Cases, 114.) it appeared that the Act, No. XIV. of 1859, was not extended to Oude till July, 1860. As this suit was commenced on the 13th January, 1862, it falls within the exception, and must be determined as if the Act had not been passed.

In the case just referred to, in which the question arose what law of limitation was to be applied, it appeared that since the annexation of the Province of Oude various rules of limitation had prevailed. That in 1857, suits of the nature of the present one were subject to a limitation of six years, and to the general provisions of the Punjab Code. That in March, 1859, these rules had been modified by a Circular Order, No. 51, which had afterwards been repealed by another Circular Order, No. 104, dated the 4th July, [380] 1860. And their Lordships held that the case before them was to be governed by the last-mentioned Order. Upon the authority of that decision it appears that this case must fall within the 10th of the rules then promulgated under that Order. This declares the period of limitation to be three years "in all suits for money lent for no definite period or for interest thereon, unless there is a written engagement, and where Registry offices existed at the time such engagement was registered and signed by the party to be bound thereby, or by his duly authorized agent."

The rules which were promulgated under this Circular Order were modifications of the Punjab Code which previously existed, and, therefore, it may be necessary in this case to resort to that Code for the purpose of determining the time from which the period of limitation is to be calculated, or the circumstances which will take a particular case out of the operation of the limitation. Having ascertained the law to be applied to this case, we proceed to consider the question to be decided.

The suit was instituted by the Appellant, carrying on business as a Merchant at Lucknow, to recover a balance of Rs. 11,278. 3a. 0p., principal moneys and interest alleged to be due from the first named Respondent, on account of advances made to him for the maintenance of his family, through his agent, the other Respondent, Hajee Ali.

The plaint was filed on the 13th of January, 1862, and the last advance was in 1858, consequently more than three years before the commencement of the suit.

Issues were settled by the Judge, the first of them being limitation, and the case was ultimately decided [381] upon the question, whether the Plaintiff had given sufficient evidence of an admission of the debt by the Respondent to prevent the application of the period of limitation to his claim.

In order to prove such an admission, the Plaintiff produced three letters marked respectively B., D., and F., Letter B. appearing by its own date, and the other two letters by the post-marks upon their envelopes, to have been written in the year 1860. The letter F. purports to be signed by the Nawab, but has no seal. The other two letters have neither signature nor seal, but the envelope D. appears to have been "dispatched by Imtiazood, Dowlah Bahadoor from Khizzirpore in Calcutta." Letter F. is stated to have been filed with the plaint, but no attempt was made to prove that it was signed by the Nawab. No other evidence was given of the letters B. and D., except by Hajee Ali, who was called by the Plaintiff, and said "B. came to the Plaintiff, not through me, D. ditto." This was perhaps scarcely sufficient to admit them to proof, but the Judge received them, and then the question arose whether being admitted they did not carry with them internal evidence of their genuineness. There can be no doubt, that when the Nawab left Lucknow his family remained behind, and would require to be maintained during his absence. Hajee Ali was appointed his Agent by a Mookhtarnamah sealed with his seal, in which it is contemplated that money would be borrowed from the Appellant's firm, and Hajee Ali besides this authority was armed with blank pieces of paper impressed with the Nawab's seal, to be used when required. It is not pretended that the family were maintained out of the funds of the Nawab, and no other source of supply was ever [382] suggested, except that which was derived from the Appellant. Under these circumstances the debt to the Appellant was incurred. His claim is for nothing else than advances made to meet the wants of the Nawab's family, with interest upon these advances. The Nawab was examined upon interrogatories. He denied all knowledge of the Appellant. Asserted that he never had himself, nor permitted any

one to have, any money transactions with him. That he was not aware that money had been advanced by the Appellant, and that nothing was due to him for principal or interest. It is impossible not to agree with the observations of the Civil Judge (*ante*, p. 372) upon these answers of the Nawab. "That Defendant was largely indebted to Plaintiff through his old Karindah, Hajee Ali, there can be no doubt, and there is much perjury on that score in the Defendant's deposition."

But if the Respondent was indebted to the Appellant through his agent, is it at all credible that he should have been ignorant of the fact, and that knowing that his own funds had not been applied to the maintenance of his family, he should never have had the curiosity to inquire from what source the supplies were drawn? It is clear that he must have known that he was indebted to the Appellant for the means of support of his family, and it is most improbable that when the debt had grown to a large amount, and his own affairs had suffered considerably from the annexation of the province of Oude, no communication should have taken place between him and his creditor. Assuming the probability, in this state of things, that something would have passed between [383] them, it will be found that the letters in question are precisely those which might have been expected to be written under the circumstances. They are in the following terms: [His Lordship read the letters B. D. and F., *ante* [10 Moo. Ind. App.], pp. 369-371, and proceeded.]

Assuming, then, the genuineness of these letters to be thus established, the question arises whether they contain a sufficient admission of the debt to prevent the application of the period of limitation to the Appellant's suit. As the Judges below seemed to regard the letter F. as probably not genuine, and some suspicion may rest upon it, it will be better to confine the consideration of this question to the letters B. and D. Their Lordships entertain no doubt that if the question were to be tried by the rules of English law before Lord Tenterden's Act, these letters offering to pay the principal money by instalments, and praying to be excused from the payment of the interest, would be an ample acknowledgment to take the case out of the Statute of limitations, and they are not aware of anything in the Punjab Code which would lead to a different construction. The Judges in the Courts below dealt with the questions rather summarily, and disposed of the case without affording the Appellant an opportunity of supplying any deficiency which they found in this proof. But if they proceeded upon the Act for the limitation of suits, No. XIV. of 1859, and both the Civil Judge and the Judicial Commissioner thought that letter F. was out of the question, their conclusion was right, because letters B. and D. being without signature, there was no acknowledgment in writing signed by the party to be charged. But that Act not being applicable, and an admission of the debt being all that was requisite to [384] save the limitation, even if letter F. were put aside, the letters B. and D. being before the Judges, they ought to have considered them and determined whether they were sufficient to prevent the Plaintiff's remedy being barred. To this consideration their minds were never applied, and in dealing with another point which arose in the case, there seems to have been a miscarriage. It was proved by Hajee Ali that the Nawab's brother, Hadee Ali Khan, paid the Appellant Rs. 1700, in two sums, after he became agent. The Civil Judge appears to have entirely overlooked this fact. But the Judicial Commissioner, dealing with the argument that the period of limitation should be calculated from the last of these payments, which was made on the 14th of July, 1859, observed (*ante* [10 Moo. Ind. App.], 275) that "a period of limitation cannot now be renewed by a payment unless it be made at a time specifically conditioned." It is difficult to understand to what Code the Judicial Commissioner was referring when he made this observation. In the Act, No. XIV. of 1859, there seems to be no provision giving effect to a payment on account, or partial satisfaction. The Punjab Code, Part II., section 1, clause 6, limits suits to a certain time after the cause of action shall have arisen, unless (amongst other things) the complainant has "obtained an admission or partial satisfaction of his demand from the opposite party."

But from clause 7 it appears, that it is not every part payment which will amount to "a partial satisfaction of demand" within the meaning of the rule. It must be a payment according to a regular and continuous course of dealing, "something tantamount to a running account." It was this qualification which [385] the Judicial Commissioner probably had in his mind when he made the observation;

but if he meant to apply this Code, and had turned to the words of it, he probably would have thought that the payments made by the Defendant's agent upon an account, continued monthly for several months, ought to be regarded as tantamount (at least) to a running account, if not itself correctly described as a running account.

The case has not been properly dealt with, nor fully and sufficiently considered in the Courts below, and, in their Lordships' opinion, it ought to be submitted to further and more careful investigation. They will, therefore, recommend to Her Majesty that the decrees be reversed, and the cases remitted to the Court below for trial of the issues between the parties.

[386] KAMALA NAICKEN,—*Appellant*; PITCHACOOTTY CHETTY.

Respondent * [Dec. 1, 2, and 4, 1865].

On appeal from the High Court at Madras.

A., the lessee for a term of a Zemindary, brought a suit against B., the lessor, to prevent B. interfering with his possession, which he had under the lease granted to him by B. in consideration of certain pecuniary advances made by him to B. The relief sought was in effect an injunction to restrain B. from collecting the revenue of the Zemindary. The defence set up by B. in his answer was, in substance, that the lease was an executory contract, and, being without consideration, could not be enforced; and was moreover void for maintenance, by reason of a subsequent agreement for the advance of a sum of money to carry on a suit, which agreement had not been carried out. The Judge of the Civil Court adopted this view, and held the lease void. The High Court of Madras on appeal treated the case as a suit for specific performance, and decreed execution of the lease. Upon appeal the Judicial Committee sustained the decree as to possession under the lease; but as it appeared from the evidence questionable, whether the transaction in respect of the lease did not really operate only as a loan, and as a right to redeem might exist, the affirmance was made with a declaration, that it was to be without prejudice to the claim (if any) of B. to which he might be entitled, and to any question which might be raised as to the amount actually advanced by A. to B.

The appeal in this case was brought by Kamala Naicken, the Zemindar of Annaya Naickanur, the Defendant in a suit instituted by the Respondent against him in the Civil Court of Madura: which suit sought relief in the nature of an injunction to prevent the Appellant, as lessor, from interfering with the possession and enjoyment of the [387] profits of that Zemindary. The Respondent claimed under a lease, dated the 17th of September, 1851, of the Zemindary for the term of ten years. By the decree of the Civil Court, Mr. Cotton, the Civil Judge, held, first, that the lease had been cancelled by a subsequent agreement executed by the Respondent on the 25th of November, 1851, and secondly, that as the transaction, as between the Appellant and Respondent, was, in his opinion, of the nature of maintenance and savoured of champerty, the lease was not a legal or valid instrument, the provisions of which could be enforced either in law or equity. Upon appeal this decree was reversed by the High Court at Madras (consisting of the Chief Justice, Sir Colley Harman Scotland, and Mr. Justice Strange), and by that Court's decree it was declared, that the Respondent was entitled to specific performance of the lease and to the possession and enjoyment of the Zemindary, under the terms of the lease. The present appeal was from this decree.

The case of the Appellant was, that as the agreement of the 25th November, 1851, was proved, and the Respondent having failed to pay the money therein men-

* Present: Members of the Judicial Committee, The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

tioned, the lease under the circumstances became forfeited and void; and, therefore, that the decree of the High Court was unjust in decreeing specific performance of the lease. On the other hand, the Respondent insisted that the lease was valid and the agreement a fabricated document, and submitted, that the objections of champerty and maintenance, even if raised upon the pleadings, were not sustainable.

The substance of the pleadings and evidence appear sufficiently in their Lordships' judgment.

[388] The Attorney-General (Sir R. Palmer, Q.C.), Mr. W. H. Melvill, and Mr. J. D. Mayne, for the Appellant; and Sir Hugh Cairns, Q.C., and Mr. W. W. Mackeson, for the Respondent.

Their Lordships' judgment was pronounced by

The Right Hon. Lord Chelmsford (Dec. 21, 1865).—The original suit out of which this Appeal arises was instituted in the Civil Court by the Respondent, for the purpose of obtaining undisturbed possession of a lease of the Zemindary granted to him by the Appellant, the Zemindar.

The lease, which is dated the 17th of September, 1851, recites that the Appellant had leased out to the Respondent the whole of the Zemindary for a period of ten years from Fusli, 1267 (answering to the year 1857, A.D.), and had fixed the amount of lease at Rs. 19,000 per annum. It then directs that out of the Rs. 19,000 the lessee should pay the pesh kist of the Zemindary, at Rs. 13,961. 8a. 6p., and certain other expenses, amounting in the whole to Rs. 16,469. 8a. 6p., and that out of the amount to be realized during the ten years at Rs. 2530. 7a. 6p., after deducting the Rs. 16,469. 8a. 6p., Rs. 3000, which the lessor states "I have up to this day borrowed from you under the Bonds executed to you by me and its interest," should be paid (for this is clearly what was intended, although the sentence is not complete); and it then proceeds thus: "that if I can afford to pay the same before the lease of the Zemindary shall take effect in Fusli, 1267, you should receive the principal and interest; that I should also pay the [389] said amount if demanded by you; that even if the said debt may be thus discharged, still you would, without any objection whatever, enjoy the lease of the said Zemindary for the said ten years, in consideration of the assistance you have done to me; that as you have at my request agreed to lend me Rs. 18,000, in order to discharge my debts, and you should, after getting possession of the said Zemindary, lend me Rs. 5000, in Fusli, 1267, Rs. 5000 in the following Fusli, and Rs. 5000 in the next following Fusli; and should credit for these sums, and the said sum of Rs. 3000 (in the event of it not being paid before the lease takes effect), the aforesaid annual residue Rs. 2530. 7a. 6p.; that in the event of my not requiring the said loan, you should deduct the said sum of Rs. 3000 and its interest from the amount to be realized by you for the debt at Rs. 2530 per annum, and pay me the remainder annually." The Appellant, on the same day, executed two Bonds to the Respondent, one for Rs. 2000 and the other for Rs. 1000. The Bond for Rs. 2000 is in these terms, "To meet the cost of suit now instituted by me, and the demand of Ramakrishna Setti by means of precept, etc., I have up to this date borrowed of you the sum of Rs. 2000. For this sum of Rs. 2000 and the interest thereon, at 1 per cent. per mensem, I have rented out to you my Zemindary for a term of ten years from Fusli, 1267, and executed a lease specifying the amount of the rent to be Rs. 2530. 7a. 6p. per year: therefore you should credit this rent amount towards the principal and interest in question. If you require the said principal and interest before the said Zemindary is put in your possession in Fusli, 1267, I shall pay them, and I [390] shall also discharge the said debt if I could get coin. Although the debt may be discharged as aforesaid, yet there is no objection whatever in your enjoying the lease, of the said Zemindary, under the terms of the lease, for a term of ten years from Fusli, 1267." The Bond for Rs. 1000 recites the execution of the bond for Rs. 2000, and in all other respects is exactly similar. In addition to these securities the Appellant on the same day (the 17th of September, 1851), issued an order to the inhabitants of the villages in his Zemindary, reciting the lease to the Respondent from Fusli, 1267, to Fusli, 1276, directing them "to continue to pay during the said Fusli to the said Settiar (the Respondent), or his agents, all sorts of revenue, and place themselves under his orders."

Upon the arrival of the term at which the Respondent became entitled under the

lease to the possession of the revenue of the Zemindary, he sent the above order of the Appellant to the inhabitants of the villages, but found that the Appellant had issued a counter order, directing them to send to himself the collections and accounts.

The Respondent thereupon instituted his suit in the Civil Court of Madura, praying for a decree adjudging the Defendant not to interfere with and prevent his enjoyment of all the incomes of the Zemindary.

The Plaintiff in his plaint recites that having obliged the Defendant by lending him Rs. 3000 on the 17th of September, 1851, in relief of the distress which he had been subject to, he has leased out to him the whole of his Zemindary, and then sets out the stipulations in the lease, and after stating the [391] takid or order to the inhabitants of the villages of the same date, he alleges that he had sent a copy of the Defendant's takid with his own takid to the villagers who had admitted them, but that Defendant had sent a counter order, and had thus prevented him from holding according to the terms of the lease, and he prays for a decree in the terms above mentioned.

The Defendant by his answer alleges that the Plaintiff, a Merchant, has, with a view of defrauding the Defendant and getting the agreement in question from him by holding out to him hopes of pecuniary and other assistance, executed separate documents to the Defendant's men, and having thus gained them over and caused them to persuade the Defendant, had thus fraudulently obtained the agreement in question.

That the sum of Rs. 3000, which is said to have been advanced to the Defendant by the Plaintiff for the agreement in question was never paid. That the Plaintiff has entirely omitted to mention in his plaint the stipulations of the documents passed respecting the same, and the documents passed in pursuance thereof in regard to certain other transactions, as also the stipulation of these documents by which the Plaintiff is bound to do certain acts.

The Plaintiff in his replication denies that the lease was obtained by holding out any hopes to the Defendant, or by executing any documents to the Defendant's men as alleged in the answer. And as to the Rs. 3000 not having been paid, he states that the Defendant has not only executed a Bond for the sum of Rs. 3000 which is said in the plaint to have been lent to him by the Plaintiff, but has also acknowledged his (Defendant's) receipts of the same in the said lease.

And lastly, the Defendant by his rejoinder states "that about seven years ago the Plaintiff, with a view of obtaining a lease of the Defendant's Zemindary, and breaking his friendship with Mr. Fondclair, who had obtained an Izaradar and had held dealings with him at the time, caused the Defendant to institute a suit against that gentleman, and held out to him hopes of pecuniary assistance for that suit, for the precept to which the Defendant was then liable, and other necessary expenses. That the Plaintiff has also caused the Defendant's men and friends (whom he gained over) to persuade the Defendant, and having thus obtained the lease has executed separate agreements to them, giving them certain shares in the said lease as follows, viz., one eighth share for the Defendant's manager, Muttaya Pillai, in the name of his younger brother Mayandiya Pillai; one thirty-second share for his Rayasani (Clerk), Subbramaniya Pillai, in the name of his brother-in-law, Sankaralingum Pillai; five thirty-second shares for his friend Varadaya Naikar; and five thirty-second shares for Kalayar Kovil Chellama Ayar, a friend of both the parties, in the name of his son, Aiyairayar. These particulars came to the Defendant's notice lately. That the Plaintiff obtained two Bonds from the Defendant (on the date of the said document) for the sum of Rs. 3000, which he required at the time, but paid him only Rs. 500 at the time. With the aid of this money, the Defendant instituted a suit against the said gentleman in No. 4 of 1851, on the file of this Court of Rs. 23,000. The Plaintiff has subsequently paid to the Defendant only Rs. 52 on one occasion, and Rs. 500 on another occasion, and has executed to him an agreement of the 25th of November, 1851, to the effect that if he should fail to pay the rest of the amount within five days, he would return the lease and bond, and receive back the amount advanced by him. The Plaintiff, who failed to pay the money within the said time, having been demanded about the same, has stated in the presence of certain mediators that he would, according to his younger brother's advice, return the said lease, etc., and that the said sum of Rs. 1000 and odd should

be paid back. Accordingly, the said amount was ready, and the Plaintiff was searched for, but he could not be found. The Plaintiff having failed to give any pecuniary assistance according to his positive promise and concealed himself, the Defendant was obliged to pay Rs. 1000 and odd for Madura Ramakristna Chetti's precept through Mr. Fondelair, and to withdraw the said suit No. 1; and the Defendants' grove of tamarind trees and karamal (tanks), which can yield Rs. 5000 per annum, were sold at auction."

From the singularly loose and inexact character of the pleadings, it is scarcely possible to discover what were the precise questions intended to be raised between the parties, and no copy of the issues is to be found amongst the printed proceedings.

It is clear, however, that two of the main questions of fact to be tried were:

First, whether the lease of 17th of September, 1851, was obtained by undue influence; and, secondly, whether the document of the 25th of November, 1851, was a genuine document.

Another question arose as to the payment of the [394] Rs. 3000 by the Plaintiff to the Defendant, which although not decisive of the suit, has yet an important bearing upon the genuineness of the document upon which the case principally, if not altogether, depended. The Plaintiff rested the proof of his case entirely upon the lease of the 17th of September, 1851, and the two Bonds of the same date executed by the Defendant, in which the advance of the Rs. 3000 before their execution is distinctly admitted, and also upon the order to the inhabitants to pay to the lessee or his agents, after the commencement of the lease, the whole revenue of the Zemindary.

The Defendant, in support of the allegation in his rejoinder, produced a document, dated the 25th of November, 1851, and purporting to be attested by three witnesses, and to have been engrossed by one Appavaiyar, of Madura. And he called five witnesses to prove its execution. Of these, two were the persons whose names appeared as attesting witnesses, the third name being that of a person who was proved to have been dead several years, and another was Appavaiyar, the alleged writer of the document. All these five witnesses swore to the execution of it by the Plaintiff in their presence. In addition to this evidence, four of the witnesses stated in almost the same words, that "the Plaintiff did not act up to the conditions of the agreement. That as soon as the term of the agreement had expired, the Defendant sent for the Plaintiff and asked him to receive back the money and return the lease and the Bonds. That the Plaintiff said in a week he would send for and return the documents and receive back the money."

Upon the case thus presented the Civil Judge of [395] Madura dismissed the suit on the ground that the alleged lease was an executory contract, and being without consideration could not be enforced, and also that the transaction was void for maintenance.

Upon appeal to the High Court of Judicature the objections taken by the Civil Judge were overruled, and the case remanded to him to be disposed of upon its merits generally. It is perhaps unnecessary to consider the objections upon which the Civil Judge originally disposed of the case. They were very slightly alluded to in the argument before their Lordships, and are not entitled to any weight. On the return of the case to the Civil Judge, he decided upon the merits in favour of the Appellant. He thought there was no cause to question the truth of the evidence and genuineness of the document of the 25th of November, 1851, that the lease of the Zemindary was cancelled by it, and he, therefore, decreed that the Plaintiff's suit be dismissed. Upon appeal the High Court of Judicature reversed this decree, and gave judgment that the Plaintiff was entitled to specific performance of the lease, and to the possession and enjoyment of the Zemindary under the terms of such lease.

Before proceeding to examine the grounds of this decree, their Lordships cannot refrain from animadverting upon the inaccurate and inartificial character of the pleadings in this case.

The Plaintiff's right of action depended entirely upon the lease, which entitled him to possession of the Zemindary; and if that possession had been usurped by the Zemindar, the Plaintiff ought to have brought ejectment. The prayer of his plaint seems rather to be for an injunction to restrain the Zemindar [396]

from collecting the revenue of his Zemindary, against the terms of his own authority to the Plaintiff. But the High Court of Judicature appear to treat the suit as one for specific performance, which it could not be if, according to their opinion, the lease was not an executory contract. It is most desirable that such laxity of pleading should be discountenanced, as it imposes additional difficulties in the decision of a case like the present, where the utmost precision and accuracy were necessary in order to bring the parties to distinct issues.

It is evident that the whole case ultimately resolved itself into the proof of the genuineness of the document of the 25th of November, 1851.

This question is involved in considerable difficulty. On the one side there is the positive testimony of five witnesses, who swear to the execution of the document; and on the other, there is negative evidence of the strongest character arising from the great improbability of its ever having been executed. It must, however, be borne in mind that the *onus* of displacing the Plaintiff's case rested upon the Defendant, and in support of his appeal he ought to be able to show that the evidence he produced was so unsuspicious and satisfactory that the High Court of Judicature were not justified in making a decree against him.

The Plaintiff's evidence merely consisted of the lease of the 17th of September, 1851, and of the contemporaneous Bonds, and the authority from the Zemindar for the collection of the revenue. The Defendant rested his defence on three grounds:—first, that the lease was fraudulently obtained by the Plaintiff by means of bribing the Defendant's servants [397] and friends to exert their influence to persuade him to grant it; secondly, that the whole of the Rs. 3000, the consideration for the lease, was not paid, but only Rs. 1052, by three payments; and, thirdly, the agreement of the 25th of November, 1851, by which the Plaintiff agreed to return the lease if he did not make payment of the residue of the Rs. 3000, within five days, which he failed to do.

With respect to the allegation of the improper and fraudulent mode in which the Plaintiff obtained the lease, it is unnecessary to say more than that the Civil Judge thought it was not supported by the evidence.

The question as to whether the whole of the Rs. 3000, was advanced requires a little more consideration. The Plaintiff relied entirely upon the estoppel arising from the statement of the advance of that sum in the lease and the Bonds.

The Defendant proved that the Plaintiff paid only Rs. 500 on the date of the execution of the Bonds, and that when the agreement of the 25th of November, 1851, was executed, a further sum of Rs. 500, was paid. If the genuineness of the agreement of the 25th of November, 1851, was established, it expressly states that Rs. 1052 only had been paid. It is difficult to reconcile the mode in which the Plaintiff conducted his suit with the idea that he had really paid the Rs. 3000 to the Defendant. He is a Merchant at Madura, keeping Books, as a matter of course, in which all his transactions would be entered. He might have presented himself as a witness, have proved the advance of the Rs. 3000, and have vouched the entries in his Books in support of his evidence. This course of proceeding would not only [398] have established the honesty of his case, but have gone very far to show that the agreement of the 25th of November, 1851, with its statement of the advance of only Rs. 1052, could not have been signed by him.

But notwithstanding the prejudice which arises to the Plaintiff's case from his not appearing as a witness to facts peculiarly within his knowledge, and especially to disprove his signature to the document of the 25th of November, 1851, that document is still exposed to all the improbabilities which surround it on every side. The Defendant's case represents the Plaintiff as so anxious to procure the lease in question that he bribed the Defendant's servants and friends to assist him in his endeavour to obtain it; and yet, succeeding in his object, as having agreed a little more than two months afterwards to surrender the right which he had acquired by such improper means, upon non-payment of a sum of Rs. 1948, within five days, and as having been unable to raise such a comparatively small sum to save this valuable interest from forfeiture.

It is a circumstance worthy of remark that the lease was registered immediately after its execution, but the alleged document of the 25th of November, 1851, was never registered at all. Now, although it might not have been one which it was absolutely necessary to register, yet when a lease was recorded which so seriously

affected the interests of the Zemindar, it might have been expected that an instrument which five days after its execution had actually put an end to the lessee's right to the lease, would have been placed upon the register as a matter of ordinary prudence and precaution.

[399] One circumstance of improbability suggested by the High Court of Judicature must be dismissed as having arisen from a misapprehension of the facts. They say, "The lease in issue was on a stamp, the instrument to cancel it is on unstamped paper; and it is highly improbable that the precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place as far as possible beyond question an instrument obtained to make void the lease, if such instrument were genuine." The fact, however, is, that both the lease and the instrument were originally without stamps, and upon both the penalty was paid for stamping them to render them admissible in evidence.

But a further improbability arises from the circumstance that after the Defendant had obtained this instrument, and the terms of it had not been complied with, he allowed the lease on the Bonds to remain in the Plaintiff's possession for upwards of six years without any attempt to obtain them from him, except what he states in his rejoinder, "That the money he was to pay back was ready, and the Plaintiff was searched for and could not be found." There is no evidence of this alleged fact, and it is highly improbable that the Plaintiff, who was carrying on business at Madura, should have eluded the Defendant's search during so many years. But if he was thus continually endeavouring to escape the fulfilment of his undertaking, it is the more extraordinary that the Defendant should not have instituted a suit against him to compel him to deliver up the lease and the Bonds upon payment back of the money he had received, and which alleges that he was ready to pay.

[400] But all these improbabilities are as nothing, in comparison with that which arises from the conduct of the Defendant in the present suit. The object of this suit is to obtain a decree to enable the Plaintiff to collect all the revenue of the Zemindary, to which he claimed to be entitled under the lease granted to him by the Defendant.

If the Defendant's case founded upon the document in question was a true one, he had a short and conclusive answer to the Plaintiff, and it is not unfair to presume that it would at once have been brought forward. It is not pretended that there is any distinct allusion to such a document in the Defendant's answer, but certain vague and doubtful expressions are relied upon, as showing that it must have been in existence at this time, although not specifically mentioned. But if this were the case it is most unaccountable, that the Defendant should have left this complete answer to the Plaintiff's case to the last stage of his pleadings, and even then have introduced it almost incidentally as part of a narrative of the transactions between them.

One other circumstance may be mentioned as prejudicial to the notion of this being a genuine document. The Defendant himself put in evidence a Bond, dated the 1st of September, 1856, executed by Mutta Pillai to the Plaintiff for the payment of a sum of Rs. 250, within ten months, from the profits derived from one eighth share of the Zemindary, and from the income of his own lands. The lease of the Zemindary was to commence in 1857, and Mutta Pillai would then be put in possession of his share. Mutta Pillai was the manager of the Defendant, and it is hardly possible to believe that if the [401] document in question had ever been executed, it should have been unknown to him, and that he should have been dealing with an interest in 1856 which had ceased to exist in 1851.

All these strong improbabilities the Defendant had to overcome before he could fairly expect that reliance would be placed upon witnesses, however numerous, to the execution of a document upon which his own conduct had thrown so much suspicion. All the facts were within his own knowledge, and yet he did not tender himself as a witness to strengthen the evidence which both from the station of the witnesses produced by him, and from the general character of their testimony, is extremely untrustworthy. No satisfactory explanation was even attempted of any of the extraordinary circumstances accompanying and following the supposed agreement, and the effect of them is not to be weakened, much less avoided, by the observation of the Civil Judge, that "there is no accounting for a native's acts."

Their Lordships think that the High Court of Judicature were warranted in their conclusion, that "upon consideration of all the circumstances affecting the credibility of the witnesses and the whole of the evidence, together with the probabilities and improbabilities of the case, the document had not been proved to be a genuine and binding instrument."

In adopting this view their Lordships are anxious to preserve to the Appellant all the rights which arose to the Zemindar out of his dealings with the Respondent. Although the Respondent may be entitled to possession under the lease, yet it may be at least questionable whether the transaction did not [402] operate merely as a security for the money advanced, and agreed to be advanced, and whether the Zemindar would not have been entitled to redeem. Again, the unwillingness of the Respondent to appear as a witness, knowing that it was not only asserted that he had not advanced the full sum agreed upon, but also that he was charged with imposition and fraud, makes it extremely doubtful whether the Zemindar ever received the whole amount of Rs. 3000. Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the High Court of Judicature in favour of the Respondent for possession of the Zemindary under the terms of the lease be affirmed with costs, but with a declaration that it is to be without prejudice to the claim for redemption (if any) to which the Appellant may be entitled, and to any question which may be raised as to the amount actually advanced to the Zemindar by the Respondent.

[403] PRANKISHEN PAUL CHOWDRY,—*Appellant*: MOTHOORAMOHUN PAUL CHOWDRY,—*Respondent* * [Dec. 15, 1865].

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

An adult brother, a member of a joint undivided Hindu family, in consequence of disputes, separated from the family. As no regular partition of the estate was made, the lands remained undivided, and each member took his share of the rents. After a short separation, the brother returned to the family, and it was by a deed of Unghoputtur, or settlement, agreed that the acquisitions made by the elder brother during the separation should go into the joint funds. During the separation the elder brother purchased a Putnee Talook. Held, that the reunion of the Brother to the family remitted him to his former *status*, as a member of a joint Hindoo family, and that he was entitled to share in the purchase, as it must be presumed to have been made out of the funds of the joint estate.

The presumption of Hindoo law is, that property not shown to be separate is joint, and the *onus probandi* lies on the party claiming it as separately acquired [10 Moo. Ind. App. 411, 412].

The parties to this appeal constituted a joint undivided Hindoo family. The suit was brought by the Appellant in the Zillah Court at Nuhdea against his brother, Nobokishen Paul, deceased, and now represented by his son, the Respondent, to recover, after crediting the Defendant with certain moneys paid, a balance of Rs. 8244. 8a., together with interest thereon, making together the aggregate sum of Rs. 16,489 alleged to be owing from him, in respect of the moiety of the purchase money of a Putnee Talook; after an account taken of the reception of the rents [404] of the family property in which it was alleged the Appellant and Nobokishen Paul Chowdry held equal undivided moieties.

The Respondent's defence was, that the Putnee Talook had been purchased out of the joint family acquisitions; and upon that issue the case was tried by the Principal Sudder Ameen. The suit was dismissed by that Court, as well as by the

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

Sudder Dewanny Adawlut to which an appeal was made, and from whose judgment the present appeal was brought.

The question turned upon the effect of the evidence adduced. The general facts, as well as such parts of the evidence essential to the comprehension of the case, will be found in the judgment of their Lordships.

Mr. Rolt, Q.C., and Mr. Leith, for the Appellant, contended, that the case made by the evidence was, that the purchase of the Putnee Talooks in question was made by the Appellant, and that the Respondent was a sub-purchaser of a moiety from the Appellant: thereupon he became liable for the payment of one moiety of the purchase money, and that though the Defendant pleaded that the purchase money was paid by the Appellant out of their joint moneys, and, therefore, nothing was due from him in respect of the sub-purchase, yet he had failed to establish such fact by evidence, and they insisted that the Respondent was estopped from entering into evidence on that point by a deed of Ungshoputtur, or settlement, of the 28th of July, 1848, made between the Appellant and the Respondent's father.

[405] The Attorney-General (Sir R. Palmer, Q.C.), and Mr. W. H. Melvill, appeared for the Respondent, but were not called upon by their Lordships, whose judgment was delivered by

The Right Hon. Sir James W. Colvile. — Their Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the Respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of Ungshobodhareet Puttur. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the Appellant, and the Respondent, and a younger brother of the half blood, who was a minor, and is since deceased. They were, in all respects, a joint and undivided family. In the year 1854 B.E., there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the Record, and although it is not very distinctly stated in the deed, [406] it would almost follow from the nature of the case, that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rents and profits received previous to the partition. That is stated distinctly in the judgment of the Sudder Court, where the Judges say, "We find that the Plaintiff's Pleader admits that up to 1253 his client, as elder brother, made all the collections, and held all the joint funds of the family. That although a separation took place in 1253, and the Plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother Defendant."

The separation of the two brothers continued for little more than eleven months: they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the Putnee Talook, the price of which is the subject of the present contention: and further, that the youngest brother having died, and his mother having taken his share by inheritance, Prankishen Paul Chowdry had purchased that share from her, subject to an annual payment of Rs. 1200.

On the reunion of the two brothers, which of itself remitted them to their former *status* as members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed with respect [407] to these transactions are these: first, there is a recital "that I, Prankishen Paul Chowdry, by contracting loans, negotiated to take in Putnee Turruff Munsebpore and Dhee Rajapore, benamee in the name of my relative, Sunboodchunder Singh, inhabitant of Dowlutgunge, and advanced the byana, or earnest money." Then it

states, "Afterwards a settlement was effected between us brothers, and again the entire property came into our ijmaltee possession, as it had been before, and the Putnee, etc., that had been recently purchased also came under the ijmaltee settlement, and of the balance of the consideration or purchase money of the aforesaid Munsebpore, etc., taking no putnee, some was paid by us two from our private funds and some portion by loans raised in bonds given by us respectively, and by granting durputnee pottahs, and we obtained a Pottah of the said Putnee, and both brothers remained in ijmaltee possession, having taken from the aforesaid Singh an ikra or acknowledgement of the benahee; at present we two brothers have brought under ijmaltee the entire hereditary and acquired property, and that which has been recently acquired as putnee, and all real and personal property, have made this condition and settlement that from hence the whole is to remain ijmaltee, and that such property of the share of Ramkishen Paul as I, Prankishen Paul, had purchased and held under a perpetual Pottah was likewise to become ijmaltee and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our step-mother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs in such case, shall equally share and take our said deceased half brother's property, and not [408] more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint, and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect, "All the money that has been borrowed on our joint Bonds, and that which I, Prankishen Paul, had borrowed during the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase money for the putnee of Turruff Munsebpore and Debee Rajapoor, shall all be accounted as our ijmaltee debt, and the said ijmaltee debt shall be liquidated by us out of the profits of the ijmaltee property." As their Lordships understand that stipulation, it provided that whatever Prankishen Paul had borrowed on Bonds given in his name, or whatever the two had borrowed on their joint security, in order to provide the consideration money paid for the purchase of these two Putnees, should be a charge on the joint estate, and should be liquidated out of the joint property; but they can find in that no provision whatever for the repayment, out of the joint property, to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same amount, out of his private money. The deed is, upon that [409] point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation:—"No party shall make any claim hereafter upon the other on account of any cash having reference to the former ijmaltee period, that is, for the time anterior to the year 1254, B.S. I, Prankishen Paul, have no claim upon you, Nobokishen Paul, on account of the price of the real and personal property of Ramkishen Paul's share, for which I had obtained a perpetual Pottah, and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now, those last words show that although Prankishen Paul may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any moneys for which he may have been accountable in respect of those earlier collections. And Mr. Leith relies upon that as an answer to that portion of the Respondent's case which rests upon the assumption that the moneys which are in dispute

[410] came out of these former collections, and were applied by Prankishen Paul to the purchase of the Putnee Talooks. But it seems to their Lordships that the whole deed must be taken together, and as one general compromise; and if they are right in their construction of the former clause, that there was no provision made for the payment, or the adjustment of the price of the Putnees, except in so far as it consisted of borrowed money, which was to be paid out of the assets of the joint estate; then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the other hand, the elder brother makes no claim in respect of any moneys which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any monies *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore, upon this deed if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of reunion they again separated, and the deed of partition, which, though not printed in the record, has been produced to-day and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the clause, really would fall upon the joint estate. That provision imports, "that the money borrowed under simple [411] and mortgage Bonds is to be liquidated by both in equal portions." Therefore, the subsequent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way re-open any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the Appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the jumma khurruch, which seems to have been used originally to meet the fraudulent claim of the trustee, to hold the Putnee Talooks as his own, if those sums, though described as coming from the private funds of the Appellant, had been alleged and proved by him in this suit to have been money actually borrowed on Bond or otherwise, and had been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the Appellant.

The issue of fact upon which the parties went to trial was raised by the other side, and, as ultimately settled, was this, "whether it was true that the Plaintiff had, out of his own funds, paid the sum of Rs. 20,120, or that the said amount had formed a part of the *ijmalee* funds of the two parties." The Appellant gave no evidence on this issue: the Respondent examined four witnesses upon it, and it was found in his favour. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings, that the parties originally had any separate property; the presumption of Hindoo law in such cases is, that property not shown to be separate is joint; and it is an [412] admitted fact that the Appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brother. And if the moneys employed in the purchase of the Talooks formed part of those so drawn from the joint estate, it follows that the Respondent on the reunion was entitled, upon the general principles of Hindoo law, and independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are, therefore, of opinion that the decrees of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this appeal be dismissed with costs.

[413] SHEONATH, *alias* BURAY KAKA, Appellant: RAMNATH, *alias* CHOTAY KARA,—Respondent * [Nov. 28, 1865].

On appeal from the Court of the Judicial Commissioner of Oude.

No power is vested in the Court of the Civil Judge at Lucknow, under the provisions of secs. 312 and 314 of the Code of Civil Procedure (Act, No. VIII, of 1859), which is in force in Oude, to refer the decision of any issue raised in a suit to Arbitrators nominated by the Court against the protest of one of the parties [10 Moo. Ind. App. 423-426].

An Award, founded on such a reference, held on Appeal, not binding on a Defendant and set aside, as the parties must either name the Arbitrators, or consent to the nomination of them by the Court.

A party is not bound to appeal from every interlocutory Order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory Order [10 Moo. Ind. App. 423].

In this case the suit was instituted by the Respondent against the Appellant in the Court of the Civil Judge at Lucknow. The parties were cousins, natives of Lucknow, jointly interested in certain ancestral [414] estates. They also carried on business in co-partnership as Bankers and Merchants. The business in which they were engaged was carried on by them in three Kothees, or Firms, styled Hurjus Roy and Gungaram, and two other names. Disputes arose between them, and to a certain extent, a partition of the joint property was made, leaving open the debts due to the Firms up to the date of the partition. Farighkluutees, or mutual releases, were executed upon that footing. Notwithstanding this partition, the disputes between the parties relative to their rights continued, and after an ineffectual attempt to settle these disputes by a reference to Arbitrators, which was never carried into effect, the Respondent instituted the present suit against the Appellant. By the plaint, a general account and partition was prayed for, on the allegation that no account had been settled between the parties, and that the releases given on the execution of the before-mentioned arrangement were not operative, as no partition had taken place.

The suit went through its various stages: but as the material question on appeal was narrowed to a single point, namely, whether it was competent to the Court under the Civil Procedure Act, which is in force in Oude, to refer one of the questions at issue to Arbitrators nominated by the Court, against the protest of the Defendant, it is not necessary further to state the proceedings, which are fully detailed in their Lordships' judgment.

The Civil Procedure Act of the Legislative Council of India, No. VIII, of 1859, entitled "An Act for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter," secs. 312 and 314, upon which this question was decided, provide as follows:—

[415] By section 312, it is enacted, that "If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the final decision of one or more Arbitrator or Arbitrators, they may apply to the Court at any time before final judgment for an order of reference," and Section 314, declares that "the Arbitrator or Arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the Arbitrator or Arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the Arbitrator or Arbitrators."

The Respondent put in no appearance to the appeal, which was, consequently, heard *ex parte*.

The Attorney-General (Sir R. Palmer, Q.C.), and Mr. Leith, for the Appellant. As the Appellant refused to agree to the persons nominated by the Judge of the Civil

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor.—The Right Hon. Sir Lawrence Peel.

Court as Arbitrators, upon an issue referred to them, the Award is not binding on him. The Arbitrators were, in the absence of the Appellant's consent, never legally appointed, so as to enable them to act as Arbitrators; Code of Civil Procedure, Act, No. VIII, of 1859, secs. 312, 314. The Award, therefore, must be set aside and the case remitted to the Court below.

Judgment was reserved and now delivered by

The Right Hon. Sir James W. Colvile (Dec. 22, 1865). The Appellant and Respondent are first cousins, [416] and natives of Lucknow, and were formerly jointly interested in certain ancestral property, and in the business of three Kothees, or Firms, the styles of which were Hurjus Roy and Gungaram, Gungaram and Juggurnath, Sheonath and Ramnath. Each appears to have been also possessed of separate property.

In 1859 they made a partition, as far as they then could, of their joint property; and on the 16th of September of that year they interchanged Farighkhuttees, or instruments of mutual release, of which that executed by the Respondent, after stating that the two parties were jointly interested in the before-mentioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, etc.; and after formally abandoning all claims on account of the said firms against the Appellant and his heirs,—contained this passage, "But I have a claim to an equal share of such moneys as may be realized on account of debts due to these Firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these Firms up to this date."

In 1861 there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the Firm of Sheonath and Ramnath; and they agreed to refer the matters in dispute to the arbitration of five persons, named Hyder Hosein Khan, Meer Wajid Ali, Mr. Jacob Johannes, Sah Mukhun Lall, and Girdharee Lall. A written agreement to this effect was executed by each on the 8th of May, 1861; but the Appellant afterwards drew back from his agreement, and refused to have it registered; and [417] nothing came of this attempt to settle the dispute by arbitration.

In September, 1861, the Respondent, Ramnath, instituted this suit against the Appellant. The plaintiff sought a general account and partition: it alleged that no account had ever been settled between the parties; it mentioned the execution of the Farighkhuttees, but alleged that there had been no partition, as stated in them; that the partition was intended to take effect after a settlement of accounts, when the Farighkhuttees were to have been registered; and that, in the meantime, they had remained with the Appellant as incomplete instruments. It referred, also, to the agreement for a reference to arbitration, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of Lucknow (Mr. E. G. Fraser), with the assistance of a jury, and his decree, founded on the findings of the jury, established that there had been an actual partition and division of the joint property; that the Farighkhuttees had been executed on the footing of it, without taint of fraud, and that the Respondent had failed to prove that he had any interest in a fourth Firm which the Appellant carried on under the style of Ramnath Rughonath. It also decided against the Respondent a question in the suit touching the profits made by the Appellant by means of sale and purchase of Government notes during the rebellion.

The Respondent appealed against this decision to Mr. Campbell, then the Judicial Commissioner, who by his Order of the 15th of May, 1862, affirmed it on all the points raised by the appeal. His judgment, however, contained these passages: "But it seems [418] clear that there is one account between the parties still quite unadjusted, viz., the division of the outstandings, which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to Plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again, "There was something very considerable to be settled that still remains to be settled, and I trust that, in accordance with my Order, the Judge will manage, by a successful arbitration, to

give the Plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this Order was conclusively to limit the claim of the Respondent to his share in the outstandings of the three Firms; and to direct, or at all events to suggest, that that claim should be enforced not by taking the accounts upon the footing of the Farighkhuttees in the regular way; but by giving him a lump sum as the value of his interest therein, and that such value should be fixed by the Award of the Arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that officer, on the 7th of June, 1862, made an Order, whereby he referred to four out of the five Arbitrators formerly named (the fifth, Girdharee Lall, having left Lucknow) the decision of the following questions: first, what accounts remained unadjusted between the parties; second, what amount of outstandings remained then unrealized and undivided; third, what amount should be given to the [419] Plaintiff (the Respondent) as an equitable acquittance of his share therein. He directed the Arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The Appellant did not acquiesce in this Order. On the 10th of June, 1862, he petitioned the Judicial Commissioner against it. In his petition he stated, that he had no objection to the Order of the appellate Court referring the question of joint but divisible debt to arbitration, but that he objected, on the grounds therein stated, to the Arbitrators to whom the Civil Judge had referred the case, and requested that other Arbitrators might be selected by the parties, and that his case be referred to them. The Order of the Judicial Commissioner on this petition was in these words: "It is in the Judge's discretion to employ the Arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated account can be settled by a jury."

The Appellant being thus referred back to the Civil Judge, presented on the 13th of June a petition to that Officer, in which he reiterated his objections to the Arbitrators named, and begged the Judge, as authorized by the Judicial Commissioner, to dismiss them, and to order "other Arbitrators to be named, composed of such parties as I and the Plaintiff may select." This application was on the 23rd of June, 1862, rejected by the Judge, who gave the following reasons for his decision: "I see no reason to change. I acted on the Judicial Commissioner's Order, and transferred the case to the old Punches. If their work, when it comes in, prove open to suspicion, or [420] is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partisans, and go in favour of Plaintiff unduly, they will still have to show grounds. If they go against the Plaintiff, whose friends they are said to be, it will be all the more satisfactory to the Defendant." Against this last Order the Appellant appealed by petition dated the 25th of June, 1862, to the Judicial Commissioner, whose order thereon was in these words, "I will not interfere in this stage."

The Appellant afterwards, and before any Award was made, presented two further petitions to the Civil Judge. The first of them is dated the 22nd of July, the other the 19th of August, 1862. In these, after referring to his ineffectual protests against the nomination of the particular Arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceedings. And in the last petition, he expressly asked that their Award might be set aside, and that new Arbitrators might be appointed in their stead, by which means justice might be done him.

The Arbitrators filed an Award about the 20th of August, 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was, that the amount which the Respondent could fairly claim from the Appellant in respect of the outstandings was Rs. 66,090, besides one moiety of a judgment debt which had been recovered in the Civil Court of Cawnpore, and was described as the "Rusdhan decree."

[421] On the 4th of September, the Award was discussed before the Civil Judge. He overruled the Appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the Plaintiff was entitled in respect of these must be referred back to the Arbitrators. His decree was

to this effect: "I accept the decision of the Arbitrators, awarding Rs. 66,090 to the Plaintiff as equivalent for all outstandings except the mortgages, and half of the Rusdhan decree."

Against this decree the Appellant, on the 16th of October, 1862, appealed to the Judicial Commissioner. The Order passed by him on the following day was in these words: "Case is not completed; appeal will be heard when the whole is complete."

On the 20th of December, 1862, the Arbitrators, to whom a fifth (Ihtimamood Dowlah) seems to have been added, made their Award in respect of the mortgages. The effect of it was, that a further sum of Rs. 15,000, should be paid on this account to the Respondent by the Appellant.

On the 22nd of December, 1862, the Civil Judge adopted this finding in spite of the Appellant's objections, and ordered that he should within three months make good this sum, as well as those which by the decree of the 4th of September, he had been ordered to pay.

The Appellant appealed also against this decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of March, 1863, states, amongst other things, that the Arbitrators had been challenged by him both in the Lower Court and in the Judicial Commissioner's Court. This appeal, and that against the decree of the 4th of September, [422] 1862, of which the consideration had been postponed, was brought before Mr. Cooper, who had then become Judicial Commissioner, in the place of Mr. Campbell, and he, on the 3rd of July, 1863, upheld the Awards of the Arbitrators, and affirmed both the decrees of the Civil Judge.

Against this decision the present appeal is brought.

Their Lordships will assume, and such is, in fact, their opinion upon the facts before them, that if the questions which the Arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their Award have been established. It has, however, been strongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his Order of the 15th of May, 1862, the rights of the parties under the Farighkhuttees, and to impose on the Appellant the obligation of purchasing the Respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of appeal chiefly insists—is that the nomination of the particular Arbitrators by the Judge, without the consent and against the repeated protests of the Appellant, was altogether irregular, and that their Award is, therefore, not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the first point, but they are nevertheless of opinion, that the determination of this appeal must depend upon the validity of the second objection; because if the nomination of the Arbitrators were regular, there is evidence in the petition of the 10th of June, and in other parts [423] of the proceedings, that the Appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the Respondent should be settled on that principle and by arbitration.

That both points are open to the Appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. Cases, p. 302) (see also *Forbes v. Ameroonissa Begum*, ante [10 Moo. Ind. App.], pp. 340, 346). The appeal is, in effect, to set aside an Award which the Appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every Interlocutory order which was a step in the procedure that led up to the Award.

Was it, then, competent to the Judge to refer the decision of this question to Arbitrators selected by him against the will and in spite of the repeated remonstrances of the Appellant? When the suit was commenced, the powers and procedure of the Courts in Oude were still regulated by the Rules and Ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in that Province on its first annexation? These were substantially the same as those which had previously been in force in the Punjab, and were known as the Punjab Code. But on the 6th of August, 1861, the Governor-General in Council, by a notification issued under the 385th section of Act, No. VIII. of 1859, extended to the Province of Oude the provisions of that Act [424] (which is generally known

as the Code of Civil Procedure), subject to certain exceptions and provisions as from the 1st of January, 1862. The exceptions are only five in number; they are modifications of the 3rd, 17th, 111th, 172nd, and 205th sections of the Act, and none of them have any bearing on the questions raised by this appeal. At the date, therefore, of the Judicial Commissioner's Order of the 15th of May, 1862, the Code of Civil Procedure had thus been extended to and was in force in Oude.

The 388th section of that Code provides that from and after the time when this Act shall come into operation "in any part of the British territories in India, the procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and except as otherwise provided by this Act, by no other law or Regulation." The only exception as to suits pending at the time when the Act shall come into operation is contained in the preceding section, and is in these words: "If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act, No. VIII. of 1859, by virtue of the provisions last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here [425] complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself, in the proceeding, appealed to certain sections of the Act as establishing the finality of the Award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the Punjab Code must be held to have been suspended on the 15th of May, 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th section of the Act provides, that if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more Arbitrator or Arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th section provides, that the Arbitrator or Arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the Arbitrator or Arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the Arbitrator or Arbitrators.

These sections clearly import that the parties must either name the Arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court to force upon a reluctant party the decision of any [426] question in the cause by Arbitrators selected at its discretion. It may be observed that the Punjab Code, Part II., sec. 2, cl. 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and the appointment of Arbitrators.

Their Lordships need hardly observe, that if the appointment of the Arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the Appellant had on a former occasion agreed to refer the matters then in dispute between him and the Respondent. That agreement to refer had proved abortive: the Respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the Arbitrators was an entirely new question, suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider, whether this case could be brought within the principle of those authorities, which establish that a defect in the nomination of Arbitrators, may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision. Their Lordships are, however, of

opinion that the Appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated, it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the Arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

[427] Their Lordships, therefore, however much they regret the necessity of re-opening this litigation, feel bound to allow the present appeal.

It is not improbable that the decrees impeached give no more to the Respondent than upon a proper adjustment of the accounts will be found to be his due. But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to Arbitrators who were not duly authorized to determine it. The consent of the Appellant was essential both to the form of the issue, and the constitution of the Tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what directions this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the Order of the 15th of May, 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to Arbitrators duly appointed under the Act, No. VIII. of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to and from the three Firms at the date of the Farighkhuttees, and of what has been received and paid in respect thereof, and by whom; and by inquiring whether any and which of the debts due to or from the said firms, remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is [428] due from either and which of the parties to the other of them. Act, No. VIII. of 1859, sec. 92, seems to give to the Court the power of appointing a Receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Judicial Commissioner of the 3rd of July, 1863, and that of the Civil Court of Lucknow of the 4th of September, 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three Firms pursuant to the Farighkhuttees, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to the costs of the Order of the 15th of May, 1862, and of the proceedings following upon it.

[See *Forbes v. Ameerionissa Begum*, 1865, 10 Moo. Ind. App. 360.]

[429] TAYAMMAUL.—*Appellant*; SASHACHALLA NAIKER and VIRASAMI NAIKER,—*Respondents* * [Nov. 28, 29, and 30, 1865].

On Appeal from the Sudder Dewanny Adawlut at Madras.

In a suit which involved a disputed question of fact as to an alleged adoption and the due execution of a Will, the Court in India disregarding other evidence, relied solely upon the evidence of a witness examined at the instance of the Court itself. The effect of the evidence of this witness was to show that at the time of the adoption and execution of the Will, the alleged Testator was in a dying state, and, although at times roused to consciousness, was, from

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

his enfeebled mind, incapable of understanding the acts he was represented to have performed: the Court below, however, upon the evidence of this witness, as to his testamentary capacity, corroborated, as it thought, by a letter of the widow of the alleged Testator, recognizing the adoption, and by her acquiescing in the performance of certain funeral rights of her deceased husband by the supposed adopted son, pronounced both the adoption and the Will to be valid. Upon appeal, held, that although as a general rule, in a question of fact, the Judicial Committee were unwilling to disturb the judgment of the Court below, yet that as it was the duty of the appellate Court to weigh the evidence and probabilities, and form an independent judgment, and taking into consideration the evidence regarding the state and capacity of the alleged adopter and Testator, they were of opinion, that the evidence relied upon was so unsatisfactory, that neither of the decrees of the Courts below could be supported, and reversed the same with costs.

The appeal in this case was brought from a decree of the Sudder Court at Madras, which Court affirmed a decree of the Civil Court of Cuddalore, in a suit instituted by the first Respondent, as guardian of the [430] second Respondent, a Minor, the alleged adopted son of one Balakristnama Naiker, deceased, against the Appellant, the widow of Balakristnama Naiker, and other Defendants, to recover the estate of Balakristnama Naiker in the possession of the Defendants. An alleged Will of Balakristnama Naiker was also set up, which instrument, after reciting the adoption, and appointment of guardians to the second Respondent during his minority, purported to bequeath one-fourth of his estate to the Appellant, his widow. The fact of the adoption and execution of the Will were both denied by the Appellant. Witnesses were examined on both sides, whose evidence as to the adoption and execution of the Will was so unsatisfactory, that the Judge of the Civil Court of Cuddalore called an independent witness, not named by either party, and upon whose individual testimony, in addition to an arzee sent to the Collector of the District informing him of the adoption, and alleged to have been signed by the Appellant, who lived in seclusion, the day after her husband's death, the Courts in India pronounced both the adoption and Will valid. Hence the present appeal.

The general facts of the case, and the effect and weight of the evidence, is stated in their Lordships' judgment.

The appeal was heard *ex parte*.

Sir Hugh Cairns, Q.C., and Mr. Pontifex, for the Appellants.

The consideration of their Lordships' judgment was adjourned, and now pronounced by

The Right Hon. Lord Chelmsford (Dec. 22, 1865).—After stating the nature of the appeal, his Lordship proceeded as follows:—

The claim to the property is founded on an alleged [431] adoption of the infant, Virasami Naiker, by Balakristnama Naiker on the day of his death, on which day it is alleged, that he also executed a Will, by which he appointed the Respondent, Sashachalla Naiker, the uncle of the infant, and Devanavaga Naiker, the father of his wife (the Appellant), the guardians of his adopted son, and "to manage all the affairs," till his adopted son came of age.

The alleged adoption took place at 7 o'clock, and the Will was made about 9 o'clock, in the evening of the 30th of July, 1849. Although there was no necessary connection between these two acts, as the adoption might be good and the Will invalid, yet it is difficult to separate the different transactions of the day from each other, or to view them in any other light than as different parts of one arrangement.

On the part of the Appellant both the adoption and the Will are disputed, the first by denying that it ever took place, and both upon the ground that Balakristnama Naiker was on the day in question utterly incompetent to perform either of the acts imputed to him.

The acts which are said to have constituted the adoption are described by all the witnesses in almost the same words (no unusual circumstance with Indian witnesses), but there is no reason to suspect that these acts were not performed; and the mere *factum* of the Will appears to be sufficiently established by the evidence

There was no proof that application had been previously made to the natural parents of Virasami to give their child in adoption, nor was it shown that Balakristnama Naiker had ever contemplated the adoption of this boy before the day in question.

[432] The acts were performed without much preparation, and without many of the accustomed ceremonies, but it was admitted in argument that they were not essential, and that enough was done (if there were no other objection but the absence of these ceremonies) to constitute a legal adoption.

The case was heard *ex parte* before their Lordships, but in the Civil Court in India it was strongly pressed against the Appellant in support of the validity of the adoption, that she was a consenting party to it, performing her part in the ceremony, and afterwards showing by unequivocal acts her entire acquiescence in what had been done. These acts were—allowing the boy to perform the funeral rites as an adopted son, and the day after the adoption putting her mark to an arzee addressed to the Collector of Southern Arcot, stating the adoption and the performance of the funeral rites by the adopted son, and praying for the transfer into his name of her late husband's property.

With respect to the arzee, the Appellant, who was examined as a witness in the suit, positively denied that she ever put her mark to it, and asserted that it was a fraudulent imposition upon her; and, as to the performance of the funeral rites, it was alleged on her behalf that they were not performed by Virasami as an adopted son, but as her agent, she being unable by the custom of her caste to go out and perform them herself.

The evidence in support of the arzee is not of the most satisfactory description. Devanayaga, the Appellant's father, by whom it is said to have been prepared, and who wrote her name before she put her mark to it, was not produced, although he was in the [433] list of witnesses delivered in by the Plaintiff. The reason for not examining him is stated in a memorandum presented to the Court by the Plaintiff, "that he suspected Devanayaga Ayangar was associating with the adverse parties."

With respect to the performance of the funeral rites considerable doubt at least arises upon the testimony of the Purohit, or family Priest, whether they were really performed by the boy as an adopted son.

But assuming both these acts to be satisfactorily established, and also the participation of the Appellant in the proceedings of the 30th of July, 1849, all this will not sustain the validity of the adoption, unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal.

The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The Appellant is a Hindo female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or Will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a Will in fact, and a valid Will. The acts attributed to her are really no confirmation of the Respondents' case, as every one of them upon [434] which reliance is placed might equally have been done with respect to a legal or an avoidable adoption.

The question, therefore, will be, not whether certain acts were done which if unobjectionable in other respects would have constituted adoption, but whether the alleged adopting father was of sufficient capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to their performance.

On this question, upon which the validity of the adoption and of the Will depends, many witnesses were called on both sides. It is unnecessary to examine the evidence, or to weigh one set of witnesses against the other, because the Judge who tried the cause in the Court below declined to decide the case upon their conflicting testimony, but himself directed an additional witness to be examined, and taking the facts deposed to by him as to the bodily and mental state of Balakristnama Naiker at the time of performing the acts in question, made them the foundation of

his judgment. Can it be said that he rightly exercised his judicial function in the appreciation of those facts, and in the correct application of the law to them? What is the description given by Kandoji Rao, the Court witness, as he is called, of the state of Balakristnama Naiker on the day in question? That of a dying man, almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility, and when momentarily conscious, with his mind quite inert and instantly fatigued upon the slightest exertion.

How is it possible that a person in such a condition [435] could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion. Viewing the adoption and the Will together, they present every appearance of a concerted family arrangement. As an adopted child passes into a new family, his natural relations become, as it were, strangers, and the association of the boy's natural uncle with the father of the adopting mother for which the Will provides, must be regarded as a contemporaneous and concurrent act with the adoption. If the law were to countenance acts of this description, performed at such a time and under such circumstances, without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority.

If this question had come originally before their Lordships and not by way of appeal, they would have had no difficulty in deciding that Balakristnama Naiker was on the day in question quite incompetent to perform the adoption, or any other act requiring the exercise of the powers of judgment and reflection.

They have, however, to deal with the case under the influence of two previous decisions at variance with their own views. But the concurrence of opinion of [436] two Courts in India, even upon a mere question of fact, has not upon previous occasions prevented their Lordships acting upon their own independent judgment. In the case of *Rungama v. Atchama* (4 Moore's Ind. App. Cases, p. 1), upon a disputed question of adoption, the Provincial Court and the Sudder Court on appeal, held that the evidence was not sufficient to establish the fact of adoption: but their decision was reversed by this Committee. Precisely the same state of things occurred in *Huradkun Mookurjia v. Muthoranath Mookurjia* (4 Moore's Ind. App. Cases, 414), and with the same result. And in *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry* (4 Moore's Ind. App. Cases, 431), Dr. Lushington in delivering the judgment of their Lordships, says in p. 433, "Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in India generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

This case is something different from a mere question of fact. The matters questioned, an adoption and a Will, involve both the *factum* of each and the capacity of the alleged adopting father and Testator. Each of these acts interferes with and displaces previously existing rights, inchoate or presumptive. A Judge who decides in favour of a disputed adoption or Will in a case of questioned capacity of a dying [437] man, must apply his mind not simply to the act of adoption in fact, or to the execution in fact of a Will, but he must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully complied with. Now, in this case the Judge, not satisfied with the evidence brought before him, selected a witness to assist him with his judgment. There was no careful weighing of the evidence on both sides, but his decision was founded upon the single testimony of this witness. The Sudder Court say, "Little need be added to the arguments on which the Civil Judge has founded his decision," and they add

nothing. They, therefore, adopt the conclusions at which the Civil Judge arrived, based not upon a review of the whole of the evidence, but upon a witness chosen by himself, whose testimony in the opinion of their Lordships does not warrant the judgment which he has pronounced. They will, therefore, recommend to Her Majesty that the decrees appealed from be reversed, with costs.

[See *Ram Charan v. Debi Dou*, 1890, Ind. L.R. 13 All. 165; *Toolsey Persaud Bhuckt v. Benayek Misser*, 1896, L.R. 23 Ind. App. 102.]

[438] MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR,—*Appellant*;
SHEOPURSUN MISSER,—*Respondent* * [Feb. 7 and 8, 1866].

On appeal from the Sudder Dewanny Adawlut of Bengal.

A summary suit was brought by A. against B., to recover arrears of rent of certain Mouzahs alleged to be held by B. under a Lease and Kabooleat. The defence by B. to the suit was a denial that the latter instrument had been executed by him, and he set up a title to the Mouzahs as being Bhakee Birt tenure. The Deputy Collector before whom the suit was tried, doubted the execution of the Kabooleat by B., and dismissed the suit. A. then brought a regular suit against B., seeking, first, to establish his proprietary title to the Mouzahs as Zemindar; secondly, to set aside the summary award; and thirdly, to recover arrears of rent under the lease and Kabooleat, when B. raised the same defence as in the summary suit. The Sudder Court nonsuited A., and dismissed the suit for multifariousness and misjoinder. Such decree reversed on appeal by the Judicial Committee as, by the rules of pleading in India, a claim for rent in arrear, and to remove doubts in A.'s title as Zemindar to lease to B., as raised by the defence, is not objectionable on the ground of multifariousness, but can be included in one plaint.

The Appellant in this case by his suit claimed, first, possession of certain Mouzahs, as forming part of his Zemindary; secondly, to set aside a summary award which upheld the Respondent's right under an alleged Bhakee Birt tenure; and thirdly, to recover arrears of rent under a lease and Kabooleat, alleged by him to have been granted to the Respondent of the Mouzahs in question. The Sudder Court, in effect, reversing the decree of the Zillah Court, declined to adjudicate the case upon the issues raised as to the title [439] of the Appellant as Zemindar to the Mouzahs, on the ground of the multifariousness and misjoinder of claims in the plaint. Hence the present appeal.

As the judgment upon appeal was confined to a question of pleading, it is only necessary to give a brief outline of the facts.

It appeared from the statements in the Appellant's case that the entirety of Pergunnahs, Majhona and Sumraom, comprising the Zemindary of the Appellant, were permanently settled by the Government, under Ben. Reg. I., of 1793, in the years 1790-1, without specification of Mouzahs, and only by Tuppahs, with the grandfather of the Appellant, Maharajah Beer Kishwur Singh. That the Mouzahs in question, ten in number, were included within two of the settled Tuppahs, viz., Tuppah, Chigwun Butsurra and Tuppah, Manpore, situate in Pergunnah Majhona. The Maharajah died in possession of the entirety of the Zemindary, which ultimately descended to the Appellant.

It further appeared, that since the permanent settlement in 1790-1, the Mouzahs in question, had been let to different tenants, at varying jummas, sometimes jointly with other lands, and sometimes separately. That from the year 1223 [Fusly,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

1815-1816 C.E.] to 1819 C.E., the Mouzahs were let to Nanouh Ram Misser, the father of the Respondent, afterwards to other persons, and further, that in the year 1850, the Appellant's ancestor, Maharajah Nawul Kishwur Singh, had granted to the Respondent a lease of the Mouzahs for five years, at a jumma of Rs. 2305 13a. 6p., delivering to him a Pottah, and taking from him a Kabooleat, or counterpart, of such lease.

[440] The rent secured by the lease and Kabooleat falling into arrear, the late Maharajah in 1853 instituted a summary suit against the Respondent in the Deputy Collector's Court of Chumparun, to recover the arrears due. The Respondent by his answer denied that he was lessee of the Mouzahs, or had taken any lease, or executed a Kabooleat, and set up a title to the Mouzahs as having for a long time been ancestral, and purchased as Blakee Birt by his ancestors; that his ancestors and himself had been in possession of the Mouzahs, paying the revenue, according to the rent-roll fixed in Fusli, 1197, yearly, to the Maharajah, in consequence of its being joint at the settlement of the lands in 1198, Fusli (1790-1), and that the Maharajah had no right to diminish or enhance the registered jumma. This was denied by the Maharajah, but the Deputy Collector being of opinion, that the execution of the Kabooleat was doubtful, dismissed the summary suit.

In consequence the Maharajah brought a regular suit in the Court of the Principal Sudder Ameen, for the District of Sarun, against the Respondent.

In the plaint the claim was laid at Rs. 68,036 7a., the value of the lands in dispute and balance of rent due for the years 1260 and 1261 Fusli (1852-3; 1853-4 C.E.). The plaint stated, that the Plaintiff sued for possession of the Mouzahs, his hereditary property, amounting in extent to 2587 beggahs of land, and valued at Rs. 64,700, the price of the land at issue, at the rate of Co.'s Rs. 25 per biggah, and to recover Rs. 1030 9½a. arrears of rent for 1260 Fusly, for which a summary suit was pending, and Rs. 2305 13a. 2p., the rent for 1261 Fusly, inserted [441] in the Kabooleat, dated 5th of the month of Assin, 1258 Fusly, making an aggregate claim of Co.'s Rs. 68,036 7a.; by the annulment of a summary award of the Deputy Collector of the District of Chumparun, dated the 29th of the month of May, 1854, and by the cancellation of a letter affirming the Blakee Birt, dated the 17th of the month of Assar, 1232 Fusly, and alleged by the Defendant to have been granted by Maharajah Anund Kishwur Singh to Nanouh Ram Misser, the father of the Defendant. The principal facts above stated were set forth in the plaint, and, amongst others, that the Mouzahs in question were a part of the Plaintiff's settled ancestral Zemindary, and had been let on lease or farm to divers persons, and, among others, to the Respondent, and previously to his father, since deceased. The plaint also stated that litigation had occurred in 1228 Fusly (1820-1 C.E.), between the late Maharajah Anund Kishwur Singh and the father of the Respondent, and pleaded and insisted on the disclaimer made therein, on the 18th of September, 1824, and which then became and thereafter remained matter of record, of the Blakee Birt tenure and title set up by the father of the Respondent, and also on the judgment of the Magistrate, dated the 16th of February, 1825, founded on that disclaimer; and the plaint charged and insisted that a letter and four acquittances said to bear the seal of the late Maharajah, and relied upon in the summary suit by the Respondent, in order to avoid the effect of such disclaimer, were forgeries; and in corroboration the plaint referred to the previous legal proceedings brought against the Respondent for rent, and by him [442] against the Ryots, in which he was described as "farmer" merely, and also to the fact that no mention was made therein respectively, or otherwise at all, of the pretended Blakee Birt tenure, letter, or acquittances aforesaid respectively, since the disclaimer, and the judgment of the Magistrate. The plaint, after pointing out that the finding of the Deputy Collector, on the comparison of seals merely, in favour of the authenticity of the alleged letter and acquittances, was erroneous, and not founded on any sufficient proof, concluded by insisting that the proprietary right and possession of the Maharajah and of his ancestors with respect to the Mouzahs in question, and the absence of any interest of the Defendant in them, were manifest; nevertheless, owing to the Deputy Collector having passed an Order for the dismissal of the claim for rent, it had become necessary to prefer a claim for possession by the annulment of the award, and to recover the rent, and prayed that the summary award, and the letter of Blakee Birt pleaded by the

Defendant, might be annulled, and that possession of the Mouzahs, and the claim for rent, with interest hereafter, and Putnee mesne proceeds, with interest to the day of possession, be granted from the Defendant.

The Respondent by his answer, after taking several technical objections to the suit and to form of the plaint, stated that the Mouzahs came into possession of his father at different periods, as Blakee Birt at a jumma, or rent of Rs. 1901, the revenue fixed, as it was alleged, at the settlement of 1197 Fusly. The answer then admitted the legal proceedings had taken place in 1228 Fusly, between Maharajah Anund Kishwur [443] Singh and the Respondent's father, and the filing of the disclaimer by the father, which he accounted for as being given under coercion and pressure. The answer denied the execution of the Kabooleat by the Respondent, and then referred to and relied on the award or decree in the summary suit brought on that instrument for rent.

Issues were recorded by the Principal Sudder Ameen, the principal being, first, whether there was a misjoinder of claims, and secondly, as to the alleged tenure of Blakee Birt.

Both parties went into evidence to establish their respective claims, and the hearing of the suit took place on the 3rd of May, 1856, before the Principal Sudder Ameen (Mirza Mahomed Saduk Khan) of the District of Sarun, when a decree was made in favour of the Plaintiff. In that Judgment all the technical objections pleaded in bar were set aside, and it was therein stated, that the suit had originated agreeably to the reasons stated in the plaint, on account of the plea of Blakee Birt having been set up on the part of the Defendant in the summary suit; that in fact, the Kabooleat and summary suit were for nine Mouzahs, but, inasmuch as the plea of Blakee Birt referred to eleven Mouzahs, and one out of these was not under litigation, for this reason, the claim was for ten Mouzahs. That these facts were all manifest from the plaint and replication, and that there was no flaw in this case; and passing over some other technical points, it was declared, that there was no misjoinder of claims, because the principal claim was for possession by the annulment of the Blakee Birt, and the claim for rent had been connected with it like mesne [444] proceeds; that, till 1261, which was within the term of the lease pleaded by the Plaintiff, the claim was under the designation of rent, and subsequent to that the application was for mesne proceeds till the recovery of possession; and that, therefore, there was no joinder of contradictory claims. The decree then decided against the Kabooleat of the Defendant, filed by the Plaintiff, stating that it was not proved to the satisfaction of the Court; and that its genuineness could not be relied upon, because it had been executed upon plain paper, and attested by two of the subordinates of the Plaintiff; that when the jumma contained in a Kabooleat was high, that is, above Rs. 2000, and there has been a contention with the Defendant on a former occasion, its execution in this manner was surprising, and that in such a case it was necessary that the Kabooleat should have been executed upon stamp paper and registered, and ordered that the case be decreed with a modification, that the Plaintiff be put in possession of the Mouzahs in question and recover from the Defendant the mesne proceeds thereof, from that day's date till recovery of possession, whatever might be ascertained at the execution of the decree, with costs proportionate to the amount proved, and interest according to practice; that the costs of the Plaintiff for the amount unproved be charged to the Plaintiff, and that the costs of the Defendant be borne by himself.

The Defendant appealed against this decree to the late Sudder Dewanny Adawlut of Bengal. The principal ground of appeal was, that by reason of the claim being multifarious, the Plaintiff ought to have been nonsuited. A cross appeal was also brought by [445] the Appellant against so much of the last-mentioned decree as declared that the Kabooleat was not proved to have been executed.

The hearing of both appeals came on before the late Sudder Dewanny Adawlut, the Courts consisting of Messrs. B. J. Colvin, A. Sconce, and D. J. Money, on the 31st of July, 1858, when a decree was pronounced, reversing the decree of the Principal Sudder Ameen, and dismissing, or nonsuiting, the Plaintiff's suit. The judgment of the Sudder Court stated, that the Plaintiff's Pleaders contend, that the Kabooleat said to have been executed by the Defendant on the 5th Assin, 1858, was a reciprocal contract, binding by its terms on both parties; that this contract being repudiated by

the one party, could not be binding on the other: that the Defendant, rejecting the Kabooleat, relied upon an earlier title, and that this earlier title being opposed to the Plaintiff's right as Zemindar, he was competent to sue to set it aside; that the averment that the Defendant was a farmer for five years, created by the will of the Zemindar, was a simple and limited issue; but if that issue was not substantiated, it appeared to the Court that it would be unjust to the Defendant to put him to the disadvantage of opposing his ejection from the villages upon grounds incompatible with the ground which Plaintiff chose as his cause of action. And, lastly, the Court considered the Kabooleat of 5th Assin, 1258, not to be substantiated; and that it would be improper to proceed to adjudicate upon issues which could arise only from circumstances foreign to the claim founded upon that document. The decree accordingly dismissed the Plaintiff's suit, so far as it concerned the validity of the Kabooleat; but did not adjudicate any issue as to the Defendant's [446] right of occupancy of the villages, or to his alleged Bhakee Birt tenure, declaring that on those points the decision would have the effect of a nonsuit.

The present appeal was from this decree.

No appearance having been put in by the Respondent, the appeal was heard *ex parte*.

The Attorney-General (Sir R. Palmer, Q.C.) and Mr. Leith, for the Appellant.—This decree is most unsatisfactory. The Court below refused to decide upon the merits, upon a technical ground of pleading, which we submit cannot be sustained. There was, we submit, no such misjoinder of claims as justified the Court in non-suiting the Appellant. The Court, having regard to the pleadings and circumstances of the case, ought not to have refused to adjudicate the issues raised as to the Respondent's right of occupancy of the Mouzahs in question, under the alleged Bhakee Birt tenure set up by him, and as to the effect of the summary decision of the Deputy Collector establishing the same. [Sir Lawrence Peel: The Sudder Court seems to forget the rights of the Plaintiff, and to treat the defences of the Defendant as the cause of the Plaintiff's action.] The primary object of the suit was to obtain a reversal of that summary award, and to have it decreed and declared that such Bhakee Birt tenure did not exist, and then on the assumption that such a tenure did not exist, as ancillary thereto, and on his right as Zemindar and proprietor of the Mouzahs, to obtain in the alternative, either a decree for the rent due during the time the Respondent was in possession under the lease and Kabooleat, or a decree for possession, in the event of his denial of such a lease.

[447] Upon the merits we contend that from the frame of the answer, the *onus probandi* was on the Respondent to prove the Bhakee Birt tenure, relied upon by him, which he failed to do; while, on the contrary, the Appellant established his preliminary title, and that the Mouzahs were held by the Respondent's father, himself and others, as ordinary lessees, at varying rents, and not under any fixed tenure, as he set up in his defence.

Judgment having been reserved, was now delivered by

The Right Hon. Lord Chelmsford (Feb. 10, 1866).—This is an appeal from a decision of the late Sudder Dewanny Adawlut of Bengal, which reversed a decision of the Zillah Court in favour of the Appellant, the Plaintiff in the suit. The decision of the Sudder Court proceeded solely on the ground of misjoinder of causes of action in the Plaintiff's suit. That objection had been raised in, and overruled by, the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The plaint states them with sufficient precision in the first paragraph. It alleges that the Plaintiff sues, not summarily, but in due form, for possession of certain Mouzahs which it describes by names and boundaries, and which it alleges to be his hereditary property; and also to cover certain arrears of rent, amounting to Rs. 1030. 9½ for 1260, Fusly, for which a summary suit was pending; and Rs. 2305. 13a. 2p., the rent for 1261, Fusly, inserted in the Kabooleat, dated the 5th of the month of Assin, 1258, Fusly, by the annulment of a summary award of the Deputy [448] Collector of the District of Chumparun, dated the 29th of May, 1854, and by the cancellation of a letter affirming the Bhakee Birt tenure, dated the 17th of the month Assin, 1232. This specification of the causes of suit is accompanied with statements of the falseness

of the claim to the Blakee Birt tenure, of the danger which the Plaintiff apprehends to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the Defendant respecting the Blakee Birt tenure.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. Macpherson's Book on "Civil Procedure," page 111 [3rd Ed.], where he says, "A plaint may have an appearance of doubleness when it prays, not only for possession, but that the transactions upon which the Defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and, in fact, forms part of, the former, because possession cannot be given without first removing the existing impediments." This question is distinct from any that relates merely to defect of proof or error in law, in a Plaintiff's view of his case in the whole or part, that may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connection and dependence between the claims of the Plaintiff. In this suit the Plaintiff's title is one: it is his proprietary right as Zemindar. We must look to the Plaintiff's admitted title as Zemindar and to the in-[449]-terference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The Mouzalis are part of the Plaintiff's Zemindary; the Plaintiff is the assessed proprietor under the Decennial Settlement. The Defendant claims that which would, if established, be a dependent tenure, the Zemindar being his immediate superior in the holding. It is not a Ryotwary tenure at all, and no question as to Ryot's title to occupancy can arise in this dispute. All the distinct portions of the Plaintiff's claim flow from, support, and have relation to and connection with his proprietary title, which *prima facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the Zemindar and the cultivators, the ordinary relation between him and them exists; but if it be interposed, the Zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jumma from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a Zemindar, and may materially interfere with his successful management of his Zemindary. Such an intermediate tenure cuts off the possession, that is, the Zemindar's title to the rents and profits immediately derived from the cultivators.

In this sense, the term "possession" is used in this plaint. Now, this injury, supposing the claim to the Blakee Birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right, derived from the Zemindar: as, for instance, by a farmer [450] of a portion of the Zemindary. If such a claim were preferred by a person having such an interest, it would certainly be competent to the Zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A Zemindar, or landlord, may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the Blakee Birt tenure be valid, the Plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel even from a Birt tenant, if the latter accepted a lease, but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a Birt tenure, therefore, be removed, the Plaintiff cannot have the "possession" which he seeks, since, in some way or other, the Defendant stands between the Plaintiff, as owner of the *prima facie* proprietary right and the cultivators. Had the Defendant admitted the tenancy under the Kaboolat, the Plaintiff's title to the rent would have been established, but that

admission, unless qualified, would also have removed those impediments to the Plaintiff's proprietary title which he desires to have removed; but [451] as the Defendant repudiates that tenancy altogether, he, at least when the Plaintiff fails to prove it, cannot urge it against the Plaintiff's title. See in the case of *Rajah Oodit Parkash Singh v. Martindell* (4 Moore's Ind. App. Cases, p. 451), Lord Kingsdown's judgment in affirmance of the general principle.

This lease being removed (the Plaintiff having failed to prove it, and the Defendant renouncing it), what bar is there to the assertion of the proprietary right to the collections, unless the Birt tenure interpose one! On that bar the Defendant does rely, and unless it be removed, the Plaintiff can scarcely expect to lease or otherwise manage his Zemindary with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the Sudder Ameen's Court for overruling the objection seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds in contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think, therefore, that the Sudder Court should have heard the appeal upon the merits. [452] Their Lordships ought, upon general principles, to give now the decision which the Sudder Court should have given; but a difficulty has been interposed in the Court of the Sudder Ameen, which renders a decision on the Birt tenure impossible by this Board. The question of this Birt tenure has not been adjudicated upon in the Court below. The Sudder Ameen should have allowed the Defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The Plaintiff ought not in any way to be prejudiced by this neglect of the Defendant, and to allow the Defendant to reargue these questions as to the Birt tenure in another suit would be a serious injustice and wrong to the Plaintiff. The proper course, then, to be adopted is to reverse the decisions of the Sudder Court and of the Sudder Ameen, and to remand the cause to the lower Court, not for the purpose of taking further evidence, or of hearing the cause on fresh materials other than the stamped documents, but to enable the Defendant to get the instruments stamped. The inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, give a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the Birt tenure, on the evidence in its present imperfect state; but they think it proper to observe that if the Birt tenure be displaced, that displacement will tend considerably to fortify the Plaintiff's proof of the Kabooleat; for the Defendant's possession [453] would then have no apparent title, unless one derived from a lease from the Zemindar, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of Zemindar.

This Order for remanding the cause to be thus reheard, will entitle the Plaintiff to have the matter of his appeal to the Sudder on the Kabooleat reopened. It is in favour of his appeal so far as to subject the decision against the Kabooleat to review upon the reconsideration of the whole case upon the merits. The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim, or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the decrees of the Sudder

Court, and of the Sudder Ameen be reversed; that the Appellant should have the costs of the appeal; that the cause be remanded to the High Court, with directions to send the cause back to the Zillah Court for re-trial, on the issue of the existence of the Birt tenure, giving the Respondent an opportunity of having the unstamped documents stamped, if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

[454] LALLA BUNSEEDHUR.—*Appellant*: KOONWUR BINDESEREE DUTT SINGH, and after his death, MUSSUMAT GUNAISH KOER,—*Respondent* * [Feb. 5 and 7, 1866].

On appeal from the Sudder Dewanny Adawlut of the North West Provinces at Agra.

In 1850, the guardian of a Minor (his stepmother) by an Ikrarnamah, among other things, charged the Minor's ancestral estate with the payment of Rs. 27,000 in favour of L., the amount of his alleged claim against the estate, respecting which an appeal was then pending, but to which estate he was himself a debtor, undertaking at the same time to prosecute certain claims against M., L. agreeing to advance money for that purpose, and to resist certain claims brought by M. against the Minor's estate. In February, 1851, M. having obtained judgment against the estate for Rs. 26,986, and taken out execution thereon, the estate was advertised for sale on the 20th of that month. To prevent the sale, L. advanced the amount of the judgment debt, and on the 19th of that month commenced a suit against the guardian in which he claimed the Rs. 26,986, the amount advanced by him, and the Rs. 27,000 agreed to be paid him by the Ikrarnamah, and the further sum of Rs. 1351, alleged to have been paid by him for the proceedings against M., making together Rs. 55,341. On the following day the guardian filed a confession of judgment admitting the debt, hypothecating the Minor's estate, and undertaking to pay the same by instalments, with the exception of the Rs. 27,000, at six per cent. interest. The instalments not being paid, L. in 1853, took out execution on the judgment, and under the execution put up the estate for sale, and became the purchaser himself. On the Minor attaining his majority, he brought a suit to set aside the sale, impeaching the transaction as fraudulent and collusive obtained by L. from his late guardian. The Courts in India set aside the sale upon the ground of fraud, and decreed the restitution of the estate, with mesne profits and damages, subject to the repayment, by way of reduction, of the Rs. 26,986 at five per cent. Upon appeal, such decree affirmed by the Judicial Committee, first, on the ground that the transaction was fraudulent and collusive, and prejudicial to the estate of the Minor: there being no evidence to show the necessity for the guardian obtaining the pecuniary assistance sought, or to justify her submitting to L.'s extraordinary terms contained in the Ikrarnamah, by allowing, without consideration, his doubtful claim against the Minor's estate, to which he really was a debtor himself; and secondly, that L., who set up the charge, had failed to relieve himself of the burden which the Hindoo law cast upon him of showing that he had, at least, good ground for supposing that the transaction was for the benefit of the Minor's estate.

In setting aside the Ikrarnamah and sale, interest was allowed L. on the Rs. 26,000, advanced by him, at the rate of six per cent. contracted for in that instrument, in lieu of five per cent. awarded by the Sudder Court.

Such a modification of the decree of the Court below, held not sufficient to deprive the Respondent of costs of appeal.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

The case of *Ali Hossain v. Badel Khan* (19th of May, 1863, S.D.A., N.W.P.), where it was held, that there is no difference to be made between the innocent purchaser and one tainted with fraud, which had brought about an execution sale observed upon and dissented from.

The suit out of which the present appeal arose was instituted by the late Koonwur Bindseree Dutt Singh deceased, and afterwards represented by the Respondent, [455] against the Appellant and Goolab Koonwur, his step-mother, who had acted as his guardian during some part of his minority. The object of the suit was to recover a Talook, and other ancestral property, purchased by the Appellant at a judicial sale under a decree, which it was alleged had been fraudulently procured by him through collusion with Goolab Koonwur, in a suit brought by him in which she had allowed judgment to go by default; the suit having been originally instituted under an Ikarnamah, or deed of agreement, executed by her as guardian to the Respondent, charging the Minor's estate.

The adverse title set up by the Appellant was thus derived. Sheodutt Singh, the Respondent's father, died on the 3rd of July, 1849. He had had, in his lifetime, pecuniary dealings with one Seetaram Singh, the Appellant's father, and these had involved him in a long course of litigation with the Appellant. For advances to carry on that litigation, or otherwise, he had become largely indebted to one Mohun Lall. At [456] the time of his death his son (the Respondent) was but four years old; and his step-mother, Goolab Koonwur, became his guardian.

In February, 1850, a negotiation took place between her and the Appellant, which resulted in her executing to him on the 17th of that month, an Ikarnamah, or deed of agreement. By that instrument she, amongst other things, charged the Minor's estate with the payment of a sum of Rs. 27,000 to the Appellant, and undertook to prosecute certain claims against Mohun Lall; the Appellant undertaking to advance money on certain terms for that purpose, as also for the purpose of resisting the claims which Mohun Lall was prosecuting against the Minor's estate.

In February, 1851, Mohun Lall having obtained judgment against the estate for Rs. 26,986. 15a. 4p., and taken out execution thereon, had advertised the estate for sale, on the 20th of that month. It was alleged that to prevent this sale, the Appellant advanced the amount of the judgment debt; and, on the 19th of February, commenced a suit against Goolab Koonwur, as the guardian of the Respondent, in which he claimed, as due to him from the estate, the amount of that advance, the sum of Rs. 27,000, which was stipulated by the Ikhar to be paid to him; and a further sum of Rs. 1354. 1a. 9p., alleged to have been advanced for the purposes of the proceedings against Mohun Lall, making, in all, the sum of Rs. 55,341. 1a. 1p. On the following day the guardian, as Defendant, filed a confession of judgment, admitting the whole amount claimed to be due; undertaking to pay it by annual instalments of Rs. 7000; reciting the Ikhar and the advance of the Rs. 26,986. 15a. 9p.; hypothecating the Minor's estate [457] as a security for the whole amount admitted to be due; and providing that in the event of any failure in the payment of the annual instalments, the Appellant should be at liberty to take out execution against the hypothecated property for the whole amount of his judgment debt with interest. It was stipulated, however, that the Rs. 27,000 should bear no interest, and that the rate of interest on the rest of the debt should be six per cent.

The instalments were not paid; and, in 1853, the Appellant took out execution on the judgment confessed for the sum of Rs. 70,168. 7a. 11p., put up the property for sale under that execution, and on the 20th of June, 1853, purchased it himself for Rs. 51,635. In consequence, however, of a mortgage on the Talook, which was held by Mohun Lall, which gave rise to a protracted litigation, he did not obtain possession of that portion of the property purchased until the year 1860.

The Respondent attained his majority in December, 1860, and commenced this suit on the 22nd of July, 1861. By his plaint he impeached as invalid and collusive the Ikhar, the cognovit or judgment by confession, and the execution sale, as being collusively obtained from his guardian.

The principal Sudder Ameen (Moulvee Mohumud U'bdoola Khan), of Zillah Allahabad, made a decree in the Respondent's favour on the 11th of November, 1861, awarding him possession of the estate sued for, with Rs. 36,470. 11a. 6p. for mesne

profits and damages, out allowing the Appellant to set off against this sum the sum of Rs. 28,418. 3a. 10p., which was compounded of the before-mentioned items of Rs. 26,986. 15a. 4p. and Rs. 1351. 1a. 9p. On [458] appeal, the Sudder Court at Agra consisting of Messrs. Roberts and Batten, by its decree of the 20th of July, 1863, generally affirmed this decree, but reduced the damages awarded by an allowance of five per cent. for the cost of collection and management, and by the sum paid for income tax; and also reduced the reduction or set-off allowance to the Appellant by the item of Rs. 1351. 1a. 9p. And by its decree of the 31st May, 1864, made on an application for review of judgment, the same Court modified its own decree by allowing the Appellant interest on the principal sum of Rs. 26,986. 15a. 4p., which was to be deducted by him, at the rate of five per cent.

The appeal was from this decree.

Mr. Forsyth, Q.C., and Mr. Pontifex, for the Appellant.—The circumstances in which Goolab Koonwur, as guardian of the Minor, was placed at the time of execution in the Appellant's favour of the Ikrarnamah of the 17th of February, 1850, were such as to render it a proper act on her part. She acted under the advice of those who were interested in the preservation of the ancestral property of the Minor. It is clear that the estate would have been sold on the 20th of February, 1851, if the Appellant had not advanced the Rs. 26,986. Such a charge made by a Manager for the benefit of the Minor's estate is good by the Hindoo law. *Hunoomanpersaud Panday v. Mussumat Bahadur Munraj Koonwuree* (6 Moore's Ind. App. Cases, 393) and authorities there cited (*ib.* 407). There was no evidence to show [459] fraud and collusion between Goolab Koonwur and the Appellant in the transaction, or that the same was prejudicial to the Minor's estate. We submit, therefore, that the auction sale to him was a regular and valid sale which cannot be annulled or set aside, and that he is entitled to possession under the sale. [Lord Chelmsford: You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit or confession of judgment, you force a sale yourself and actually buy in the Minor's estate. Can that stand?] The sale was by public auction under a decree of Court whereby the payment of the Rs. 26,986, advanced to save the estate, was decreed. If the transaction as to the Ikrarnamah fails, yet the Appellant was a purchaser at an execution sale and a decree holder. His rights were similar to a stranger purchasing, *Ali Hossein v. Badel Khan* (19th May, 1863, S.D.A., N.W.P.). At all events the execution sale was good to the extent of Rs. 26,986, and the decree appealed from, if correct, so far as possession was awarded to the Respondent, does not place the Appellant in the position in which, in equity, he is entitled to be placed, *Brooklehurst v. Jessop* (7 Sim. 438). Both Courts in India held that this particular sum, part of the amount awarded to the Appellant by the decree under which the auction sale took place, was actually advanced by the Appellant to Goolab Koonwur as guardian of the Minor and registered proprietor of his property, and if the decree had been confined to that sum, the sale of the estate would properly have taken place in execution thereof. Lastly, the Court below was wrong, [460] in allowing only five per cent. interest. The Sudder Court has no discretion to alter the rate of interest allowed in India, namely twelve per cent.

The Attorney-General (Sir R. Palmer, Q.C.) and Mr. Leith for the Respondent.—There was no legal contract between the step-mother, the Appellant and the Minor as would in equity bind the Minor's estate. The evidence shows the whole transaction tainted with fraud. [Lord Chelmsford: We are satisfied on that point; you will confine yourself to the question, whether interest ought not to have been allowed by the Court at the rate of twelve per cent.] No specific amount of interest was agreed to. The amount of interest is in the discretion of the Court. Here the Ikrarnamah and the whole transaction was collusive and fraudulent. In *Lindsay v. The Oriental Bank at Colombo* (13 Moore's P.C. Cases, 426) a wrong-doer was disallowed his advances, though for business purposes of a firm.

Their Lordships reserved judgment, which was now pronounced by

The Right Hon. Sir James W. Colvile (Feb. 26, 1866).—After stating the above facts his Lordship proceeded:—

"The first and principal question that arises upon it is whether the Ikrar of

the 17th of February, 1850, which was executed by his guardian during his minority, is binding upon the Respondent.

In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authorita-[461]-tively laid down in the case of *Hunoomanpersaud Pandey v. Mussumat Babooe Munraj Koonweree* (6 Moore's Ind. App. Cases, p. 423). It is there said, "The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." And again, p. 424, "The lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate." It follows, from the passages above cited, and from the rest of this judgment, that he who sets up a charge upon a Minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The learned Counsel for the Appellant have not ventured to contend that the stipulations of the instrument, to which these principles have now to be applied, were, upon the face of them, beneficial to the Respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which Sheodutt Singh had in his lifetime been engaged. It becomes necessary, therefore, to review, as briefly as may be, the very tedious and intricate history of that litigation.

[462] In 1828, Seetaram Singh, the father of the Appellant, had lent, or agreed to lend, Rs. 29,500 to Sheodutt Singh, on a mortgage of the ancestral Talook now in dispute. The Talook consisted of twenty-nine villages, and the mortgage was to be a usufructuary mortgage by way of a lease for ten years of the whole Talook. Before this arrangement was completed, it appeared that the two other persons, named Baijnauth and Bishun Dayal, claimed to be prior mortgagees of part of the Talook.

It was at first settled between Sheodutt Singh and his mortgagees, that Seetaram Singh should apply part of the Rs. 29,500 in paying off Baijnauth and Bishun Dayal; but it was ultimately arranged between those two persons and Seetaram that the three should be jointly interested in the mortgage; the share of Seetaram being taken to be Rs. 17,700, and that of the other two Rs. 11,800. The instrument of the 27th of May, 1828, by which this so-called partnership was effected, provided, that if it should be deemed advisable thereafter to dissolve the partnership, the property should be divided and held separately in the proportions above specified.

They entered into possession of the mortgaged property in June, 1828, and in 1831 dissolved their so-called partnership; thereupon Bishun Dayal and Baijnauth became mortgagees in possession of twelve, and Seetaram became, or ought to have become, mortgagee in possession of the remaining seventeen villages of the Talook.

We say "or ought to have become," because it appears, from the subsequent proceedings, that he never was in possession of five of these villages; they having been transferred by Sheodutt Singh [463] prior to the mortgage to his wives and two other persons.

Seetaram carried on his general business in partnership with one Sheosuhai; and on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of Sheosuhai. He was never, however, recognized as mortgagee by Sheodutt Singh, nor was his name recorded as mortgagee until after June, 1838, when the period of ten years, during which the possession of the mortgagee was to continue, expired. Sheosuhai and the other parties then in possession of the mortgaged premises, retained possession after June, 1838; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one Ilahee Buksh, whose security, Torab Ali, acquired by assignment the whole of the interest, as mortgagee

(if any) of Sheosuhai, and also the mortgage rights of Baijnauth. Those of Bishun Dayal became vested in some other parties.

Torab Ali instituted proceedings on the mortgage securities against Sheodutt Singh, claiming the balance alleged to be due on them; but these proceedings, though successful in the Court of first instance, were ultimately dismissed by the Sudder Court, apparently on the ground that the mortgage debt had been satisfied by the perception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th of June, 1842, Sheodutt Singh brought the first suit of which we have any mention against the Appellant and his brother, since deceased, as the sons and representatives of Seetaram Singh, and against all the other persons [464] who in the course of the transactions lastly above stated had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained.

It is unnecessary to consider very minutely the merits of this suit, because a final decree had been made in it before February, 1850, when the widow of Sheodutt executed to Bunseedhur the Ikramnamah in question. It is sufficient to state that although the plaint expressly stated that the principal and interest of the mortgage debt had been liquidated by the collections, the Appellant did not dispute that fact. His defence was simply that by reason of the assignments to Sheosuhai by his father Seetaram, he had ceased to have either interest or liability in the matter.

The course of the suit was as follows:—On the 26th of June, 1843, the Principal Sudder Ameen decreed in favour of the Plaintiffs for redemption and possession of the estate after the expiration of the farm, but nonsuited the claim for mesne profits and damages. On a remand from the Sudder Court, the same officer, by a decree, dated the 28th of November, 1843, made the Appellant and his brother, as co-heirs of Seetaram, liable jointly with Sheosuhai in the sum of Rs. 16,570. 7a. 9p., as mesne profits for the year 1246, but dismissed the claim for [465] damages for the years 1247, 1248, and 1249 B.S. It should also be mentioned that he expressly found in his judgment that the mortgage debt had been discharged. There was an appeal from this second decision, and the Sudder Court by its original decree on that appeal held, that the Appellant, as the then sole heir and representative of Seetaram (his brother having died), was solely liable to the Plaintiffs for the mesne profits and damages due to him; and that the sum awarded by the Principal Sudder Ameen ought to be increased by the mesne profits for the years 1247, 1248, and 1249. Their decree seems to have proceeded on the ground that Seetaram and his estate were primarily liable to the mortgagor for the nondelivery of the possession when it ought to have been redelivered; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to Baijnauth, Bishun Dayal, Sheosuhai, and others.

The Appellant applied for and obtained a review of this decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by Baijnauth and Bishun Dayal; that he was improperly charged with the profits of the five villages of which, by reason of their assignment to Sheodutt's wives and others, Seetaram was never in possession; and that he was improperly charged with a certain amount under the head of Sayer. And he again raised the question that the effect of the transfer to Sheosuhai was to determine the liability of Seetaram for the profits of any part of the estate. The majority of the Court decided against the Appellant on the last point, and in his favour on the three others; and the final decree was [466] against him for the sum of Rs. 14,865. 10a., being the amount of the profits claimed in respect of the twelve villages of which Seetaram was unquestionably in possession after the dissolution of the so-called partnership between him and Baijnauth and Bishun Dayal. This final decree was dated the 1st of March, 1846. The Appellant satisfied this judgment by payments into the Court to the amount of Rs. 26,211. 12a. 9p.; and these moneys were afterwards paid out through the Mookhtar of Sheodutt Singh, and are those or some

of those which in the third clause of the Ikrarnamah are alleged to have found their way into the hands of Mohun Lall.

The Appellant, having thus satisfied this decree, instituted in the year 1847 a suit against Sheodutt Singh. His claim was founded on the wrong done to Setaram by reason of his not getting possession of the five villages assigned to the wives of Sheodutt Singh, and was for the profits of those villages during the ten years of the mortgage lease. The gross amount claimed was Rs. 27,129. 6a. 6p. principal, and an equal sum for interest. The proceedings in this suit are not amongst the documents in the Appendix, and for the facts we are referred to the short report of the case in the fourth volume of the Sudder decisions for the North-Western Provinces (1849), p. 60.

From that, it appears that the Principal Sudder Ameen, on the 31st of December, 1847, decreed in favour of the Appellant upon the ground, certainly erroneous, that he had been made to pay the profits of these villages; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit: treating [467] the rest of the claim as barred by the Regulation of Limitation. The Sudder Court on appeal reversed this decree, and by its decree of the 26th of March, 1849, dismissed the Appellant's suit altogether. The reasons for the judgment are not very clearly expressed; but the Court seems to have been of opinion, that if Seetaram had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease; and that at all events his representative (the Appellant) could not then maintain that action. The Appellant obtained leave to appeal to Her Majesty in Council against this decree: and his appeal was pending in 1850 when the Ikrarnamah was signed.

In the meantime, and in 1848, Sheodutt Singh had brought his suit against the Appellant for the profits of the Talook during the years of the farming lease which were not covered by the former suit, and had obtained a judgment for the sum of Rs. 7480. 4a. 9p., which is the subject of the fourth clause of the Ikrarnamah. He had also commenced a third suit against the Appellant in the name of his son, the Respondent, in respect of property derived by the Respondent from his mother. That suit was undecided on the 3rd of July, 1849, when Sheodutt Singh died.

Hence at the date of the Ikrarnamah the position of the Appellant and the Respondent's guardian with reference to the antecedent litigation was this. The Appellant had been decreed to pay and had paid Rs. 26,211. 12a. 9p., in respect of the final decree of 1816. By the decree of 1848 he had been found liable to pay, but had not paid, Rs. 7480. 4a. 9p., with (probably) interest and costs. Another suit was pending against him, but had not been decided. On [468] the other hand, he had brought a suit to enforce a claim for upwards of Rs. 50,000 against the estate of Sheodutt Singh. But this claim had been only partially decreed in his favour by the Zillah Court, had been wholly dismissed by the Sudder Court, and was the subject of an appeal to England.

This being the position of the parties, what were the provisions of the Ikrarnamah which the guardian was induced to sign? The first clause, after stating that the Appellant had been unjustly made to suffer the losses which he had sustained, by reason of Sheodutt Singh's first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the appeal in his own suit, made the estate liable to pay him Rs. 27,000, without interest. This clause was obviously against the Minor's interest, in so far as it reopened the questions closed by the final decree of the 1st of March, 1846: admitted the injustice of the claim on which it was founded: and gave compensation to the Appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending Rs. 27,000 to avert that danger from the estate. This is the point which has been most laboured at the Bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned Counsel for the Appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis* the Defendant had not been in possession. They were

further obliged to admit that under Reg. XXXIV. of 1803, the interest [469] of the holder of a usufructuary mortgage in the property would cease on the liquidation of the usufruct of the principal and interest of his debt; and consequently that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the nondelivery of such possession, something still remained due on the mortgage.

Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by the Appellant; since in the first suit of Sheodutt Singh against him it had been alleged and proved as a fact, that the mortgage debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that by reason of Seetaram's assignment to Sheosulhai he had no interest whatever in the mortgage. But assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that if the appeal had come here, this Committee would have taken the unprecedented course, suggested by Mr. Pontifex, of reversing a decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the appeal occasioned no such danger to the Minor's estate; and that there are no grounds for saying that the stipulations of the first clause, so favourable to the Appellant, were for the benefit of the Minor, or could have been reasonably supposed to be so.

[470] The third clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation in order to recover back from Mohun Lall sums for which he would necessarily have to account in the general account then open, and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the Appellant moneys which, if recovered, would belong to the Minor's estate. The latter objection affects also the seventh clause.

There is a conflict of evidence concerning the alleged payment of the sum of Rs. 7480. 1a. 9p. mentioned in the fourth clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the Gomastah of the Appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the Appellant's Books. On the other hand, it is remarkable that the Appellant, though examined as a witness on other points, did not depose to this payment; and the circumstance that the claim in respect of which this sum had been decreed was of precisely the same character with those which the first clause of the document had pronounced to be unjust tends to justify the conclusion of the Courts below, that this clause was under colour of an admission of a payment that was never made,—the release of a judgment debt to the prejudice of a Minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the [471] Ikrar; but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The fifth clause seems to imply the abandonment of the suit pending at the date of Sheodutt Singh's death. It was, therefore, also to the prejudice of the estate.

If the above-stated view of the particular clauses of the Ikrar be correct, the only ground on which the instrument can be supported is, that the transaction, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the Appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this appeal to say that, in their Lordships' judgment, the Appellant has wholly failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts

below were warranted in imputing the character of fraudulent contrivance to this transaction.

The negotiation out of which it sprang was one between a Purdah woman acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burdens her ward's property without consideration, except the merely colourable one of the abandonment of the appeal, and [472] the promise of future advances for the purposes of litigation, of which a portion, at least, was neither necessary nor prudent: of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any) upon her ignorance or her fears she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the Appellant, the transaction was in either case a fraud upon the Respondent.

It has, however, been strongly urged that this finding of the invalidity of the Ikrar is not fatal to the title of the Appellant as purchaser at the execution sale. It has been contended that his rights are identical with those which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the Rs. 26,987 advanced to save the property from sale at the suit of Mohun Lall; and that the rights of the Respondent against the Appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favour of this conclusion was, that the Respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of Mohun Lall.

As to the latter argument, it seems sufficient to [473] observe that we have to deal with the rights of the parties in the events that have happened, not in those that might have happened; that the salvation of the property by other means from the sale at Mohun Lall's suit was not absolutely impossible; and that, in any case, an execution for Rs. 26,987 is less formidable than one for upwards of Rs. 70,000. Again, it is to be observed that if the Respondent has been wronged by the sale of his property at the suit of the Appellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those Provinces, that the policy of allowing it to be taken in execution and sold under judicial sales has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property when sold under an execution, rarely, if ever, realizes its full value. It follows, therefore, that to restore the property to the Respondent on the terms of paying to the Appellant what may be justly due to him is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which is stated to have been decided in 1847 by two out of three of the then Judges of the Sudder Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud [474] which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the Ikrar. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships,

therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the Respondent. In considering on what terms this should be done, their Lordships concur with the Sudder Court in thinking that the only principal sum for which the Appellant was entitled to receive credit was the Rs. 26,987. That he had no title to the Rs. 27,000 follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the Rs. 1354. That sum had been advanced for costs for the litigation in which he involved the guardian under the 3rd clause of the Ikrar. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and cost of an infant's estate.

[475] The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the Rs. 26,987. The Attorney-General has insisted that it was a favour to the Appellant, in the circumstances, to give him any interest at all on that sum; that the rate was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side, it has been argued that the rate ought to be twelve per cent., such being the current rate of interest, and that which the judgment debt of Mohun Lall would naturally have carried. The contention below on the hearing of the application for a review was, that the rate should be six per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all—and they think the Court below was right in allowing it—the rate should be fixed according to some principle, not according to the arbitrary discretion of the Judges. On the other hand, the Appellant has no right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favourable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the Ikrar. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly recommend to Her Majesty that the decree of the Sudder Court be modified by the allowance of interest on the [476] Rs. 26,987, at the rate of six per cent. instead of that of five per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the Respondents of the costs of this appeal.

[See *Bahoo Lekraj Roy v. Bahoo Mahtab Chund*, 1871, 14 Moo. Ind. App. 396.]

TARAKANT BANNERJEE.—*Appellant*; PUDDOMONEY DOSSEE, RASMONEY DOSSEE, and others,—*Respondents* * [Feb. 12, 1866]

On Appeal from the Sudder Dewanny Adawlut of Bengal.

In 1814 a litigation commenced between a Zemindar and his tenants, called the Moonshees, by reason of the Zemindar dispossessing them of lands held under a jote tenure. A decree was made in favour of the Moonshees, when the Zemindar assessed the jote lands at a rent. The rent fell into arrear, and under a decree the jote lands were, in 1836, sold in satisfaction of arrears and purchased by J. The decree purchaser was put in possession in 1839. There

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

was another suit pending between the Moonshees and their mortgagee, in which a question arose whether these jote lands were included in the mortgage, which was decided in favour of the Mortgagee in 1841, but J., the then jote tenant, was no party to that suit, and continued in possession of his jote lands. Disputes arose between the mortgagee and J., the jote tenant, and by an Order of the Sudder Court made in 1845, the jote lands were ordered to be put in possession of the mortgagee. In 1856 a suit was brought by J.'s representative to set aside that Order and to recover possession of the jote lands. The Courts in India held that there had been adverse possession from 1841, and that the suit was barred by Ben. Reg., III. of 1793, sec. 14. Upon appeal held: that as J., the jote tenant, was not a party to the suit, under which the decree was made in 1841, the decree was not binding on him or those deriving title through him, and that the suit was not barred by effluxion of time by the Regulation, as the cause of action only arose in 1845.

It is the practice of the Courts in India not to give possession under a judicial sale by removing one who is in possession under an apparent *bona fide* title. As a debtor can only assert his title to possession by a suit, so a decree-holder who derives his title through him must assert his title by a regular suit [10 Moo. Ind. App. 483].

The practice of including in the transcript record prepared and printed in India, under the Order in Council, 13th June, 1853, voluminous accounts and receipts, unnecessary to the question at issue, condemned [10 Moo. Ind. App. 489].

Directions given in taxing costs to disallow all expenses occasioned by the insertion in the transcript of such unnecessary matters.

This appeal was brought from a decree of the late Sudder Dewanny Court of Bengal, affirming a decision of the principal Sudder Ameen of the Zillah [477] Court at Dacca, which dismissed the Appellant's suit, on the ground that the cause of action had arisen twelve years before the suit was brought, and, therefore, barred by sec. 14 of the Ben. Reg. of Limitation of Suits, III. of 1793.

That suit was brought on the 28th of August, 1856, to recover possession of 1384 beegahs and 14 cottahs of land, described as jote (tenants' land) set out by fixed boundary, situate in Mouzahs, Narainpoor, Khoondkarkandee, Gooneerkandee, and Kuddumpoor; together with a dwelling-house and mesne profits; and also to annul or reverse a summary Order of the Sudder Dewanny Adawlut, made in a miscellaneous, or summary suit, bearing date the 18th of November, 1845.

The decree of the Sudder Dewanny Adawlut, appealed from proceeded on the assumption first, that the possession of the lands and house in question by one of the Respondents, Rasmoney Dossee, the principal Defendant, was an adverse possession for a period of more than twelve years before the suit was brought; and that, therefore, the same was barred by effluxion of time under Ben. Reg., III. of 1793, [478] sec. 14; and secondly, that the fraud and collusion which had been pleaded and charged by the Appellant against her and the other Defendants, had not been proved, so as to entitle the Appellant to have a period of four years deducted from the twelve years in calculating the period of limitation.

The decision of the Principal Sudder Ameen proceeded upon the construction of the same section of the Regulations of Limitations of Suits, and dismissed the Appellant's suit; but that Judge assumed an adverse possession from a still earlier date than that fixed on by the Sudder Dewanny Adawlut, and in that respect the decree was set aside and reversed by the appellate Court.

The question raised in the suit and on appeal was confined to this point, whether the 1384 beegahs and 14 cottahs were, as contended for by the Appellant, included in and belonged to the jote lands, of which the jote jumma (tenant rent) had been purchased at a judicial sale on the 10th of June, 1836, by the Appellant; or whether they were, as insisted by the Defendants, included in and belonged to a Muskoree Talook called Ooturnarainpoor, paying revenue direct to Government, purchased by one Rajchunder Rae, deceased, the late husband of Rasmoney Dossee, at a judicial sale under a decree made in a suit brought against Reazooddeen and others, to enforce

a Kutkubala, or deed of conditional sale, alleged to have been executed by them in favour of Rajchunder Rae.

The material facts of the case appear in the judgment of their Lordships.

As no appearance was put in for the Respondents, the appeal was heard *ex parte*.

[479] The Attorney-General (Sir R. Palmer, Q.C.), and Mr. Leith, for the Appellant. The two decrees of the Sudder Court and the Sudder Ameen, dismissing the Appellant's suit as barred by Ben. Reg. of Limitation, III. of 1793, sec. 14, were erroneous. That section prohibits the Court from hearing or determining the merits of a suit if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it. The present suit was commenced within twelve years from the true date of the cause of action, therefore, that Regulation is no bar to the suit.

It was established that, previous to that suit having been brought, two other suits had been commenced, on account of the same cause of action, and had been regularly carried on by those through whom the Appellant immediately derived title to the lands in question. Each of those suits was commenced long before the expiration of the twelve years' limitation, but even if the two other suits had not been brought, the Appellant was within the saving clause or exception in the above section, as he established that he directly preferred his claim, within the twelve years, for the matter in dispute to a Court of competent jurisdiction to try the demand. He had intervened in the suits in accordance with the prescribed forms of procedure. Upon the question of limitation, *Doorgapersaud Roy Chowdry v. Tarapersaud Roy Chowdry* (8 Moore's Ind. App. Cases, 308), *Mussumut Chundrabullee Debia v. Luckhee Debia Chowdrain* (Ante [10 Moo. Ind. App.], p. 214) and *Rajah Enayet Hossein v. Sagud Ahmed Reza* (7 Moore's Ind. App. Cases, 238) were referred to. The charge of collusion and fraud we admit cannot be sustained.

[480] The consideration of the judgment was adjourned, and now pronounced by

The Right Hon. the Lord Justice Turner (Feb. 26, 1866).—The suit of the Plaintiff was instituted on the 28th of August, 1856. It was brought to recover 1384 beegahs, and 14 cottahs of land, described as "jote," set out by fixed boundaries, and situate in certain Mouzahs or Kismuts called respectively Narainpore, Khoondkarkandee, Goonerkandee, and Kuddunipoor: and also to reverse a summary Order of the Sudder Dewanny Adawlut, bearing date the 18th of November, 1845, made in a miscellaneous or summary suit in that Court. The Zillah Court dismissed the suit of the Plaintiff on two grounds,—first, that it was barred by the law of limitation, and secondly, that the matter had been decided adversely to the Plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The Sudder Court, on appeal by the present Appellant, decided the case against him on the law of limitation only, and expressed no opinion on any other point. The decision of the Sudder Court on the law of limitation proceeded on a different ground from that on which the Lower Court had founded its decree, dating possession under the adverse title from a time later than that which the Zillah Court had fixed for its commencement. The Appellant reckoned the time of his dispossession from the 18th of November, 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The Sudder Court carried the adverse possession back to an earlier Order of the Court, bearing date the 11th of April, 1844, and counting the time [481] of adverse possession from that last date, it held the suit to be barred by effluxion of time. The Zillah Court, in their judgment, had carried the time still further back to the year 1841, considering that the Plaintiff's dispossession was effected by possession having, as the Court considered, been at that time delivered to the Plaintiff in another suit, to which we shall presently refer, by one Ramgottee Rae, the Ameen delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary, therefore, to state the nature of this litigation and the titles of the Appellant and of the principal original Respondent, Rasmoney Dossee, in order to clear the subject of possession from some confusion in which it has become involved.

The jote tenure is a dependent tenure within and part of a Zemindary, called Pergunnah, Taleehate, Ameerbad. In the month of February in the year 1814, a litigation commenced between the Zemindar and three persons named Reazooddeen Mahomed, Fysooddeen Mahomed, and Mahomed Cossim, termed the Moonshees (a description which for the sake of brevity it will be convenient to adopt). The Moonshees complained that they had been dispossessed by the Zemindar of their jote tenure, including the lands claimed in this suit: the Zemindar denied that inclusion, and claimed them as part of his Zemindary. At this time the Moonshees were possessed of a Talook called Ooturnarainpore, paying revenue direct to Government: and throughout their litigation with the Zemindar, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their jote tenure, [482] and made no claim to them as included in the Talook: proof of this inclusion in the Talook would have been a complete answer to the claim of the Zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The Moonshees succeeded in that litigation, and the decree in their suit declared the lands to be part of the jote tenure, and limited the Zemindar's claim to a title to assess them for rent. The Zemindar appealed against this decree, which was, however, affirmed, and Byrubchunder Bannerjee, an Ameen, was ordered to give possession of the lands to the Moonshees. This was done in conformity to the decree, and possession was given in the usual way by the Ameen, by taking Kabooleats from the cultivators, and by fixing bamboos to mark the boundaries. The Ameen's report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the Moonshees of this tenure so pleaded, proved and adjudged, nor of any attempt to withdraw any part of the lands from the jote tenure, on the ground of mistake or otherwise, and to ascribe them to the Talook title before the time of the judicial sale which is now about to be stated. The rent of the jote tenure fell into arrear, the Zemindar sued the Moonshees for rent, recovered in the suit, and caused the jote tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th of June, 1836, and one Juggutchunder Rae was the purchaser. The Appellant's title is derived from him under two intervening private sales, one by Juggutchunder Rae to one Ramdhone Sircar, and the other by the sons and heirs of Ramdhone Sircar to the Appellant. By this purchase, Juggutchunder Rae obtained the right, title, and [483] interest of the Moonshees in the jote tenure. He became, by force of this purchase, in the same relation to the Zemindar in which the Moonshees before stood. As against the Moonshees themselves and the Zemindar, the title of the purchaser was that which the Moonshees had had adjudged to them in their suit against the Zemindar. The possession given to the purchaser was co-extensive with that given to the Moonshees, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep this origin of the possession clearly in view.

The Moonshees appear to have disputed at that time, the title of the auction purchaser to have these lands included in his purchase; they claimed them then as included in their Talook. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bona fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court, therefore, leaves the purchaser to assert his title by regular suit. In this case, however, the Moonshees, the debtors under the decree, were themselves in possession. The decree was for rent of the jote tenure: the Zemindar caused the tenure, including these lands, to be put up to sale: the Moonshees, in claiming these lands, had pleaded this tenure, and it was adjudged in their favour by a suit which bound both them and the Zemindar. The suit for rent was against them as jote tenants, for rent due under that very tenure, and the demand included [484] the rent of these lands: consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded, and by them admitted title, and putting the decree purchaser in possession. This was done in the regular mode, by taking Kabooleats, except as to one small part, as to which, however, possession was also given, and the purchaser was thus put in

complete possession of these lands under the jote tenure. This appears from the report of the Ameen, dated the 7th of August, 1839. Unless this possession was changed at some intermediate period between the 5th of August, 1839, the date of the delivery of the possession above stated, and the 18th of November, 1845, the date of the Order of the Sudder Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the Ameen, Ramgottee, on which the Zillah Court relied. That Ameen was acting in the execution of a decree in another suit which had been pending between the Moonshees and their mortgagee of their Talook. A dispute had arisen between them of this nature: the mortgagors had mortgaged the Talook, but, as they contended, excepting these lands from it, as to which they were carrying on a litigation with the purchaser of the jote tenure. The mortgagee, on the other hand, insisted that these lands were included [485] in the mortgage. The suit was decided in favour of the mortgagee, and, as between him and the Moonshees these disputed lands were adjudged to be within the Talook; but as the jote tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that decree, and it was under this proceeding the Zillah Court considered that the Appellant was dispossessed, and the possession given to the mortgagee in the year 1841. The proceedings and the decree, however, are not in evidence in this appeal. In the execution of that decree a conflict arose between the purchaser of the jote tenure and the mortgagee, as decree-holder, each party claiming the same lands, but the jote tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the jote tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the jote tenant could not be changed merely in proceedings to execute a decree. This appears to have been entirely overlooked, both by the Ameen Ramgottee Rae, and by the Zillah Court in the consideration of his acts. It appears that the Ameen did, in effect, attempt to disturb the possession of the jote tenant, and that he took fresh Kaboo-leats, from the cultivators who had before attorned to the jote tenant under the direction of the Court. The Court, however, on the complaint of the jote tenant, set that matter right, and directed, in substance, the cancellation of the new Kaboo-leats. The legal effect of this Order of the Court was, to set up the original Kaboo-leats, and to restore or confirm the jote tenant's possession. Now, there is not only no evidence of [486] any subsequent change of possession before the decree of the Sudder Court of the 18th of November, 1845, pronounced by Mr. Reid, but the very language of that judgment conflicts with such a supposition, for by that judgment, which was adverse to the jote tenant, the possession was ordered to be restored by him to the Talookdars. It is plain that there is no error in the language of the judgment; it is language perfectly consistent with the Order of the Court directing the second set of Kaboo-leats to be brought in, and it is also consistent with the course of practice in executing decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the Appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The act of the Court which directs the cultivators to attorn is, of course, not designed to expose them to risk of forfeiture: their simple obedience to the act of the Court, in pursuance of the mode in which it executes a decree, could not be attended with that consequence; and when the Court corrected its error, it meant to restore, and did in law restore, the old possession. As their Lordships think that the possession was not, in fact, disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the decree.

The other point on which the Zillah Court decided against the Appellant was, that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction sale of the jote tenure, sold to one

Ramdhone Sircar. [487] Before this sale, he had instituted proceedings against the decree-holders under the title of the Talook. Ramdhone Sircar purchased, therefore, *Pendente lite*. He applied to be substituted in the suit, in lieu of Juggutchunder Rae, which application was granted. This litigation terminated in the Zillah Court in favour of Ramdhone Sircar, the jote tenant. From that decision Rasmoney Dossee appealed. On her appeal the Sudder Court reversed that decision. This was the decree of Mr. Reid of the 18th of November, 1845, which this suit seeks to set aside.

On this, Ramdhone Sircar instituted a regular suit against Rasmoney Dossee and others, claiming, in substance, the same relief which is sought by this suit. Pending that suit, Ramdhone Sircar died, and his three sons, Mohemachunder Sircar, Anundchunder Sircar, and Greeschunder Sircar, were substituted in his place on the record. Pending this litigation, the present Appellant purchased the jote tenure from the sons of Ramdhone Sircar. He applied in his turn to be substituted on the record and to conduct the suit. One of the sons, however denied the purchase, and the Court refused the application. In a few days afterwards, the cause was decreed for the Defendants. It is alleged that the actual Plaintiffs conducted their case negligently, if not collusively. On the argument before their Lordships, the Attorney-General abandoned the case of fraud, but contended that the Plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene, that he could not reasonably be [488] expected in the interval either to appeal against the order refusing him leave to intervene, or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the Defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

The cause has not been decided in either Court on the principal point—whether the lands formed part of the jote tenure or of the Talook. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Courts below, their Lordships find themselves unable to dispose of the suit; and as they do not agree in the opinion either of the Sudder or of the Zillah Court, they will humbly recommend to Her Majesty that the decisions of both Courts should be reversed, and that the High Court at Calcutta should [489] remand the cause for hearing in the Zillah Court on the issues on the merits other than the issues already decided in this Court on appeal.

Their Lordships will further recommend that the costs of the appeal be paid to the Appellant, and that it be referred to the Registrar of this Court to tax the costs of the appeal, with directions to disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from India of matters which he shall consider to have been improperly introduced therein, and that any taxation which may be had in India be regulated by the course which the Registrar of this Court may adopt.

Their Lordships have observed with regret the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in India, and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase; and their Lordships trust that the attention of the Courts in India from

which appeals lie to Her Majesty, will be directed to the subject, with a view to provide a remedy for a very serious evil (a).

[490] RAMPERSHAD TEWARRY,—*Appellant*: SHEOCHURN DOSS, or LOLL TEWARRY, MUSSUMAT THOOKRA and Others,—*Respondents*. And in a Cross Appeal by SHEOCHURN DOSS,—*Appellant*: RAMPERSHAD TEWARRY,—*Respondent*. And in another Cross Appeal by MUSSUMAT THOOKRA,—*Appellant*: RAMPERSHAD TEWARRY,—*Respondent* * [Feb. 8, 9, 10, 1866].

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

D., one of five brothers, constituting an undivided Hindoo family, but having no ancestral estate, acquired personal property with which, with the aid of his brothers, he established and carried on a banking business at five different places. Such circumstances, under the general principles of Hindoo law, held to constitute a joint family property in which the brothers were entitled to share [10 Moo. Ind. App. 505-507].

The burthen of proof that such was only an ordinary partnership, and not a jointly acquired family property, lies on the party claiming it to have been separately acquired.

Ordinary co-partnership property is not subject to the rule of Hindoo Law, which excludes a widow from the succession at her husband's death to a share of the joint property of an undivided family.

The Sudder Court having established that the family was joint and the property undivided, awarded a gross sum out of the estate, calculated to make the widow of one of the brothers a monthly payment for maintenance. Held that although a Court of Equity in this country would have set apart a certain sum to a separate account during the lifetime of the widow, yet from the want of machinery in the Native Courts in India, such practise could not be carried out [10 Moo. Ind. App. 509].

Where a Defendant refused to render accounts, and there was evidence of spoliation of the banking books, the Court charged him with the principal sum for which he was accountable, with interest at 12 per cent per mensem in lieu of the profits he failed to account for.

These appeals arose out of a suit instituted by the Appellant, Rampershad Tewarry, who was one of five brothers, against his brothers' representatives in [491] the Court of the Principal Sudder Ameen, which suit was afterwards transferred to the Civil Court at Agra, to enforce his claim as a member of a joint undivided Hindoo family, to a fourth share of the joint estate in five several Banking firms respectively established in the Agra, Jhoosee, Ghazeepore, Benares and Mirzapore; also to set aside a deed of partition and a deed of gift whereby the Respondent, Mussumat Thookra, purported to give the share awarded to her under a deed of partition to one of her husband's brothers' sons named Sheochurn Doss.

Sheodut Tewarry, the ancestor of the parties, was a Priest, and had five sons, named Gunga Pershad, Moona Loll, Radakishen, Deenanath, and the Appellant, Rampershad. Sheodut had no ancestral estate. Deenanath, from capital acquired by him, established the five Banking firms, taking his four brothers into the business, and accumulated a large fortune. The family continued undivided, but in 1848 the Appellant, Rampershad, separated from the joint firms and conducted the Mirzapore Banking branch alone. In 1850, Deenanath died, leaving a childless widow,

(a) The transcript record (which was printed in India, under the order in Council of the 13th June, 1853, sec. III.), contained upwards of 1000 pages, a great portion of which consisted of accounts and receipts.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

the Respondent, Mussumat Thookra. By a deed of partition, dated the [492] 23rd of February, 1825, the estate of Deenanath was divided into four parts and apportioned between the brothers, Gunga Pershad, Moona Loll and Radakishen, or their representatives, and the Respondent, Mussumat Thookra, who was allowed her husband's share to the exclusion of the Appellant, Rampershad, on the ground of his separation from the other members of the family in the year 1848. This share was afterwards given by a deed of gift dated the 7th of September, 1855, by the Respondent, Mussumat Thookra, in favour of Sheochurn Doss.

The nature of the pleadings and effect of the evidence is sufficiently set forth in the judgment. The Appellant, it appeared, had refused to account for the receipts and disbursements of the Mirzapore branch of the Banking firm he was in possession of, and, as alleged, had tampered with and altered the Books of that firm.

The case of the Appellant was, first, that the Banking business had been established and the capital thereof acquired, not by the five brothers, but by their father, Sheodut Tewarry, or from his ancestral estate, and that by the Hindoo law, on the death of Deenanath, without issue, the surviving brothers, or their representatives, succeeded to his share, to the exclusion of his widow, who had no interest in his estate beyond maintenance; and secondly, that a deed of partition, in 1843, relied upon by the Respondents was fraudulent. On the other hand the Respondent, Mussumat Thookra, the widow of Deenanath, contended that her husband was the founder of the business, that he had associated his brothers only as ordinary partners, that the firm had not been established with ancestral capital, there having been [493] in fact none, and, therefore, that she, as a childless widow, was entitled to her husband's full share of the profits in the business. The case of the other Respondents was, that in the year 1852, a division of the estate of Deenanath had been made between his widow and the representatives of Deenanath's brothers, which excluded the Appellant, Rampershad, he having separated from the Banking firm four years before Deenanath's death. The Sudder Court at Agra, consisting of Messrs. R. B. Morgan and M. R. Gubbins, two of the Judges of that Court, by a decree, dated the 9th of June, 1860, held that Sheodut, having died without leaving any capital, and that there was no ancestral estate, the whole capital having been acquired solely by Deenanath, who had associated the names of his brothers with his own in the several firms from natural affection; and that being a joint family, the widow was entitled only to maintenance, which was fixed by the Court at Rs. 150 per mensem, and not to any share of her husband's estate, which the Court held belonged to the brothers equally; and it was ordered that the Respondent, Sheochurn Doss, should pay only a portion of the claim made, by reason of the Appellant having received a considerable sum more than he was entitled when he separated from his brothers, for which the Court charged him with twelve per cent interest. The other Respondents were exonerated from the Appellant's claim.

From this decree Rampershad brought the present appeal, and Sheochurn Doss and Mussumat Thookra cross appeals. These appeals were, upon petition, ordered by the Judicial Committee to be consolidated and heard together.

[494] The consolidated appeals were argued by Mr. Rolt, (Q.C.), and Mr. Leith, for Rampershad Tewarry. The Attorney-General (Sir R. Palmer, Q.C.), and Mr. Cave, for Sheochurn Doss. Mr. Piffard, for Mussumat Thookra, and Mr. J. Anderson, Q.C., and Mr. W. Downing Bruce, for the Respondents, Mussumat Sudao, Buldeo Doss, Bhyronpershad, and Mussumat Bilassa.

The points mainly insisted upon by the Appellant in support of the appeal are stated and commented upon in the judgment.

As to the presumption of Hindoo law, with respect to the five brothers constituting in the Banking business an undivided Hindoo family, or merely a copartnership, there being no ancestral funds and the brothers living apart at the different Banking firms and also the effect of the separation in the year 1848. The *Mitacshara* (by Colbrooke), ch. II. sec. IV. pp. 346, 8, *Elberling's Treatise on Inheritance, Gift, etc.*, by Mahomedan and Hindoo Law, p. 79, *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543, 610), were referred to.

On the assumption of the Banking firms being only a copartnership; then as to the right of the widow to one-fourth share, *Dayabhaga*, ch. XI. sec. I. p. 158, *W. H. Macnaghten's Princ. of "Hindu Law,"* Vol. I. p. 47, or in the alternative of the

family being united, her title to maintenance only. *W. H. Macnaghten's Princ. of "Hindu law,"* Vol. I. p. 19, and *ib.* Vol. II. p. 21, were cited; also that the *onus probandi* [495] that her husband's property was separately acquired, *Prankishen Paul Chowdry v. Mothooramohun Paul Chowdry* (*ante* [10 Moo. Ind. App.], p. 403); *Dhurm Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229).

And, as to the refusal to give in the accounts, and the alleged spoliation of the Books of the Mirzapore firm by the Appellant, Rampershad's, it was submitted that the charge made by the Sudder Court in taking the accounts of the assets of the family, in deduction of that Appellant's claim, at the rate of twelve per cent. for the principal sum he was accountable, was, in the circumstances, correct, referring to *Gray v. Haig* (20 Beav. 219); *Wardour v. Berisford* (1 Vern. 452).

The consideration of their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Sir James W. Colvile (March 17, 1866).—The suit out of which these appeals have arisen was brought by Rampershad Tewarry to enforce his claims against the other members of a joint and undivided Hindoo family. The common ancestor of the Plaintiff and the Defendants was one Sheodut Tewarry, who lived at Jhoosee, a village on the Ganges, opposite to Allahabad, and exercised there the functions of a Purohit, or Priest. He died in 1802, and is not shown to have left any property except the house, such as it was, in which he lived, and the Hugg Purohittai, or Priests' fees, the right to which seems to have been hereditary. He left five sons, Gungapershad, Moona Loll, Radakishen, Deenanath, and the Plaintiff, Rampershad.

Radakishen died in 1840, leaving three sons, Buldeo [496] Doss, Bhyronpershad, and Seetulpershad, all of whom were Defendants below; but Seetulpershad has since died, leaving three infant sons, who are represented on the record by Mussumat Bailassa, their mother and guardian.

Gungapershad died in 1846, leaving three sons, Sheochurn Doss or Loll Tewarry, the principal Defendant below and Respondent here; Bheekum Singh, a Defendant below, who has since died without issue; and Bhugwan Doss.

Deenanath died in 1850 or 1851, without issue, but leaving a widow, Mussumat Thookra, one of the Respondents and a cross Appellant.

Moona Loll, who survived Deenanath, is dead; but there is some confusion as to the date of his death. From the partition deed of the 23rd of February, 1852, which is afterwards referred to, we should infer that he was dead at that date. From other parts of the record, it would appear that he was alive in April, 1857, and died between that month and June, 1858. Whenever he died, he left an only son, Sheopershad, a Defendant below, who has since died, leaving two sons, the Respondents, Soorujpershad and Ramnath.

The evidence concerning the precise history of the family after the death of Sheodut is conflicting and will be afterwards considered. It is, however, undisputed that for a considerable period between the years 1818 and 1848, the five brothers or their children carried on a flourishing Banking business, on some terms of partnership or joint interest, under five different firms. Of these, one was established at Jhoosee, the ancestral seat of the family, under the style of "Moona Loll and Gungapershad;" another at Agra, under the style of "Radhakishen and Deenanath;" a third at Benares, under the style of "Gungapershad [497] and Rampershad;" a fourth at Ghazepoor, under the style of "Rampershad and Sheochurn Doss;" and the fifth at Mirzapoor, also under the style of "Rampershad and Sheochurn Doss."

The Mirzapoor firm was under the management of the Plaintiff, Rampershad; and it is alleged by the Defendants, though not admitted by the Plaintiff, that about the year 1848 he separated himself from the rest of the family, appropriating to himself the assets and property of that firm. That about that time he was on bad terms with the others members of the family, and ceased to render the accounts of the Mirzapoor to the Jhoosee firm according to the course of business theretofore subsisting, seems to be pretty certain; but there is no proof of a formal separation or dissolution of partnership at that date.

On the 23rd of February, 1852, the adult members of the family other than Rampershad, viz., Sheopershad, as representing Moona Loll; Sheochurn, for himself and as guardian of his infant brothers, as representing Gungapershad; Baldeo Doss, for himself and as guardian of his infant brothers as representing Rada-kishen; and Mussumat Thookra, as representing her husband Deenanath, executed a deed of partition, which stated that the five brothers had been associated in partnership in trade and banking since 1874 Sumbut (corresponding with A.D. 1818); that the five before-mentioned Banking firms had been established; that in 1904 Sumbut (1848) Rampershad, who was at Mirzapoor, having taken as his share Rs. 1,16,197. 10a. in cash and houses situate at Mirzapoor, had separated himself and ceased rendering accounts and correspondence in regard to the property in his possession; and that [498] similarly, he having no concern with the firms of Agra, Jhosee, Ghazee-poor, and Benares, the undersigned being the partners of those firms, with a view to obviate future disputes and contests, had examined the accounts of the firms and the property appertaining thereto, and found in cash Rs. 503,118. 8a., which they had amicably divided into four equal shares, each share amounting to Rs. 125,996. 4a., and had separated themselves. The deed then provided for the future division of some outstandings, which were to be held jointly until realization; and for the division of certain boats, and the warehouses and shops there mentioned, but stated that the houses situated at Jhosee were to remain in the joint possession of the four parties. The effect of this instrument was to exclude Rampershad from any participation in the property which was the subject of the partition, and to give a fourth share to Mussumat Thookra as the widow and representative of Deenanath. This fourth share she afterwards, by an instrument dated the 7th of September, 1855, assigned to Sheochurn Doss.

The suit was commenced on the 4th of January, 1856, in the Court of the Principal Sudder Ameen, whence it was transferred to the Civil Court of Agra. The plaint claimed a one-fourth share of the property therein specified, giving credit for Rs. 1,16,197. 10a., the assets of the firm of Mirzapoor in Plaintiff's possession; and to set aside the deed of partition of the 23rd of February, 1852, and the deed of gift of the 7th of September, 1855.

It may be necessary to examine the pleadings more particularly hereafter, for the purpose of considering the weight of certain arguments which were addressed [499] to their Lordships on the hearing of these appeals. At present it is sufficient to say, that the material questions in the cause were, whether the property of which a share was claimed, and in particular the property of the Banking firms, was the joint and undivided property of the family; and consequently, whether, by the Hindoo law, as it obtains in the North-Western Provinces, the Defendant, Mussumat Thookra, was incapable of taking a share of it; and further, whether, by his conduct in 1848, the Plaintiff had effectually separated himself from the rest of the family, and had conclusively bound himself to take the assets of the Mirzapoor firm in full satisfaction of his share and interest in the joint concerns.

The Civil Judge of Agra, by an Order of the 7th of March, 1857, referred these questions, as well as various questions of account, together with the partnership Books, to two native Assessors or Commissioners; and upon their report of the 15th of March, as well as upon his own view of the evidence taken before him, he, by his decree of the 28th of March, 1857, determined both the before-mentioned questions in favour of the Plaintiff, and awarded to him, in full satisfaction of his claims up to the date of the decree, the sum of Rs. 1,37,508. 5a., with subsequent interest to the date of realization, and costs. For this amount all the Defendants were made liable.

Against this decree there were four appeals to the Sudder Court. Two of them, viz., those of Mussumat Thookra and Sheochurn Doss, went to the merits of the suit. Of the other two, one was presented by Sheopershad as representing the interest of Moona Loll, and by the guardian of Blugwan Doss, the infant son of Gungapershad; and the other was presented by the sons and representatives of Rada-[500]-kishen. Both of them were confined to the point that the Appellants were improperly made liable for any part of the sum decreed to the Plaintiff; since, upon his mode of taking the accounts, they would be entitled to more than they had received under the partition deed of the 23rd of February, 1852.

The Sudder Court dealt with the merits of the case upon the appeal of Sheochurn Doss. Before doing this, however, and on reading the papers in all the appeals, they made an Order on the 9th of May, 1860, whereby they referred the case to two native Commissioners (being the same persons who had acted in that capacity in the Court below) for inquiry and report upon three new points. The first was, what were the profits of the Mirzapoor firm during the four years between 1904 Sumbut and 1908 Sumbut, *i.e.*, between 1848 and 1852. The second involved certain disputed items in the accounts. The third was the amount of maintenance to be allowed to Mussumat Thookra, should it be ultimately determined that she was not entitled to a share of the property in dispute.

On the 21st of May, 1860, the Commissioners reported that the account of profits rendered by the Plaintiff under the first head of inquiry was incorrect, and begged that either the Plaintiff's Pleaders should be required to furnish a proper account within a given time, or that they (the Commissioners) should be allowed to submit a report on the two other points.

On the 22nd of May the Court gave the Plaintiff one week within which he was to file correct accounts. On the 29th of May the Commissioners made their report, which was to the effect that for want of proper accounts furnished by the Plaintiff they were unable to report on the profits realized by the Mirzapoor [501] firm; reporting on the disputed items of account; and finding that Rs. 125 per mensem was a proper sum to be allowed for the maintenance of Mussumat Thookra. On the 4th of June the Plaintiff presented a petition to the Court objecting to this report. On the 5th of June the Court, after hearing the verbal assertions of the Commissioners and the Pleaders of the parties, passed an Order that the case should be adjourned, the Commissioners dismissed, and the petition of the Plaintiff objecting to the report placed with the record.

By its decree of the 9th of June, 1860, the Court disposed of the appeal of Sheochurn Doss. They concurred with the Court below in holding that the property in dispute was joint and undivided; that Mussumat Thookra, as the widow of one of the co-sharers, was not entitled to take a share in it; and that the Plaintiff had not forfeited his rights as a co-sharer by separating himself from the rest of the family in 1848. They held, however, that Mussumat Thookra was entitled to maintenance according to the scale proposed by the Commissioners, and that Rs. 15,000 must be set aside out of the divisible assets to provide for it. They further reduced the divisible assets by the amount of certain bad and irrecoverable debts and other items pursuant to the finding of the Commissioners. And inasmuch as the Plaintiff had failed to account for the profits of the Mirzapoor firm between the years 1848 and 1852, they charged him with interest on the principal sum for which he was accountable at 12 per cent. The amount was Rs. 55,280. The effect of this decree was to reduce the sum presently payable to the Plaintiff to Rs. 17,478. 12a. 9p., for which, having regard to the shares taken by him and by the other [502] parties under the deeds of 1852 and 1855, they held Sheochurn Doss to be solely liable.

Pro forma Orders giving effect to this decree were passed on the same day upon the other three appeals.

The Plaintiff has appealed against these decrees to Her Majesty in Council. He submits that they should be affirmed in so far as they affirm the decree of the Zillah Court, and ought to be set aside, reversed, or varied, in so far as they vary or differ from that decree. The particular relief which he has claimed at the bar will be more conveniently noticed thereafter.

Sheochurn Doss has presented a cross appeal against the decrees below. He insists that they are unjust and erroneous in so far as they affirm the decree of the Zillah Court, and that the Plaintiff's suit ought to have been dismissed with costs. He further submits that, if the decree of the Sudder Court against him was substantially right in other respects, it was erroneous in making him solely responsible for the sum decreed to the Plaintiff.

Mussumat Thookra has also presented a cross appeal. Her appeal is not distinguishable from that of Sheochurn Doss, except that she does not quarrel with that part of the decree which makes him solely responsible for the amount (if any) payable to the Plaintiff; and on the other hand insists that if the decree impeached

was substantially right, positive directions should have been given and provision made for the payment of the maintenance to which she was found entitled.

In dealing with these appeals, we shall first consider whether both the Courts below were right in holding that the property in question was the joint and undivided property of the five brothers; and [503] in deducing as a consequence from that finding, that the Plaintiff, notwithstanding his acts and conduct in 1848, was in 1852, the date up to which the accounts have been taken, entitled to one-fourth share of it.

The case of the Defendants and cross Appellants upon the first of the points is that the partnership property was in no degree acquired by the use of ancestral property; that Deenanath left his native village to seek his fortunes some years after his father's death with nothing but his brass lotah, or drinking vessel; that he took service with one Peeroo Mull, a native Banker at Agra; that whilst in that service he realized a small capital by means of some private adventures; that with the capital so acquired and its accretions he established first the Agra and afterwards the other firms; that he associated with himself, from motives of family affection, first Radhakishen and Moona Loll, and afterwards the other two brothers; employing them in the business rather as dependants than as partners on an equal footing with himself; and that the property of the different firms, if not wholly the separate and self-acquired property of Deenanath, was nevertheless partnership property, to be dealt with according to the rules which regulate mercantile partnerships between strangers and was not subject to the rule of Hindoo law which excludes a widow from the succession to her husband's share of the joint property of an undivided family. If this contention be well founded, the Plaintiff was entitled to at most a fifth share in the partnership assets, and when he brought his suit had received even more than his due in the assets of the Mirzapoor firm.

[504] Before dealing with the evidence upon the question now under consideration, it may be well to notice the arguments of the Attorney-General to the effect that the pleadings of the Plaintiff are in fact inconsistent with the case on which he now relies, and tend to confirm that of the Defendants. To show that the Plaintiff did not sue as one of the co-sharers of a joint and undivided family, but as an ordinary partner, he relied on the phrase "The claim is brought in virtue of right of copartnership" at the commencement of the plaint, and the use of the word "partnership" in other parts of the pleadings; and also on the circumstance that the Plaintiff claimed only one-fourth part of Deenanath's share, whereas the Hindoo law of succession, which he was supposed to invoke, would have given him one-half of that share; inasmuch as by that law nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer.

Assuming the latter proposition to be correct, which their Lordships consider it to be, it may show only that the Plaintiff has to some extent mistaken his rights, and claimed less than he might have claimed. The presumption arising from this misstatement of his rights as co-sharer in an undivided Hindoo estate, is by no means conclusive. It may be outweighed by the proof that the property was in part joint, which the conduct of the family, and the mode in which they kept their accounts, afford. And it may be observed that the claim made is also inconsistent with the hypothesis of a partnership governed by the rules which regulate the rights of mercantile partners as such *inter se*. Nor is it possible to read the whole plaint without seeing that the ground on which the claim to any portion of [505] Deenanath's share rests is the rule of law which excludes the widow from the succession to a share in a joint and undivided Hindoo estate, and limits her rights to maintenance. Upon the argument founded on the word "copartnership," their Lordships have to observe that the pleadings before them have been translated from those in the native language; that the word is ambiguous; that the phrase "is brought in virtue of right of copartnership" covers the whole claim, which includes the Huqq Purohittai, admitted to be ancestral property and no part of the assets of the mercantile firms. Looking to the whole scope of the pleadings, their Lordships have no doubt that the Plaintiff's claim was really based upon his alleged rights as a co-sharer, in a joint and undivided Hindoo estate, and that, as such, it was sufficiently well pleaded.

Upon the facts it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds

employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family, and there was a nucleus of ancestral property. It may be further admitted that Deenanath laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate, property that which he acquired at Agra. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners, and that thenceforward they carried on business together, each contributing by his exertions to the increase of the common stock. The partition deed of the 23rd of February, 1852, itself [506] negatives the hypothesis that he employed his brothers as servants or dependants, since under that instrument they share as partners and take an equal share with his widow and assumed representative. There is nothing *prima facie* improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions would, according to the general principle of Hindoo law, be the joint property of the family whilst undivided, and be partible as such on a partition. There is no proof of any special contract (and the proof of such lay on the Defendants) which impressed the character of partnership as distinguished from joint or separate property, in the Hindoo sense of these terms, upon the property in question. In this state of things we have not only the judgments of the two Courts below in favour of the Plaintiff upon this question, but we have also the finding of the two native Assessors to whom it was expressly referred, founded on the pregnant evidence afforded by the Books and accounts of the family. These persons are shown, by later proceedings in the cause, to have had no undue bias in favour of the Plaintiff, and they brought to the examination of the matters referred to them that intimate knowledge of native usages to which a European rarely, if ever, attains. Their Lordships cannot adopt the construction which the Attorney-General would have them put on the Assessors' report of the 15th of March, 1857. They believe the first finding in that report to be that the property was joint in the Hindoo sense of the term. And they see no sufficient grounds for dissenting [507] from that conclusion, or from that to which the Assessors and the Courts below also came, upon the question whether the Plaintiff had effectually separated himself from the rest of the family in 1848.

This being so, the remaining questions for determination, with the exception of one touching the provision for Mussumat Thookra's maintenance, are those which arise upon the Plaintiff's appeal, and involve the consideration of the deductions made by the Sudder Court from the amount awarded to him by the Zillah Court.

That it was right to call upon the Plaintiff to bring into the account the profits made by the Mirzapoor firm between the years 1848 and 1852, appears to their Lordships to be too clear for argument. It is, however, insisted that the Court has improperly visited his failure to produce the accounts required, by charging him with interest on the principal sum for which he was accountable at the rate of 12 per cent.; that they ought to have given him further time to produce his accounts; and that the cause ought to be sent back to India, in order that the account of profits may be now taken. Their Lordships have to observe that the time to be allowed was a matter for the discretion of the Court; that the account was presumably one which the Plaintiff, as a Merchant and Banker, ought to have been able to produce at short notice; that the time actually allowed was not unreasonably short; that in the circumstances it was competent to the Court to charge the Plaintiff with interest in lieu of the profits for which he had failed to account; and that the rate of interest was only that which he himself claimed on the sums due to him. The Defendants are willing to accept the [508] interest in lieu of the profit, and their Lordships can see no ground for sending the cause back upon this point at the instance of the Plaintiff. The sum of Rs. 14,316. 2a. 6p., mentioned in the examination of the Commissioners of the 28th of March, 1857, was obviously one item of profit appearing in the Books; not the measure of the profits of the Mirzapoor firm for the whole of the four years in question. The other items of account which the Plaintiff disputes, and on which he asks to have the cause sent back for further trial, have all been investigated by the native assessors or commissioners. These were persons peculiarly conversant with native accounts; they appear to have been examined on their report in open Court on the 5th of June, 1860; and the Judges of the Sudder Court expressly state that, after going over the several

items with the Commissioners, they entirely concurred in their opinion. To remit a cause to India, for the purpose of reopening accounts so taken is obviously a course which their Lordships would not be justified in adopting, unless they had a clear conviction that there had been a miscarriage of justice. They have no such conviction in the present case. It may be true that the Commissioners have not required evidence *dehors* the Books; but the Plaintiff, as a member of the joint family and a partner in the several firms, was *prima facie* bound by the entries in the books. If he impeached them, it lay on him to falsify them.

Their Lordships do not think that the amount of maintenance decreed to Mussumat Thookra is excessive. It is, however, objected by her that positive directions should have been given, and provision made for the payment of her maintenance. And the [509] Plaintiff, on his side, complains that he is by the decree deprived of his right to claim a share of the principal sum deducted to meet this claim of maintenance on the death of Mussumat Thookra.

A Court of Equity in this country, if administering the whole estate, would no doubt have carried over the sum set apart for this purpose to a separate account; would have directed that the annual income should be paid to Mussumat Thookra during her life; and that the parties who had a reversionary interest in the principal should be at liberty to apply concerning it on her death. The Country Courts in India have, however, no machinery which enables them to take any such course. Nor was the suit one for the general administration of the estate. It was, in form, a suit to obtain present payment of the balance which the Plaintiff alleged to be due to him on the proper division of the property and adjustment of the accounts. The course, therefore, which the Court took was to deduct from the gross amount of divisible assets the sum of Rs. 15,000, which at 10 per cent would produce the annual sum of Rs. 1500, and to leave it as residue undivided in the hands of Sheochurn Doss, in which it was found, subject to the obligation of paying the maintenance. Sheochurn Doss and Mussumat Thookra being co-Defendants, and there being no proof of the precise terms and conditions on which he had made over to him the share which she took under the deed of the 23rd of February, 1852, the Court was hardly in a condition to make more precise provision for the payment of her maintenance by him. Nor is it expedient that their Lordships should now make any Order on that subject. Again, if the Sudder Court had simply deducted the [510] Rs. 15,000, as so much undivided residue, without saying anything about the Plaintiff's future rights, their Lordships, considering the form of this suit, would have doubted whether he had any grounds for impeaching the decree on this point. The judgment, however, says, "We decide that the best mode of settling her claim will be to deduct from the total divisible assets the sum of Rs. 15,000, the proceeds of which shall be devoted to Thookra's maintenance, and in respect to which the Plaintiff is declared to possess no right." These last words are certainly calculated to embarrass the Plaintiff, or his representatives, in asserting the right, which they seem to possess, to claim a share of this sum when the purpose for which it has been deducted from the divisible assets, the maintenance of Mussumat Thookra, has been satisfied. Their Lordships, therefore, propose to add to the decree a declaration, that it is to be without prejudice to the right of the Plaintiff, or of his representatives, to claim on the death of Mussumat Thookra, such share as he or they may be entitled to in the sum of Rs. 15,000, retained to provide for her maintenance.

Their Lordships, however, do not think that this slight modification of the decree ought to affect the costs of the appeal. And the Order which they will humbly recommend Her Majesty to make is, that the cross appeals of Sheochurn Doss and Mussumat Thookra be both dismissed with costs; and that, on the appeal of the Plaintiff, the decree in No. 62 be varied by the addition of the declaration above mentioned; that in other respects the decrees appealed against be affirmed; and that the Appellant, Rampershad, do pay the costs of his appeal.

[511] JOWALA BUKSH, son of MEETA RAM. —*Appellant*: DHARUM SINGH, *alias* IMDAD ULEE KHAN; MUSSUMAT BAJAH KOONWUR and Others.—*Respondents* * [Feb. 13, 14, 1866].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

It is essential that a Claimant seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached [10 Moo. Ind. App. 528].

A decree of the Sudder Court held, that although the title set up by the Plaintiff might be wholly bad, yet that a party Defendant with whom the Plaintiff had by a deed of Solunamah, or compromise, agreed to divide the estate, was entitled and on that ground decreed possession. Such decree reversed on appeal, as the effect of the decree would be (1) to defeat the Defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (2) as it was a violation of legal principles which protect possession, and of justice which regulate the joinder of parties and the union of titles to sue in one suit.

Act, No. XIII. of 1848, is limited to Awards made by Collectors under Ben. Regs. VII. of 1822, IX. of 1825, and IX. of 1833, which gives to the Revenue authorities judicial power to determine questions of possession, and the right of appeal from such Award is subjected to three years' limitation.

The general rule, that the possession of one member of a joint Hindoo family is the possession of all other members, does not apply where the party claiming has been clearly excluded from the family. In such a case the possession is adverse, and under the general law of limitation the time will run from such adverse possession.

Whether, a Hindoo family, though converted to Mahomedanism, but conforming for several generations to Hindoo customs and usages, can, by virtue of the retention of Hindoo customs and usages, set up for itself a special and customary law of inheritance. *Quære?*

Abraham v. Abraham (9 Moore's Ind. App. Cases, 199) distinguished from such a case [10 Moo. Ind. App. 537].

The suit out of which this appeal arose, was instituted by Aram Singh, *alias* Ushruff Ulee, since deceased, and one of the Respondents, Kalal Singh, [512] *alias* Gholam Ulee, the sons of one Loll Singh, caste "Thakoor Burh Gugar," a race descended from the Rajpoot tribe of Hindoos, on the banks of the Doab, who had been converted to Mahomedanism: against the Appellant and Mussumat Soondur, widow of Meeta Ram, to obtain a declaration of their hereditary right to succeed to the Talogga of Ourungabad Kaseer, consisting of eight Mouzahs situate in the Boolundshuhur District, in the North-Western Provinces: and also to cancel and set aside a deed of sale, dated the 17th of October, 1842, executed by the late Thookranee Maha Kooer, also called Mussumat Maha Kooer, the widow of Tara Singh, in favour of Meeta Ram, the Appellant's father, and to recover mesne profits in respect of the Talogga.

The circumstances which gave rise to the appeal were as follows:—

Roop Singh, *alias* Pahulwan Ulee Khan, the common ancestor, was Zemindar of Ourungabad, and died in the year 1753. He had issue three sons, Looft Ulee Khan, *alias* Tara Singh, Mokund Singh, and Mohun Singh, who alone had issue a son, named Loll Singh. He also died, leaving two sons, the Plaintiff, Aram Singh, and Golol Singh.

The Appellant's case was, that Mohun Singh was the issue of a concubine, and that Loll Singh the issue of a female musician, and, consequently, that the descent of Aram Singh and Golol Singh from Pahulwan Ulee Khan was not legitimate.

[513] On the death of Tara Singh without issue, in 1805, his widow, Thookranee Maha Kooer, became proprietress of the Ourungabad estate, and also of the Chukatlul estate, of which Roop Singh had been also Zemindar, but which estate was not

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

in issue in this appeal, in the room of her husband, with whom a settlement for the Government revenue was made.

In consequence of the Government revenue having fallen into arrear, and Thookranee Maha Kooer being in debt to other parties, the estates were in 1811 placed under the Court of Wards, and managers appointed, who remained in possession till the year 1833, when a settlement was made with Thookranee Maha Kooer, as sole and absolute proprietor of the estate, for twelve years, from 1833 to 1844 inclusive.

In the year 1842, Thookranee Maha Kooer sold the Ourungabad estate to Meeta Ram, the father of the Appellant, for Rs. 30,000, and executed a deed of sale, dated the 17th of October, 1842, which was registered on the 24th of February, 1843, and the purchaser's name recorded as, Zemindar, Lumbadar, and Malguzar, of the estate.

It appeared that shortly after the execution of the deed of sale, and before the name of Meeta Ram was recorded, notices were issued for objections; and as certain objectors appeared (one of whom was Aram Singh), the recording of the purchaser's name was postponed in order that inquiries might be made. The objections raised were, in the main, that Thookranee Maha Kooer was not of sound mind, and that the sale was fraudulent; the Thookranee not having been aware what she was doing. After making inquiries, the Collector declared that Thookranee Maha Kooer was of sound mind, and had sold [514] the property voluntarily, and that there was no objection to the mutation of names.

In August, 1844, Meeta Ram died, leaving the Appellant, and a widow, Mussumat Soondur Kooer, when objections were for the first time raised by Thookranee Maha Kooer, that the estate was under the Court of Wards at the time of the sale, and that the transfer of the property had been procured by fraud. These objections were overruled, and the Appellant's name registered as Lumbadar.

Thookranee Maha Kooer died in the year 1853.

On the 14th of August, 1854, Aram Singh and Golol Singh, claiming as heirs and representatives of their father, Loll Singh, and grandfather, Mohun Singh, brought a suit in the Civil Court of Meerut, for possession of the estate of Ourungabad, by cancelment of the deed of sale, dated the 17th of October, 1842, alleging, first, that they were co-sharers with Thookranee Maha Kooer; and secondly, that the estate had been obtained by fraud without payment of any consideration money, and further, that it was at the time of sale, under the Court of Wards, and for recovery of mesne profits.

The Defendants, the Appellant and Mussumat Soondur Kooer, by their answer, denied that the Plaintiffs were ever co-sharers with Thookranee Maha Kooer, and alleged that their claim was barred by the Regulation of limitations of suits, and further alleged, that the Plaintiffs were not the legitimate descendants of the common ancestor, Pahulwan Ulee Khan: that the estate was not under the Court of Wards at the time of the sale, and that the sale to Meeta Ram was genuine.

Afterwards, a supplemental plaint was filed to the [515] effect: that one Mussumat Rutta Kooer's name was registered in regard to the Chukathul Estate, as successor of Thookranee Maha Kooer, and that as the points in dispute with respect to the Chukathul and Ourungabad estates were identical, by reason that both estates were the ancestral property of Pahulwan Ulee Khan, it was necessary that Mussumat Rutta Kooer should be made a Defendant. The Appellant objected to the supplemental plaint, denying that the suits had the same foundation, and stating that there was no necessity for making Mussumat Rutta Kooer a Defendant. But she was admitted as a Defendant, and put in her answer.

The principal issues were, first, was the estate in suit the ancestral property of Pahulwan Ulee Khan, and were the Plaintiffs his real heirs, and up to the time of the sale did Loll Singh, father of Plaintiffs, and Mohun Singh, his father, continue in possession, as proprietors along with Thookranee Maha Kooer, who was the daughter-in-law of the common ancestor, or not? and at that time did the estate, in consequence of the disqualification of Thookranee and the father of the Plaintiffs, come under the Court of Wards, or was it under the sole agency and management of the ancestor of Defendants, and Meeta Ram, purchaser? Secondly, was the Thookranee at the time of the sale deranged in mind, and was the deed of sale fraudulently altered by collusion of the vendee with the agents of the vendor? And was the payment of Rs. 30,000 consideration money entered, as it stated, and the deed

executed on payment of the consideration money, with the consent of the vendor and vendee: and was the estate of Chukathul, and its decree of the same form and nature as in this suit, or how? and thirdly, were the [516] Plaintiffs on the death of Thookrance declared to be her heirs, and after the sale were they prepared to object and to institute a suit?

After taking evidence as to his ancestor being converted to Mahomedanism by force, and the family following Hindoo usages and customs, Sheikh Monim Ulee Khan, the Principal Sudder Ameen of Meerut, by a decree bearing date the 29th of August, 1856, dismissed the suit. In the judgment of the Court, the Sudder Ameen referred to the suit, No. 17 of 1856, to which the Appellant was not a party respecting the estate of Chukathul, which had also belonged to Pahulwan Ulee Khan, and concluded as follows:—"That suit, by the Orders of the Sudder Court, was again brought into this Court, and after investigation this day, in consequence of want of proof of right and dispossession of the Plaintiffs, and their ancestors for a long time, was dismissed, and the Plaintiffs being considered not to be the heirs of Pahulwan Ulee Khan, or of Mussumat Maha Kooer, deceased, were held to be entire strangers, and not having any concern with the estate; and in their petition, on which an Order was passed on the 27th of November, 1855, the Plaintiffs have clearly stated that the nature of the dispute in both suits is identical. Therefore their having no right and possession is proved in this suit also. On this account the genuineness or otherwise of the deed of sale cannot now be inquired into in a suit brought by these Plaintiffs. It is the fault of the Plaintiffs, who although they did not hold possession of the Chukathul estate, too hastily making themselves out to be the heirs of the deceased female, set about suing for the cancelment of the sale, and thus burdened themselves with costs also."

[517] The Plaintiffs appealed to the Sudder Dewanny Adawlut at Agra against this decision, and that Court, by a decree, dated the 24th December, 1861, reversed the decision of the Principal Sudder Ameen, and decreed, that the Appellant and Mussumat Soondur Kooer should be dispossessed, and that the Plaintiffs and the Defendant, Mussumat Rutta Kooer, should be put in possession of the estate of Ourungabad, agreeably to the stipulations of a certain Solunamah or deed of compromise entered into between them, by which they agreed to divide the estate: the matter of mesne profits for the past and future to be settled at the time of execution of decree under s. 197, Act No. VIII. of 1859. In giving judgment, the Sudder Court, consisting of Messrs. Gubbins, Lean, and Ross, entered more fully into the merits than the Principal Sudder Ameen, and decided that the estate was under the Court of Wards at the time of the sale, and that the deed of the 17th of October, 1842, was consequently illegal; that the proof of the receipt of the purchase-money was untrustworthy, and that the deed in question had been procured by fraud, because a certain deed relating to the Chukathul estate, and made in favour of one Nittianund (to which deed neither the Appellant nor his father, Meeta Ram, the purchaser of the Ourungabad estate, was a party), had been declared fraudulent. The Sudder Court did not deal with the main questions raised in the suit, whether the Plaintiffs or their father ever had any title to the estate as claimed by the Plaintiff, and whether such title was barred by the Regulations of Limitation; but decided the appeal on the ground that, in the opinion of the Court, the sale was not *bona fide*, and the suit had [518] been commenced by Aram Singh within twelve years after the date of the deed of sale. Hence the present appeal.

After the admission of the appeal Aram Singh died, when the appeal was revived and his representatives made co-Respondents. Mussumat Rutta Kooer did not appear.

Mr. Rolt, Q.C., and Mr. Almaric Rumsey, for the Appellant; and Mr. Leith, for the Respondents Dharum Singh, and Mussumat Rajah Koonwur.

The principal points argued on the appeal were:—

First, upon the question, whether the Hindoo or Mahomedan law governed the succession, after the conversion of the family to Mahomedanism, and the effect of the evidence of the observance of Hindoo usages and customs by the family after being so converted. *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199), and the *Lex loci* Act, No. XXI. of 1850, were referred to.

Second, on the assumption of the Mahomedan law applying, that the *onus* to establish illegitimacy was on the Respondent, *Mahomed Bauker Hoossain Khan v.*

Shurfoon Nissa Begum (8 *Ibid.* 136), and that by such law a widow would only be entitled to two-thirds of her husband's estate: *Mussummat Soobhane v. Bhetun alias Shah Azamally* (1 Ben. Sud. Dew. Rep. 346), were relied on.

Third, on the other hand, if the case was to be regulated by the Hindoo law, it was insisted by the Respondents that the sale was bad, as a Hindoo widow had only a qualified estate, namely, a right to be [519] maintained, without power of sale. *The Collector of Masulipatam v. Caraly Venkata Narrainapah* (8 Moore's Ind. App. Cases, 550); *W. H. Macnaghten's "Prince of Hindu Law,"* Vol. II. p. 211.

Fourth, whether, having regard to the long adverse possession of Thookranee Maha Kooer, and to the date of the deed of sale by her to Meeta Ram, the suit was not barred (1) by the general Regulations of Limitation of suits after twelve years. Ben. Regs. III. of 1793, sec. 14; II. of 1803, sec. 18; II. of 1805, sec. 3, cl. 1, *Maharajah Koonwur Bahoo Nitastur Singh v. Baboo Nand Loll Singh* (8 *Ibid.* 199); *Doorgapershaud Roy Choudry v. Tarapersaud Roy Choudry* (*Ibid.* 308), were relied upon; (2), as to effect of possession given by the Collector under Reg. VII. of 1822, *Syed Kasim Ali Khan v. Bhageeruttee Singh* (1st Augt. 1848, Dec. N.W. Prov. 275); and (3), as to the limitation by lapse of time after Award made by revenue authorities, Act No. XIII. sec. 3 of 1848, was relied on.

The consideration of the case was adjourned, and their Lordships' judgment now pronounced by

The Right Hon. Sir Edward V. Williams (June 18, 1866).—This is an appeal from a decree of the Sudder Court of the North-Western Provinces, reversing a decree which the Principal Sudder Ameen of Meerut had made in the Appellant's favour, by dismissing the suit against him.

That suit was brought by Aram Singh (who is since deceased, but is represented on the record by the four first Respondents) and the Respondent, [520] Golol Singh, to recover from the Appellant possession of the Talook, of Ourungabad Kaseer, in the district of Bolundshuhur, with mesne profits; and to cancel and invalidate a deed of sale of that Talook, which was executed on the 17th of October, 1842, by Mussumat Maha Kooer, wife of Tara Singh, in favour of the Appellant's father, Meeta Ram.

The Appellant was in possession of the property claimed under the following title:—The Ourungabad estate, and also another estate called Chukathul which was situate in the Collectorate of Allyghur, formerly belonged to one Roop Singh, otherwise called Pahulwan Ulee Khan, who died A.D. 1753. He was by extraction a Gujar, a race of Hindoos common in the Doab, of which Professor Wilson says in his Dictionary, "They profess to descend from Rajpoot fathers by women of inferior castes." Rook Singh, however, became a convert to the Mahomedan faith, and thenceforth adopted the Mussulman *alias* of Pahulwan Ulee Khan; and the custom of bearing both a Hindoo and a Mussulman name seems to have been continued in his family. He left a son, Lootf Ulee Khan, otherwise Tara Singh, who succeeded him in the enjoyment of his property, and died without issue in 1805. He was succeeded by his widow, Thookranee Maha Kooer, who became, as the Appellant contends, sole and absolute proprietor of both Talooks, and, as such, enjoyed them for many years. In 1842 she sold the Ourungabad estate to Meeta Ram (the father of the Appellant) for Rs. 30,000, and executed to him the Bill of sale of the 17th of October, 1842, which the Plaintiffs in this suit seek to have set aside. This document was registered [521] on the 23rd of February, 1843; and certain proceedings were had before the Collector of Bolundshuhur, which resulted in Meeta Ram being recorded, in the month of December, 1843, in the Books of that Collectorate as "Zemindar, Lumbaradar, and Malguzar" of the whole of this Talook, with the exception of one village. Meeta Ram died in August, 1844, and on an application by his son, the Appellant, for a mutation of names, the Thookranee raised some objections to the validity of the deed executed by her. These, after inquiry, were overruled by the Collector, and his decision was confirmed by the Commissioner on the 21st of February, 1845. From that time, and at least up to the date of the decree under appeal, the Appellant was the registered proprietor of the Ourungabad estate, and in actual possession of it. Thookranee Maha Kooer died on the 8th of September, 1853; and the suit was instituted on the 14th of August, 1854.

The case made by the plaint, in opposition to the Appellant's title, was to this effect:—

The Ourungabad and Chukathul Talooks were both the ancestral property of Pahulwan Ulee Khan, who is termed "the great ancestor" of the Plaintiffs. He had three sons, Mohun Singh, Tara Singh, and Mokund Singh. The two latter died without issue, but Mohun, the youngest, left a son, Loll Singh, who was the father of the Plaintiffs. The first settlement of the estates after they came, by the conquest of the Provinces in which they lie, under British rule, was made in 1213 Fuslee (1806), when the only surviving representatives of the great ancestor were Loll Singh and Thookranee Maha Kooer, the wife of Tara Singh, who, by mutual consent, lived together [522] in partnership. A summary settlement was made in 1216 Fuslee (A.D. 1809), with the assent of Loll Singh, with the Thookranee; but in the following year some arrears of revenue having then accrued, another inquiry was made as to the proprietorship of the estates, and both the Thookranee and Loll Singh having been declared disqualified, both Talooks were, by an Order of the 9th of April, 1811, placed under the management of the Court of Wards. Gunga Ram, the father of Meeta Ram, was at one time manager of both Talooks under the Court of Wards, and was, in 1825, succeeded by Meeta Ram, who was afterwards dismissed for misconduct from the management of Chukathul, but continued in that of Ourungabad, which had been transferred to the Collectorate of Bolundshuhur. The plaint then gives the subsequent history of the Chukathul estate. It alleges that Meeta Ram caused a document, dated the 21st of June, 1840, and purporting to be a deed of sale of that property by Thookranee Maha Kooer to his nephew Nittianund, for the pretended consideration of Rs. 50,000, to be fabricated; and on the 1st of March, 1842, obtained a fraudulent and collusive decree founded on that instrument. It shows that these transactions were afterwards impeached and set aside by a decree of the Civil Court of 26th of January, 1849, affirmed by one of the Sudder Court of the 19th of February, 1851; whereupon "the proprietary right reverted to its former *status*." These decrees proceeded chiefly on the ground that the estate at the date of the alleged sale was under the management of the Court of Wards, and that the disqualified proprietor had, therefore, no power of alienation. The plaint then alleges that the same objections [523] applied to the sale of the Ourungabad estate to Meeta Ram in October, 1842, that estate being also under the management of the Court of Wards. It insists that "under these circumstances the deed of sale executed by one unqualified proprietor, notwithstanding the existence of the other heirs of the great ancestor, cannot be held to be legal." It also charges that the transaction was fraudulent, and that not a single portion of the alleged consideration money was ever paid.

The plaint having been filed, the Plaintiffs were met by the difficulty occasioned by a third claim of title. Thookranee Maha Kooer had been registered as the sole owner of both the Chukathul and Ourungabad estates. After the sale of the former to Nittianund had been set aside, she had again been recognized by the Revenue authorities as the sole owner of that estate; and when she died the question arose, who was entitled to succeed as her heir. The Collector of Allyghur determined this question in favour of the plaintiffs; but his decision was overruled by the Government, which treating, apparently, the possession of the Thookranee as that of a sole and absolute proprietor, and the succession as governed by the Mahomedan law, determined that one Mussumat Rutta Kooer was, as her niece, entitled to succeed to her; and accordingly placed or continued the estate under the management of the Court of Wards for the benefit of that lady. The Plaintiffs, or rather Aram Singh alone, had brought a suit to contest the title of Mussumat Rutta Kooer to the Chukathul estate; and feeling that her title as alleged heiress of the Thookranee might embarrass them in this suit for the recovery of Ourungabad, [524] they applied for and obtained leave to file a supplemental plaint, in order to make her a Defendant to this suit also. This supplemental plaint thus stated the title of the Plaintiffs:—"During the lifetime of Tara Singh, Loll Singh, the Plaintiff's father, was entitled to one half of the ancestral property; and after the death of Tara Singh, his wife, Mussumat Maha Kooer, was entitled to only one-fourth of the estate; but in consequence of her being the elder relative, her name was registered in the Collector's

office by mutual consent, and the said Thookraanee, and the Plaintiff's father, and after his death, the Plaintiffs lived together in partnership, and appropriated the produce. The registration of the name of one of the members of the family was sufficient for all the members of the family. The principal Plaintiffs being Hindoos of the Rajpoot tribe, the Mahomedan Pentateuch is not observed in their family: besides this, they are called by Hindoo names." And again, "The fourth share held by Thookraanee Maha Kooer in the estate of Tara Singh, does not descend by custom to Mussumat Rutta Kooer. In accordance with the usage prevailing in their family, and by heritage, the Plaintiffs are the owners of the entire estate."

The defences set up by the answer of the Appellant, and of his mother, who was joined with him as a Defendant, are reducible to the following heads: first, that the Thookraanee having been in sole possession of the property up to the date of the sale to Meeta Ram, to the exclusion of the plaintiffs and their father, their suit was barred by Regs. II. of 1803, sec. 18, and II. of 1805, sec. 3, the general Regulations of Limitation; secondly, that the claim of Loll Singh [525] and of the Plaintiffs having been rejected by the Revenue authorities in 1838 and 1843, the present suit was barred by Act. No. XIII. of 1848, without reference to the other Regulations of Limitation; thirdly, that the Plaintiffs' grandfather, Mohun Singh, and their father, Loll Singh, were both illegitimate, the former being the son of a slave girl; the latter, of a female minstrel; fourthly, that Loll Singh was never in joint possession and enjoyment of the property with the Thookraanee; that the revenue settlements were made with her alone; and that she was, in fact, sole proprietor of the estate, and registered as such, not as one of several co-shares; fifthly, that the Ourungabad estate, at the time of the sale to Meeta Ram, was no longer under the management of the Court of Wards, and sixthly, that there was no fraud in that transaction, and that the purchase-money was really paid.

There is a good deal of other matter in the answer, but it is more in the nature of evidence pleaded in support of one or other of the above allegations, than of matter raising other and distinct issues.

The Replication insisted that the Plaintiffs and their father possessed and enjoyed the property jointly with the Thookraanee; that the registration in the name of the latter afforded no conclusive presumption against that joint possession; and that these facts were both an answer to the plea of the Regulations of Limitation, and gave the Plaintiffs a present title to the property. It sought to explain the revenue settlements with the Thookraanee by saying that they were made with her as the elder relative or member of the family. And it met the plea of Act. No. XIII. of 1848 by saying, that the present suit was not brought for re-[526]versal of the settlement and Orders under the provisions of Regulations VII. of 1822, IX. of 1825, and IX. of 1833, but for reversal of the sale to Meeta Ram within the period of twelve years.

The other pleadings are not of importance. It may be mentioned, however, that those between the Plaintiffs and Rutta Kooer raised more distinctly the question, whether the succession to this property from the great ancestor and from the Thookraanee, was to be governed by the Hindoo or by the Mahomedan law of inheritance; the Plaintiffs insisting on the application of the former.

It has been mentioned that Aram Singh had brought a suit against Mussumat Ratta Kooer for the recovery of the Chukathul estate. The issues raised in that suit were necessarily almost identical with those raised in this suit between the Plaintiffs and Rutta Kooer. And in so far as they involved the questions of the legitimacy of the Plaintiffs' father and grandfather, the nature of the interest which Thookraanee Maha Kooer had in both the Talooks in her lifetime, and the heirship to her, they were also similar to the issues to be tried between the Plaintiffs and the Appellant. This being so, the suit for Talook, Chukathul was by Order of the Sudder Court, transferred from the Civil Court of Allyghur to that of the Principal Sudder Ameen of Meerut, in which the suit for Ourungabad was pending. Both causes were heard together, and the evidence, common to both, was taken in both. On the 29th of August, 1856, the Principal Sudder Ameen, by separate judgments, dismissed both suits. His conclusions upon the issues common to both were stated at length in the judgment in the Chukathul case. He found that neither the [257] father nor the grandfather of the Plaintiffs was legitimate; that neither the Plaintiffs nor their father had been joint in estate with Thookraanee Maha Kooer;

and that, by reason of her long and adverse possession, the claim was barred by lapse of time. He also held that the succession to the Thookranee was determinable by the Mahomedan, and not by the Hindoo law, and that accordingly Mussumat Rutta Kooer was her heir and representative. And having thus found the Plaintiffs to be the heirs neither of Pahulwan Ulee Khan, nor of Thookranee Maha Kooer, "but to be entire strangers, not having any concern with the estate," he deemed it unnecessary to inquire into the genuineness or otherwise of the deed of sale of the 17th of October, 1842.

Aram Singh and his brother appealed to the Sudder Court against both these decisions. Pending these appeals a compromise was entered into between Aram Singh and Golol Singh on the one part, and Mussumat Maha Kooer on the other; the effect of which was that they were to divide the Chukathul estate, and the Ourungabad estate if it could be recovered, in certain proportions; and a decree was made by consent, in the Chukathul suit, on the 5th of December, 1861, giving effect to this compromise. The Sudder Court, on the 25th of December, 1861, heard the appeal in this suit; and on that occasion, after adverting to the compromise, and without coming to any conclusion concerning the Plaintiffs' title, it proceeded to consider whether the deed of the 17th of October, 1842, was illegal and without consideration. It determined this question against the Appellant, mainly on the ground that at the date of the deed, Talook, Ourungabad, like Talook, Chukathul, [528] was under the Court of Wards. But it also held that the payment of the consideration was not proved, and that the relation of Meeta Ram to the Thookranee, and his antecedents, afforded certain presumptions of fraud. It accordingly decreed possession of the property, with mesne profits, to the Plaintiffs and Musmat Rutta Kooer, in the terms of the deed of compromise; meeting the objection made by the Appellant's Vakeel that it lay on the Plaintiffs first to prove their title, by referring to the compromise and to the decree passed thereon in the former suit, and by observing that "it would indeed be but an idle and unprofitable prolongation of litigation to dismiss the suit of Aram Singh only to enable Mussumat Rutta Kooer to sue the Appellant for that which she was willing to share with Aram Singh."

Their Lordships are of opinion that this decree of the Sudder Court cannot be supported. The Appellant was in possession of the estate. He and his father had held continual possession of it from December, 1843, if not from October, 1842. His own possession of it had been unquestioned since February, 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, *i.e.*, a title which would give the claimant a right to the estate failing the title impeached. The judgment of the Sudder Court assumes that the title set up by the Plaintiffs may be wholly bad; but it says, if they are not entitled to recover the estate on showing that the Appellant's title is bad, Mussumat Rutta Kooer would be so entitled; and as they have agreed to divide the spoils with her, it matters not on which title the property is recovered. The title of Mussumat [529] Rutta Kooer could not be tried between her and the Appellant in this suit. The effect, therefore, of the judgment is to defeat the Appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession, as well as of the substantial principles of justice which regulate the joinder of parties and union of titles to sue in one suit. The decision, in effect, sustains an union of titles indirectly, which could not have been directly advanced in union against the Appellant's possession. It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the Sudder Court ought to have decided, and which must now be decided on this appeal, is, whether the Plaintiffs have shown any title to this property.

In the determination of this question, the first material issue of fact to be considered is, whether, as the Plaintiffs allege, Loll Singh, and afterwards the Plaintiffs themselves, were in the possession and enjoyment of the property jointly with Thookranee Maha Kooer, or whether her admitted possession was in exclusion of them. Upon the determination of this issue depend not only a material link in the title laid, but also the application of the Law of Limitation to the case, and various

presumptions that have an important bearing on the solution of other questions raised in the cause, particularly that of the legitimacy of the Plaintiffs' line of descent.

That the Thookranee was in her time the sole [530] recorded proprietor of the Talooks is incontestable. This, in an ordinary case, might be a circumstance of little moment; because it has been ruled, and is consistent with reason, that one member of a joint Hindoo family may be so recorded on behalf of the family. But in the present case arises the question, why the name in which the property was recorded should be that of the female rather than that of the male member of the family, particularly when, upon the application of the ordinary Hindoo law to the facts as stated by the Plaintiffs, that male member (Loll Singh) would, upon his uncle's death, have been entitled to the whole estate, and the female member (the Thookranee) would have had only a right to maintenance. It is no satisfactory answer to this question that this was done because the Thookranee was the elder member of the family: for it appears on the evidence that she was, in fact, younger in years than Loll Singh, and whether young or old, she was equally excluded by the Hindoo law from the inheritance to her husband's share in joint and ancestral property.

This recognition of her, therefore, as apparently sole proprietor, raises a presumption against the case of joint possession and enjoyment set up by the Plaintiffs.

Again, the broad facts deducible from the documentary evidence, so far from rebutting, positively confirm this presumption. The first settlement of both Talooks was made after inquiring into the title with the Thookranee in 1809. Two years afterwards, the revenue being in arrear, both Talooks were placed under the Court of Wards as "the estate of the widow of Tara Singh." In the proceeding of the Collector [531] of the 10th April, 1811, by which this was done, there is no mention of Loll Singh. The assumption of the estate by the Court of Wards would have been irregular under sec. 4 of Reg. LII. of 1803, if there had been then any co-proprietor not disqualified under sec. 3 of that Regulation. That Loll Singh was disqualified, by mental incapacity or otherwise, under that section, or had been declared to be so, there is not the slightest proof. The only foundation for the suggestion that he had been declared disqualified seems to be a loose statement in the Deputy Collector's letter of the 2nd of March, 1811, which, assuming Loll Singh, to be the heir of the Thookranee, says, that he is not qualified (and as such he could not be qualified) to have a settlement made with him.

Again, though Talook Chukathul remained under the custody of the Court of Wards, Talook Ourungabad was released from that custody some time about the year 1833. In 1833 a new settlement of Ourungabad was made with the Thookranee. In the Collector's proceedings it is stated that she then claimed the entire Zemindary, and asserted that there was no co-sharer of the estate who could call for division. A similar statement appears in the proceedings of the Collector of the 5th of September, 1836, which extended the settlement. A further extension of the settlement took place in 1839.

In 1837 we have evidence of his exclusion from Loll Singh himself. In December of that year, and again in April, 1838, he presented petitions to the Collector of Allyghur, praying for an investigation of his right as a co-sharer in Chukathul: treating the Thookranee as in possession, and himself as poor, destitute, and excluded by her. On the 10th of July, [532] 1838, a proceeding was had before the Collector. In this it is distinctly stated that neither the Claimant nor his father, Mohun Singh, were ever in possession of the estate. The illegitimacy of the Loll Singh's descent was also a point distinctly raised by the Thookranee on this occasion. The result was that the claim was dismissed, and Loll Singh referred to the Civil Court for the assertion of his alleged rights. In September, 1841, he applied to the Principal Sudder Ameen for leave to sue *in forma pauperis* for a moiety of both the Chukathul and the Ourungabad estates. His right to sue *in forma pauperis* was contested by the Thookranee, who, in her petition to the Court, repeats her objections to his title, as well as the grounds on which she sought to dispauper him. Nothing came of the suit, if it was really instituted, and Loll Singh died in 1842.

Again, the proceedings of the Collector of the 9th of December, 1843, on the application of Meeta Ram to be recorded as purchaser and Lumberdar of Ourun-

gabard, on which occasion Aram Singh and others appeared as objectors, is also inconsistent with the theory that the Plaintiffs were from the time of Loll Singh's death to the date of the sale in the possession and enjoyment of the property as co-sharers with the Thookranee. On the application for the mutation of names in 1846, they did not even appear as objectors, leaving the contest to the Thookranee, who resisted it in the character of sole proprietor.

The petition of Aram Singh touching his under-tenure is also consistent with the theory that Mohun Singh, Loll Singh, and the Plaintiffs were treated as illegitimate relations and dependants of the family. It is inconsistent with the theory that they were ever [533] admitted to the rights of co-sharers in a joint ancestral estate. The proceedings also, which resulted in setting aside the sale of Chukathul, and are so strongly relied upon for another purpose, are destructive of this part of the Respondents' case. These proceedings were instituted by and with the authority of the Court of Wards, the Collector, on the part of Government, being a party; and the result of them was to replace the Court of Wards in possession of the estate on behalf of the Thookranee. Yet, as has been shown above, the possession of the Court of Wards would have been wholly irregular, had Aram Singh and his brother then been co-sharers in that estate. The Plaintiffs, therefore, have upon the evidence wholly failed to prove that they or their immediate ancestors were in possession or enjoyment of this property as co-sharers at any time during the tenure of Thookranee Maha Kooer, or indeed at any time since the death of "the great ancestor," in 1753.

The Counsel for the Respondents, when pressed by this difficulty, had recourse to a theory that the property was in the nature of an impartible Raj, and was, therefore, held by the elder to the exclusion of the junior branch of the family. But, to say nothing of the absence of any evidence of the existence of this supposed tenure, and of its inconsistency with the title set up by Loll Singh in 1837, and now pleaded by the Plaintiffs in this suit, it is obvious that though the theory might explain the enjoyment of the property by Tara Singh in exclusion of Mohun Singh, and afterwards of Loll Singh, it would afford no explanation whatever of its enjoyment by Thookranee Maha Kooer in exclusion of Loll Singh and his sons. For, by the Hindoo law, Loll Singh, if [534] the legitimate male heir of the great ancestor, would have taken the Raj on the death of his uncle, Tara Singh, to the exclusion of the widow, the property being assumed to be ancestral, and the family undivided. In the case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543), it was admitted that this would have been the course of descent according to the Miraasharā, if the property had been ancestral. The reason why in that case this Committee, overruling the decision of the Court below founded on the opinion of the Madras Pundits, preferred the title of the daughter to that of the nephew of the last possessor, was, that the Shivagunga Raj was the separate acquisition of the deceased, and, therefore, passed according to the Canon which regulates the descent of separate property, and not according to that which determines the succession to the joint or ancestral property of an undivided family.

The facts relating to the possession of the property having now been determined, it may be convenient next to dispose of the questions arising under the different Regulations of Limitation which were so much debated at the Bar. Their Lordships are of opinion that no ground has been shown for the application to this suit of the statutory bar of three years under Act, No. XIII. of 1848. The operation of that Act is limited to Awards made by the Collectors under the Regulations VII. of 1822, IX. of 1825, and IX. of 1833, which gave to the revenue authorities judicial power to determine certain questions of possession and other matters, with a right of appeal to the regular Courts against their Awards. That right of appeal is by the Act of 1848 subjected to [535] the three years' limitation. But the order for the mutation of names in the Register of 1843, to which alone it is important to apply the three years' bar, does not seem to be an Award of the same nature with those contemplated by the Act. Nor, in their Lordships' opinion, could the Award of the Collector conclude any of the questions of title, as distinguished from possession, which are raised in this suit. These, therefore, can only be affected by the general law of Limitation. The applicability of that law to the present case depends very much upon the nature of the title on which the plaintiffs are to be taken to rely. If

they are to be taken to sue as the heirs of Thookraanee Maha Kooer, to set aside a conveyance obtained from her by fraud, their right of action accrued at the date of the conveyance, and their suit was just within even the twelve years' limitation. If they are to be taken to sue as the next heirs of her husband, to set aside a conveyance which, whether fraudulent or not, she, considered as a Hindoo widow, was incompetent to execute, their right of action accrued at the date of her death, and this suit was *a fortiori* within the legal period of twelve years. But, in so far as their title was adverse to that of Thookraanee Maha Kooer—and it is difficult to treat the title laid as not being of that nature—the facts proved touching her possession show that the claim is obnoxious to the objection that it is barred by lapse of time. The general rule, that the possession of one member of a joint Hindoo family is the possession of all, does not apply where the Claimant has been clearly excluded. In the latter case the possession is adverse, and time will run. The cases of *Muhpal Singh v. Gyadutt*, 1854, and *Bunsedhur and [536] another v. Choddumnee Loll*, 1852, in the decisions of the Sudder Court of Agra for those years respectively, are instances of the general rule, and of the exception.

It is unnecessary, however, to invoke the Regulations of Limitation if the Plaintiffs have failed, as their Lordships think they have failed, to establish the legitimacy of either Mohun Singh, or Loll Singh. That is an objection fatal to their title, in whatever character they are taken to sue. It has been seen that the illegitimacy of these persons was alleged by the Thookraanee certainly as early as 1837. Oral testimony of it, whatever that may be worth, has been given by the Appellant in this suit. The Plaintiffs have given no evidence of the legitimacy of their ancestors. They seem to rest on certain vague statements and admissions in the earlier Revenue proceedings, to the effect that Loll Singh was the grandson of the great ancestor, and the heir of the Thookraanee. The presumption of their illegitimacy is almost irresistible. There is nothing to show why, if they were legitimate, Mohun Singh, and, after his death, Loll Singh, did not share the property with Tara Singh; or why, on Tara Singh's death, Loll Singh did not succeed to it. On the other hand, the devolution of the property and the facts proved concerning their exclusion, and the sole possession of the Thookraanee in succession to her husband, are consistent with the hypothesis that they were legitimate; and, as illegitimate connections of and dependants on the family, received, by means of their under-tenure or otherwise, support and maintenance, and were to a certain extent recognized as relations.

The case has hitherto been treated upon the [537] assumption, which the Plaintiffs seem to have made part of their case, that this family, though converted to Mahomedanism, is to be taken as still conforming to the Hindoo laws and usages; and that, consequently, the questions of title raised in this cause are to be governed by Hindoo law. Their Lordships, however, are far from admitting the correctness of that assumption.

This case is distinguishable from that of *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199). There the parties were native Christians, not having, as such, any law of inheritance defined by Statute; and in the absence of one, this Committee applied the law by which, as the evidence proved, the particular family intended to be governed. But the written law of India has prescribed broadly that in questions of succession and inheritance the Hindoo law is to be applied to Hindoos, and the Mahomedan law to Mahomedans; and in the judgment delivered by Lord Kingsdown, in *Abraham v. Abraham*, p. 243, it is said that "this rule must be understood to refer to Hindoos and Mahomedans, not by birth merely, but by religion also." The two cases in W. H. Macnaghten's "Princ. of Hindu Law," Vol. II. pp. 131, 132, which deal with the case of converts from the Hindoo to the Mahomedan faith, and rule that the heirs according to Hindoo law will take all the Property which the deceased had at the time of his conversion, are also authorities for the proposition that the devolution of his subsequently acquired property is to be governed by the Mahomedan law. Here there is nothing to show conclusively when or how the property was acquired by "the great ancestor." There was no [538] conflict, as in the cases just referred to, between Hindoos and Mahomedans touching the succession to him. Whatever he had is admitted to have passed to his descendants, of whom all, like himself, were Mahomedans; and it seems to be contrary to principle that,

as between them, the succession should be governed by any but Mahomedan law. Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so. They must, however, observe, that to control the general law, if, indeed, the Mahomedan law admits of such control, much stronger proof of special usage would be required than has been given in this case.

The title advanced by the Respondents, the Plaintiffs in this suit, is that of Hindoo heirs claiming under a Hindoo title, and it is not necessary, therefore, for their Lordships to give any opinion upon the question how the case would have stood if the Plaintiffs' title had been vested upon the Mahomedan law; but as this view of the case was put forward by the Respondents' Counsel, in the course of his argument, their Lordships may observe that it does not seem to them that the Plaintiffs' case would have stood any better under the Mahomedan than under the Hindoo law, for, according to Mahomedan [539] law, Mohun Singh, if legitimate within the wide sense allowed by that law to the term, would have taken an equal share with Tara Singh in the inheritance of "the great ancestor," and Loll Singh, if legitimate, would have succeeded to his father's share, and would also, on Tara Singh's death, have come in as "residuary" for a portion of his uncle's share; and the proved exclusion of Mohun Singh and of Loll Singh would raise as strong a presumption of their spurious birth as has been already shown to prevail against the Plaintiffs' title, as rested upon the Hindoo law.

The Plaintiffs having thus failed to establish a title to the property, their Lordships do not think it would be right to express a judicial opinion upon the validity of the sale to Meeta Ram. They will only observe that the principal ground on which that transaction was impeached by the Sudder Court entirely fails; Mr. Leith having fairly admitted that on the evidence the Ourungabad estate must be taken to have been released by the Court of Wards long before the date of the sale. It may also be doubted whether sufficient weight was given to the proceedings before the Collector in 1843 and 1845. The transaction is not impeached as a purchase obtained by undue influence for inadequate consideration, but as one by which the property was obtained, under colour of a fictitious sale, for no consideration at all. It seems improbable that so gross a fraud should have escaped detection on either of the two local investigations referred to.

Their Lordships' decision, however, is to be taken to proceed wholly on the Plaintiffs' failure to prove a title to the property; and the Order which they will [540] humbly recommend Her Majesty to make is, that the appeal be allowed; that the decree of the Sudder Court be reversed; that the decree of the Zillah Court, dismissing the Plaintiffs' suit, do stand; and that the costs of this appeal be paid by the Respondents.

NAWAB SIDHEE NUZUR ALLY KHAN,—*Appellant*: RAJAH OJODHYARAM KHAN,—*Respondent* * [Feb. 17, 19, and 26, 1866].

On appeal from the High Court of Judicature at Fort William, in Bengal.

A decree of foreclosure made in 1847 by the Supreme Court at Calcutta was irregularly obtained. The mortgagees sold the mortgaged estate to A., who, in execution of the decree of foreclosure, which he had also purchased, dispossessed the mortgagor. The Mortgagor in 1848 filed a Bill in the Supreme Court to set aside the foreclosure decree, and to redeem the mortgaged estate. A. was a party to that suit, but, *pendente lite*, having wilfully

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

suffered the estate to fall into arrears of Government revenue, entered into an agreement with M., whereby it was agreed that M. should bid for the estate when sold by auction at a sum less than its actual value. At the Government sale M. purchased the estate Benanee, and it was subsequently assigned to other alienees, Benanee. At the time of the sale to M., the suit for redemption by the mortgagor was pending, and the Court afterwards set aside the decree of foreclosure, and thereby made the estate in the possession of A., under his title from the mortgagees, subject to the equity of redemption of the mortgagor. A plaint in the nature of a supplemental suit was filed in 1860 by the Mortgagor in the Court of the District where the estate was situate, for possession consequent upon redemption, charging generally the whole transaction as between the Mortgagees, the purchaser, and subsequent alienees, to have been collusive and fraudulent. The Defendant denied collusion or fraud, and pleaded in bar: first, the Act No. I. of 1845, sec. 24, requiring the suit to be brought within one year of the Government sale; secondly, the general law of Limitations, Ben. Reg. III. of 1793, sec. 14, the suit not having been brought within twelve years from the time when the cause of action accrued. Held by the Judicial Committee:—

First, that the decree of the Supreme Court, setting aside the foreclosure, placed the possession of A. upon the footing of a Mortgagee in possession, and that from that time his title and his possession were in privity with the mortgage title, and no longer constituted such an adverse possession as could be pleaded in bar to the suit, under Ben. Reg. III. of 1793, sec. 14.

Second, that as there had been a fraudulent sale, under Act No. I. of 1845, by A., the Mortgagees' representative in possession, that Act did not apply so as to defeat the Mortgagor's equity of redemption, and that the sale was to be considered as a private sale, and impressed a trust on the estate which passed under it.

Held further, that as there was a fraudulent agreement between the Mortgagees' representative in possession and the purchaser at the Government sale, both were estopped as against the Mortgagor, from relying upon the illegality of their contract [10 Moo. Ind. App. 558].

The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos is equivalent to a decree establishing proprietary right in the Courts in the Mofussil in a similar suit.

By the procedure of the Courts in India, the Courts are bound to proceed according to the facts alleged in the plaint, and not to refuse to try issues of fact upon the merits, on the ground of the legal effect of the facts alleged in the plaint [10 Moo. Ind. App. 552, 553].

This was an appeal from two decrees of the High Court of Bengal, bearing date respectively the 1st of January, 1863, and the 12th of January, 1864, made [541] by Mr. Justice Bayley and Mr. Justice Campbell, in a divisional branch of that Court.

The last of these decrees, which was made on a review of the former, affirmed it, with some slight variation, which it is unnecessary to specify. The first decree reversed the decision of the Zillah Court of Midnapore made in a suit in which the present Respondent was the sole Plaintiff for redemption and possession brought by him as Mortgagor against the several Defendants, who were, firstly, the representatives of the original Mortgagees, Aushootosh Deb and Promothonauth Deb, respectively; secondly, the Receiver of the estate of Promothonauth Deb; thirdly, the Executors of one John Compton Abbott, [542] deceased; fourthly, one Alexander M'Arthur; fifthly, the Nawab Nazim; sixthly, the Executrix of a deceased Mahomedan servant of the Nawab Nazim; and lastly, the Appellant. The connection of these parties respectively with the redemption suit of the Plaintiff will more particularly appear hereafter.

The decision of the Judge of the Zillah Court dismissed the suit of the Plaintiff, the now Respondent, with costs, upon certain objections on points of law which, in the opinion of the Judge of that Court, interposed a bar to the further prose-

cution of the suit. The Plaintiff was not permitted to go into proof of his case on the merits. From this decision the Plaintiff appealed to the High Court; and that Court, differing in opinion from the Court below on the legal points upon which it had proceeded, reversed the decision and remanded the suit for trial. The present appeal was brought from that decision.

The suit in the Zillah Court was brought for redemption and possession consequent on redemption of certain valuable estates, particularly described in the plaint, constituting the Plaintiff's ancestral Zemindary. The title asserted was, that of a Mortgagor seeking to redeem, against Mortgagees represented by their representatives in estate, and against subsequent alienees of the Zemindary taking subsequently to the Mortgagees, and, as the Plaintiff contended, taking derivatively from them, and subject to his title to redeem.

On of the points was, whether the plaint sufficiently connected the present Appellant, whom it stated to be in possession of the property, with that mortgage title originally in the Mortgagees, the Debs, so as to show a *prima facie* case for including him in this redemption suit.

[543] The suit was stated by the Respondent to be supplemental, in its nature and object, to the one in the Supreme Court for redemption of the same property, brought by the same Plaintiff against the two Debs originally, and by amendment against John Compton Abbott. It was further urged by the Respondent, that as some of the Defendants against whom relief was asked in this suit, viz., the parties above enumerated after Alexander M'Arthur, were not subject to the jurisdiction of the Supreme Court, the Plaintiff had sued in the Zillah Court of Midnapore by reason of that defect alone.

The Plaintiff, as the eldest son, was the head of a Hindoo family of distinction. A litigation had arisen between him and other members of his family, and to provide funds he had become a borrower from the Debs. Their advances were secured by mortgages taken at different times, one of which was stated to have been a Bengalee mortgage; the nature of the others did not appear. The Mortgagor and the Mortgagees were Hindoos. The Mortgagees obtained on the 25th May, 1847, a decree of foreclosure in the Supreme Court against the Mortgagor. This decree was irregularly obtained, and was subsequently set aside. Whilst this decree for foreclosure was in force, viz., on the 10th of June, 1847, the Debs sold the Zemindary to John Compton Abbott. He, after his purchase, in execution of the decree of foreclosure, which he had also purchased, dispossessed the Plaintiff. It did not appear that the Mortgagees had been in possession. The contrary was to be inferred. The possession was first acquired whilst the foreclosure decree was in force, by Abbott as owner, and not in privity with the mortgage title.

[544] The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos, is equivalent to a decree establishing proprietary right, in the Company's Courts, on similar suits on the like instruments.

On the 2nd of February, 1848, the Plaintiff filed his Bill of Complaint on the equity side of the Supreme Court, to set aside this foreclosure decree, and to redeem the Zemindary. The Bill was originally filed against the Debs only; but on its appearing, by their answer, that they had sold to Abbott, he was made a party to the suit. After he was made a party, and on the 15th of April, 1848, he entered into an agreement with M'Arthur, which agreement was filed with the plaint, in the suit in appeal. This agreement, after reciting that Abbott was well seized of or otherwise entitled to the Zemindary, that the same was in arrear for revenue, and was advertised for sale of arrears of revenue, proceeded to stipulate as between these two persons, that M'Arthur should purchase the Zemindary for the sum of three lacs, in case the estate did not sell for more at the revenue sale; that he would pay to the Government, if he should be declared the purchaser, the sum for which the estate might be sold; and that he would, within a certain time after he should be declared the purchaser, and have obtained the usual certificate of title, pay to Abbott the difference between three lacs and the sum for which the estate should have been sold. At this time the suit of the Plaintiff in the Supreme Court for setting aside the foreclosure decree, and for redemption, was pending. The Court, by its decree, dated the 16th of November, 1852, set aside the decree of foreclosure, and thereby [545] made the Zemindary in the possession of Abbott, under his title from the

Debs, subject to the right of redemption by the Plaintiff. This right was expressly declared by the judgment in the following passage:—"We think, therefore, that there must be some decree for redemption against Abbott, who, if the objections arising upon the form of the record be answered (which objections the Court had overruled), can stand upon no better footing than the Debs, whose title he purchased."

The effect of this judgment was to place the possession of Abbott upon the footing of that of a Mortgagee in possession, and from that time his above declared title and his possession were in privity with the mortgage title, and no longer constituted an adverse possession. By the reversal of the irregular foreclosure decree, the Mortgagor was restored to his original and legal relation to the mortgage title.

After Abbott had been made a party to the redemption suit, Promothonauth Deb, one of the Defendants, died, and the suit was revived, and other parties were made Defendants by a Bill of revivor and supplement. The personal representatives of Promothonauth Deb were made parties, together with M'Arthur and one George Lindsay Young, and the Nawab Nazim and the representatives of Sauduck Ally Khan, out of the jurisdiction of the Court, were also named as Defendants. These parties were stated to have been introduced as Defendants in consequence of some discovery which had been obtained by the answers previously put in. The agreement, however, between Abbott and M'Arthur previously mentioned, of the 15th of April, 1848, was then unknown to the Plaintiff, and the new Defendants [546] were made parties upon allegations that at the sale for the arrears of revenue referred to in the agreement, M'Arthur had purchased Benamee for Abbott and the Debs, and that they had sold to Sauduck Ally Khan, who had purchased Benamee for the Nawab Nazim. It would swell the narrative of the facts of the case which preceded the present suit to an unnecessary length, if the precedent litigation were followed minutely through all its stages. It will suffice to state that Sauduck Ally Khan and the Nawab Nazim did not appear to the Bill, and that, upon M'Arthur's answer coming in, and it appearing by it that he had conveyed to Sauduck Ally Khan, Benamee, for the Nawab Nazim, he was dismissed from the suit, and a decree for redemption was made against the other parties who had appeared in the suit. This decree bore date the 16th of November, 1852.

That decree, together with the agreement of the 15th of April, 1848, and another document, were annexed by the Plaintiff to his plaint in the suit under appeal. The decree declared that the "Plaintiff, as between himself and the Defendant in those suits, was entitled to redeem the mortgaged premises in the Bill mentioned, notwithstanding the said final foreclosure Order." The title to redeem was declared as to all the mortgaged premises, and not simply as to those which could be recovered in that suit, though the decree bound those only who were parties to the suit at the time when it was pronounced, and at that time M'Arthur had ceased to be a party to the suit. In a subsequent part of the decree it was ordered "that the Master should inquire and state to the Court what portions of the mortgaged premises had been sold since the same came into the [547] possession of John Compton Abbott for arrears of Government revenue, or otherwise, and to whom the same respectively had been sold: and if he should find that any had been so sold, he was to take an account of all moneys which had been received by or come into the hands of the Defendant, John Compton Abbott, or any person or persons by his Order or for his use in respect of the purchase money arising from such sales, or of the surplus proceeds of such Government sales, if any, or which, but for his or their wilful default, might have been received." This portion of the decree furnished one of the grounds on which the Judge of the Zillah Court proceeded in his dismissal of the Plaintiff's suit.

The decree also directed certain inquiries in the Master's office; and in the due prosecution of those inquiries, M'Arthur was subsequently, on the 17th of August, 1854, examined before the Master. This examination first disclosed to the Plaintiff the existence and contents of the agreement between M'Arthur and Abbott of the 15th of April, 1848. M'Arthur's examination further disclosed that there was an agreement between him and Abbott, that the latter should suffer the revenue to fall into arrear, in order that the estate might be sold for arrears of revenue; and further, that he, Abbott, should not bid for the estate. M'Arthur explained that his reason for wishing Abbott not to bid was to prevent its going above the three lacs.

This discovery led to the institution of the present suit. The plaint in this suit was filed on the 30th of May, 1860. In the plaint it was stated that possession was given to M'Arthur under the certificate of title, consequent on the sale for arrears of revenue, on the 1st of June, 1848. The plaint was for posses-[548]-sion consequent upon redemption. The relation to this suit of the several parties who are above mentioned to have been made Defendants to it, sufficiently appears by what has been already stated, except that the Defendant, Sidhee Nuzur Ally Khan, the Appellant, was described as in possession, collusively with the Nawab Nazim. The plaintiff in his plaint alleged, with respect to all the parties whose interest arose upon and after the sale for arrears of revenue, that is from the Nawab Nazim inclusively down to and including the present Appellant, that they took fraudulently and collusively. It was objected for the Appellant, that the plaint did not connect him with that charge of fraud and collusion, but the following words in the plaint, viz.: "the collusive, fraudulent, and fictitious auction sale like a private sale" evidently referred to that sale which the Plaintiff treated as the fraudulently interposed bar to his redemption, viz., that at which M'Arthur was declared the purchaser; for in a subsequent part of the plaint that sale and agreement between M'Arthur and Abbott, of the 15th of April, 1848, were referred to, and the words, "and the subsequent transfers," following on the words "the collusive, fraudulent, and fictitious auction sale like a private sale," plainly meant, as the sense imports, all those transfers between the parties whom the Plaintiff made, in person or by representation, Defendants, by derivation of title from the Nawab Nazim, and the words, "being declared collusive," imported that the Plaintiff ought by his suit to have them so declared. The repetition of the words "private sale," and the more formal conclusion, viz., "As the said sale took place in the mode described above, so it cannot be viewed in the light of a sale for arrears [549] of revenue, but is to be treated as a private one," clearly marked on what legal ground, whether sound or unsound, the Plaintiff meant to found his title to redeem as against those of the Defendants whom his former decree in the Supreme Court did not reach. Their Lordships, therefore, were of opinion that there was sufficient allegation in the plaint to connect the Appellant with the charge of fraud and collusion.

The Plaintiff swore to the truth of his plaint. The answers of the Defendants were taken. That of the Appellant, in the second and third articles, relied on the pendency of the suit in the Supreme Court, and on the Plaintiff's right not being established there. In the fourth article he relied on the special law of Limitation, sec. 24, Act, No. I. of 1845, and insisted that as the suit was not brought within one year, the sale could not be set aside. In the sixth he relied on the general Law of Limitation, sec. 14, Ben. Reg. III. of 1793. In the seventh he denied collusion. The answer of the Nawab Nazim raised the same questions on the law of limitation of suits. He objected further, in his third article, that the Government should have been made a Defendant, the suit being to set aside the revenue sale. He denied the charges of fraud and collusion, and insisted that if the Plaintiff had been wronged he had his claim for damages against Abbott and others.

The Plaintiff's Vakeel was examined by the Court as to the meaning of the Plaint and the nature of the fraud charged. That examination did not carry the matter further than the plaint itself.

The first and second issues were on the law of Limitation, as above stated. The third related to the Government not being a party, the suit being to [550] reverse the sale. The fourth was on the effect of the pendency of the suit in the Supreme Court. The fifth related to the form of the plaint.

The Zillah Judge decided against the Plaintiff on the first, second, third, fourth, and fifth issues; the defect of form to which the fifth issue related, he declared to be amendable; but as he considered the suit to be barred on the other grounds of the limitation law, and the nature of the decree in the Supreme Court, he made no amendment.

The High Court, on appeal, decided that the suit was not brought to set aside the revenue sale; that it was not barred by effluxion of time; that the pendency of the suit in the Supreme Court, at the time of the institution of the above suit (afterwards in the High Court, which had been substituted for the Supreme Court), and the decree given in that suit, were no bar to the prosecution of the claim.

The Court further considered that M'Arthur and Abbott could not allege their own wrong, and that a trust might be fixed on the estate of M'Arthur in favour of the Appellant without disturbing the Government sale; and with this declaration of the law they remanded the cause for trial. The present appeal was brought from this decree (see case, *ante* [10 Moo. Ind. App.], p. 322, on the application to stay proceedings in the Court below, pending the appeal to England).

The Attorney-General (Sir R. Palmer, Q.C.), and Mr. A. K. Stephenson, for the Appellant, and Mr. Rolt, Q.C., and Mr. Leith, for the Respondent.

It was argued:—

First, upon the pleadings (1) that plaint con-[551]-tained no distinct charge of fraud against the Appellant or the other Defendants, and was, therefore, bad, under Ben. Reg. II. of 1805, sec. 3, and Act, No. VIII. of 1859, sec. 26; and (2) that he could not be called upon to defend his title and possession on any general allegation of fraud as contained in the plaint, so as to connect him with the Mortgagees, the Debs, and entitle the Respondent to make him a party to the redemption suit.

Second, as to the operation of the Regulations of Limitations as a bar to the suit, that (1), if the statement in the plaint was correct, that the Respondent was dispossessed from the 3rd of October to the 5th of November, 1847; and if that was to be taken as the date of the accruing of the cause of action, more than twelve years had elapsed, or (2) if the cause of action accrued on the 30th of May, 1848, when the certificate of sale was granted to the Defendant, M'Arthur, as the auction purchaser of the Respondent's property, twelve years had equally elapsed, and, therefore, that the suit was barred by Ben. Reg. III. of 1793, sec. 14, *Rajah Enayet Hossien v. Sayud Ahmud Reza* (7 Moore's Ind. App. Cases, 238) was referred to on this point.

Third, it was insisted that on the correct interpretation of the provisions of Act, No. I. of 1845, relating to sales by auction for arrears of revenue, that Act was intended, not only for protection of the revenue, but to give security to titles to purchasers at such auctions; and to protect the holder of a title obtained at such auction, or his assignee, from having their titles questioned in a Court of Justice, except under the circumstances mentioned in the 24th section, or, that, at all events, the Mortgagor was bound to make good [552] to the purchaser, a stranger, the purchase money. *Hope v. Liddell* (21 Beav. 183), *Rorke v. Errington* (7 H.L. Cases, 617), *Power v. Reeves* (10 H.L. Cases, 645), *North v. Ansell* (2 P. Will. 618), *The Bishop of Winchester v. Paine* (11 Ves. 194).

Fourth, that even if there was fraud on the Mortgagor committed by Abbott and M'Arthur, in procuring a sale by auction for arrears of revenue designedly incurred, and that the sale was a secret sale, the remedy was, under Act, No. I. of 1845, by a personal action for damages, and not for the relief sought by the plaint.

Judgment was reserved, and now delivered by

The Right Hon. Sir Edward V. Williams (March 17, 1866).—After stating the above facts, his Lordship proceeded as follows:—

Before entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in India, in disposing of the case, were bound to proceed, as the High Court appears to have proceeded, upon the facts alleged by the plaint, and upon the assumption of the truth of those facts. When a Plaintiff, on certain alleged facts, asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the Plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such [553] procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof, and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts, and their Lordships, therefore, abstain from expressing any opinion upon the points urged at the Bar, which do not arise out of the Plaintiff's pleadings and documentary proofs, or which, if they arise, are not necessary to the decision of this appeal. Observations were made by Mr. Leith upon

the omissions in, and nature of, the answers put in by the Defendants to the Respondent's plaint; but their Lordships, for the above reasons, do not think it right to refer to those observations. The answers can only be looked at for the purpose of ascertaining whether they raise the legal bars insisted on. Throughout the following observations their Lordships must be understood to proceed upon a hypothetical case of fraud, and to express no opinion on its truth or probability.

The first bar to the Plaintiff's claim set up by the Appellant was that of limitation of suit by effluxion of time. The first period of limitation insisted on by the Appellant was that under Act, No. I. of 1845, sec. 24. That objection necessarily supposed the suit to be brought to set aside the revenue sale; this remedy, however, the suit did not seek, but, relying on the agreement of the 15th of April, 1848, antecedent to the sale, the Plaintiff claimed a right, as it were, to confess and avoid that sale, by imposing a trust on the estate which passed under it. The question, therefore, as to this period of limitation is, whether the Plaintiff is well founded in claiming the right thus claimed by him, in effect whether the Plaintiff can treat the auction sale, as against those Defendants who rely on it, as a private sale. Before dealing with this point, however, it will be convenient to consider the other period of limitation on which the Appellant relies as a bar, the general law of limitation of twelve years. As to this, it is sufficient to observe that on the allegations in the plaint that bar cannot be set up: for the title and possession of the Defendants against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; and we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above referred), whether the Plaintiff can, in point of law, insist, notwithstanding the auction sale for arrears of revenue, that as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to Abbott is rested on that ground, and the case which the Plaintiff alleges by his plaint, and by the documentary proof appended to it, is one of fraud between Abbott and M'Arthur, to deprive him of his title to redeem the Zemindary, by means of a secret purchase of it between them for three lacs of Rupees, including a fraudulent devise of a sale by auction for arrears of revenue, such arrears to be designedly incurred. By that agreement Abbott would become directly interested that the estate should sell for a low price, since the proceeds would be subject to the Mortgagors' claim, and the lower the price obtained at the auction sale, the larger the share would be which Abbott [555] would take of the three lacs. Parties to a secret fraud intend it to be secret, and the price realized at the auction sale would alone be known. These facts and conclusions are directly taken and derived from the plaint, and the agreement of the 15th of April annexed to it, and from M'Arthur's examination before the Supreme Court, which are all parts of the Plaintiff's proofs.

If these facts cannot be displaced, the agreement was undoubtedly a gross fraud on the Mortgagor, committed by both the actors in it, viz., Abbott and M'Arthur. But it was argued that even if this case were true, the remedy under the Act I. of 1845 was for damages only. This argument was in conformity to the opinion of the Zillah Judge. But it is to be observed that this argument assumes the very question under discussion, which is, whether the Act extends to the present case. Mr. Justice Bayley thought that the Act was not designed to protect a fraudulent purchaser. He put his decision on the ground that a man is not allowed by law to take advantage of his own wrong; and he treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction sale.

No authority founded on the decisions of the late Company's Courts was referred to by the Judges of the High Court, and none such has been quoted before their Lordships on the argument of this appeal. The case is, however, not altogether new in India. The question was considered in the decision of the Supreme Court in the cause so often referred to, to which this suit is alleged to be supplemental. Mr. Justice Colvile, in that judgment, whilst he declares a Government sale for arrears of revenue to give a title against all the world, with certain excep-[556]-tions, engrafts on that general rule this exception, that a fraudulent purchase at such auction sale by a Mortgagee will not defeat the equity of redemption. The subject is treated in Mr. Arthur Macpherson's Book on Mortgages, at p. 91, who there quotes a prior

decision, *Kelsall v. Freeman*, of the Supreme Court to the same effect. The author, now a Judge of the High Court at Calcutta, expresses a similar opinion, and as his book is one well known and frequently consulted in India, the decision under review cannot be regarded as unsettling a previously settled state of the law, and as raising for the first time an exception to the general protection which this legislative title affords to purchasers. In support of this view we may refer to other authorities. In the celebrated opinion of C. J. De Grey in the House of Lords, in *The Duchess of Kingston's case* (Howell's State Trials, Vol. 20, p. 544), he says, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled." "Fraud," his Lordship proceeds to state, "is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all judicial acts, Ecclesiastical or Temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins v. Blanton* (2 Wils. 341) is an authority [557] to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fraudulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt purchased the article, the defrauded owner could then assert his title against such reacquisition. See Viner's Abr. tit. "Market Overt," A 1. In Bacon's Abr. tit. "Fraud," p. 768 (Gwillim and Dodd's edition), it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713, Cro. Eliz. 86." The same principle applies to Bills of Exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice Bayley to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the agreement to be proved, was this sale, as between Abbott and M'Arthur, really meant to be a sale under the Revenue laws for arrears of revenue, or was it a device—part of the machinery, as it were—to effect a fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by Abbott to M'Arthur, would have been redeemable by the Plaintiff. If the sale were intended to have been a real sale under the Re-[558]-venue laws, what would have been Abbott's interest? His estate would have been extinguished, and all that he would have been entitled to would have been a Mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three lacs; the parties contemplated a sale under that sum by the auction proceeding; and it may be well to repeat that it was Abbott's interest to cause, as far as he could cause it, that the auction price should be low, since, though the auction sale was public, his agreement was not known to the Mortgagor. What, then, if the sale were to be real, could be the consideration which M'Arthur was to receive for the excess of the three lacs over the auction price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the agreement in the case that has happened, which was a case contemplated by Abbott at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the Mortgagor, the object of their fraud, and a stranger to the agreement, the illegality of the agreement itself. The Plaintiff is entitled to say, this agreement is the real contract. Two cases decided by the House of Lords upon the effect of the Sale of Encumbered Estates Act for Ireland, *Rorke v. Errington* (7 H.L. Cases, 617), and *Power v. Reeves* (10 H.L. Cases, 645), were referred to by the Appellant's Counsel, in support of the Appellant's case, but it is sufficient to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent

purpose. They do [559] not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the argument, of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent, need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried, might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interests derived under a real auction sale. The opinion of their Lordships upon this point disposes of the first bar of limitation by effluxion of time under Act, No. I. of 1845.

The questions remaining for consideration are, whether the pendency of the suit in the Supreme Court, or the nature of the decree, or any acting under that decree, present a bar to the prosecution of the suit, which the decree under appeal has remanded for trial on the facts. The mere pendency of the suit cannot operate as a bar, since the suit in the Zillah Court was intended to be simply in furtherance of and supplemental to it. The nature of the decree requires more consideration. Had that decree been one which could have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a supplemental suit on the new matter discovered since the decree, the objection might have been tenable; but the law of the Court is otherwise. [560] Had the Nawab and the parties Defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the Zillah Court might have been prosecuted by a further suit, in the nature of a supplemental suit, properly constituted in the Supreme Court. The decree, as to the account and the inquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this suit. The Defendant in possession is charged in substance as assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead an impediment against a suit instituted to remove it. The direction to inquire as to the alienated lands, and the relief consequent on that inquiry, are introduced for the benefit of the Mortgagor, in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered, the Mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the decree, it is to be observed, that the mere prosecution of an inquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose [561] that, at the time of the decree, the estate was supposed to be irrecoverable, and that the Court, in directing the inquiries which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with property pledged. The case of *Hope v. Liddell* (21 Beav. 183), quoted by the Attorney-General, was not a case of fraud. The observations of Lord St Leonards, quoted by the Master of the Rolls, relate to a *bona fide* purchaser for value, and to the proper mode of working out his equity against that of a Plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope v. Liddell* differ widely from the alleged facts in the case under appeal: and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case of *Hope v. Liddell*, the original Testator, Dr. Spencer, devised the lands in dispute to one Thompson, a Trustee, on certain trusts. Thompson devised all his estates by general words, to his sister, Grace Thompson. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir-at-law of the Trustee. One of the *cestui que trusts* contracted to sell the estate to the Defendant, Liddell. The sale was perfectly *bona*

vide on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trusts* by the direction of the supposed Trustee, Grace Thompson. The purchaser was by the trust deed not required to see to the application of the purchase money. The Court said, that if Grace [562] Thompson had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the cause, the Court found that the children, the objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken the purchase money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction sale had been contrived under the agreement of the 15th of April 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three lacs, not simply the auction price. Nothing appears further on the alleged facts, except that the inquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground, therefore, for applying the decision of *Hope v. Liddell* as an authority to govern this case in the present state of the facts.

The same cause which has induced their Lordships to refrain, in the earlier part of this judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrong-doers, all liable to make satisfaction up to one, complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution, and remedies founded on [563] contract, or converted by the choice of the sufferer into claims *ex contractu*; but, for the reasons already given, this subject cannot now be pursued further. Their Lordships will humbly recommend to Her Majesty that this appeal be dismissed with costs.

[Approved *Byjnath Lall v. Ramoodeen Chowdry*, 1873-74, L.R. 1 Ind. App. 106.]

MUDHUN MOHUN DOSS, agent of the firm of DWARKA DOSS and MUDHOBUN DOSS,—*Appellant*; GOKUL DOSS,—*Respondent* * [Feb. 27 and March 1, 1866].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

In an action of tort, the Plaintiff is not precluded from recovering ordinary damages by reason of his failing to prove the special damages laid, unless the special damage is the gist of the action.

Though a Plaintiff after a wrongful distress may have received permission to use his own property, he is neither bound to accept the permission so accorded to him, nor if he does accept it, will he lose his right of action. In such case he is entitled, at least, to a judgment for nominal damages.

On appeal, the appellate Court was of opinion, that there was evidence from which the Court below ought to have awarded damages in respect of losses sustained by an illegal attachment. As the whole evidence was before the appellate Court, it was held that there was no necessity to remit the case to India for re-trial, and the Judicial Committee accordingly assessed the damages from the materials before them.

The Plaintiff claimed as damages a larger sum than the appellate Court awarded.

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor, —The Right Hon. Sir Lawrence Peel.

No costs were given on the appeal. Held, following the practice of the Courts in India, that as the Plaintiff recovered a less amount than he laid in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed.

The facts of the case are fully stated in the judgment.

The suit was brought for a wrongful distress, and [564] the question was, whether the Appellant was entitled to any, and what amount of damages for loss of or damage to certain indigo cakes and stumps in a Factory belonging to Dwarka Doss, for whom the Appellant acted as Agent, in consequence of the illegal execution of a warrant of attachment, issued by the Respondent, under a decree in a suit brought against third parties; which warrant was subsequently by an Order of the Zillah Court of Mirzapore, set aside, and the attachment withdrawn.

The suit was instituted in the Civil Court of Mirzapore, and the Sudder Ameen of that Court (Moulvi Khoorshyd Ali Khan), by his judgment, dismissed the suit, on the ground that the claim of the Appellant on account of the damage of the indigo plants and stumps was unfounded; that with respect to the indigo cakes, that though it was probable that some trifling loss was sustained owing to the warehouse being locked up, yet that the loss was occasioned by the Appellant resisting the attachment; and further, that eight maunds of indigo had not been attached. The Sudder Court at Agra (present, Messrs. E. W. Wylly and J. Lean) affirmed that judgment. Hence this appeal.

The appeal was argued by The Attorney-General (Sir R. Palmer, Q.C.) and Mr. Leith, for the Appellant; and Mr. Forsyth, Q.C., and Mr. Pontifex, for the Respondent.

For the Appellant it was insisted, that the attachment and seizure were illegal, and had been on that ground withdrawn by a Court of competent authority; that the amount, therefore, claimed as damages, or at [565] least some damages, ought to have been awarded by the Court, first, for the deterioration of the manufactured articles; second, for loss of profits by reason of locking up the warehouse; and third, for the loss of materials, independently of any proof of special damages thereby sustained, *Bayliss v. Fisher* (7 Bingh. 153), and that such rule is adopted by the Courts in India, *Manir Ud Din v. Jai Sankar Sandial* (5 Ben. Sud. Dew. Ad. Rep. 229), *Munneooddeen Darogah v. Hurree Pershad Mundul* (6 Ben. Sud. Dew. Ad. Rep. 39); *Mussumat Sidhisree Debea v. Wise* (7 Ben. Sud. Dew. Ad. Rep. 136).

On the other hand, the Respondent denied that any damages had been sustained by the Appellant by the attachment and seizure, or if there had been any, that it was confined to the eight maunds of indigo.

Their Lordships' judgment having been reserved, was now pronounced by

Sir James W. Colville (March 17, 1866).—This suit was brought to recover the damages alleged to have been sustained by the nominal Plaintiff's employer, Dwarka Doss, in consequence of an attachment made at the instance of the Respondent as the holder of a decree.

Dwarka Doss and the Respondent had conflicting claims upon an indigo Factory lying between the villages of Putteetah and Sirswabur, called in the record sometimes by the one and sometimes by the other name. This Factory, with three others, belonged to two persons, named Chunder Churun and Esserchund Neoghy.

At the beginning of the year 1856 the Neoghys were indebted to Mussumat Ooman Soondree, the [566] wife of Tara Pershun Bagjee, in the sum of Rs. 17,761, partly for moneys advanced by her, and partly for moneys advanced by Dwarka Doss on her husband's guarantee, for the purpose of carrying on the Factories; and those advances were secured by certain instruments of mortgage, dated the 20th of January, 1852, the 18th of April, 1853, and the 1st of January, 1856. These securities embraced the block of all the Factories, and their crops at least for the year 1856-7.

On the 1st of January, 1856, Mussumat Ooman Soondree, by an instrument called a deed of re-mortgage, assigned all her interest in the Factories, under the before-mentioned securities, to Dwarka Doss, in order to secure the sum of Rs. 9761, being the balance then due in respect of his former advances, together with the future

advances to be made by him for carrying on the Factories. And it was thereby provided that he should take the Factories under his control and management during the year 1263 Fuslee, or 1856-7; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the Factories; or, if he did so, how long he continued in possession. But on the 7th of July, 1859, he obtained a decree in the Civil Court of Benares against Mussamat Ooman Soondree and the Neoghys, for the sum of Rs. 23,672, as then due to him upon his mortgage; and on the 15th of the same month he and the Neoghys filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that Dwarka Doss was to suspend the execution which he had taken out under the decree for Rs. 23,672; [567] was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one Balgobind Doss Seith, whom the Neoghys had nominated as their Agent for that purpose. The rights of Dwarka Doss, under the execution for any balance that might remain to him after the sale of indigo, were expressly reserved to him both against the Factories and against all the Defendants to his suit. This arrangement was carried out by placing a servant or Agent of Dwarka Doss in charge of the Factories.

On the day on which this instrument of compromise was filed in the Benares Court (the 15th of July, 1859), the Respondent obtained a decree in the Court of the Principal Sudder Ameen of Mirzapoor against the Neoghys for the sum of Rs. 764, alleged to be due to him upon a mortgage of the Putteetah Factory, dated in Phagon Budee 1st Sumbur 1911 (being some time in A.D. 1855). Dwarka Doss intervened in this suit as an objector, insisting that the Factory had been attached for money due to him, and that the claim was fraudulent. But the Principal Sudder Ameen held that the objection could not be tried in that suit, and was no bar to the making of the usual decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary decree against the Defendants (the Neoghys) and the mortgaged property for the sum found due.

The Respondent took out execution on this decree for Rs. 878 10a. He first obtained an Order for the attachment of both the Putteetah Factory and another Factory known as the Soorma Factory, with the appurtenances of each, and of fifty maunds of indigo alleged [568] to be at the former, and of thirty maunds of indigo, or thereabouts, alleged to be at the latter Factory.

But on the 17th of September he made a further application to the Court, wherein he expressed his desire to abandon the execution against the Soorma Factory, and submitted a more detailed list of the property at the Putteetah Factory. He limited also the quantity of indigo to be attached at his suit to eight maunds. The Order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of September, the Ameen, accompanied by two servants of the Respondent, who went to point out the property, proceeded to attach the Factory and other property detailed in the application of the 17th of September. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight maunds of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse, which was under lock and key; and the servants of Dwarka Doss refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two Peons in charge of the property attached.

The Appellant, having heard of the applications for the attachment, had on the 22nd of September applied to stay it. But as the Dusserah holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

[569] In October the Ameen, armed with a Magistrate's Order, and accompanied by a Blacksmith, went to the storehouse for the purpose of breaking Dwarka Doss's lock, but appears to have desisted on the threat of the people in charge of the

Factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of November, these circumstances having been brought to the notice of the Principal Sudder Ameen, he passed an Order to the effect that if the Defendants to the Respondent's suit, or their Agents, should fail to appear in Court within a week, and substantiate their objection to the opening of their lock, it should be broken, and the eight maunds of indigo be forcibly attached.

On the same day he required the Respondent, as the decree-holder, to answer the Appellant's objection of the 22nd of September within four days.

On the 25th of November, the Ameen having in the meantime received no Order to suspend the attachment of the indigo, proceeded, under the Order of the 5th of November, to remove the lock, attached eight maunds of indigo pointed out to him by a servant of the Respondent; and made two inventories, one of the eight maunds of indigo attached, the other of the property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under the lock of the Ameen, or in charge of his Peons, until the 8th of December, when the eight maunds were finally weighed and removed to a separate place, and all the other contents of the storehouse were left at the disposal of Dwarka Doss's people.

[570] On the 12th of December the Ameen submitted to the Court a further report of his proceedings, and stated that he had, according to the Respondent's request, attached no property belonging to the Factory except the eight maunds of indigo. The objection filed by the Appellant on the 22nd of September appears to have been thenceforward confined to these; and it was finally disposed of by an Order of the 3rd of January, 1860, which, on the ground of the preferential claim of Dwarka Doss, directed the release of the eight maunds of indigo from attachment.

Some difficulty in carrying out this Order was occasioned by the refusal of Dwarka Doss's Agents to receive back this indigo, except on terms with which the Ameen would not comply; but ultimately the eight maunds, and whatever else had been under attachment, were, by Order of the Court, left at the disposal of those who were in possession and charge of the Factory; and the Peons were withdrawn from the premises on the 28th of February, 1860.

Upon this statement of admitted facts, it appears clear to their Lordships that Dwarka Doss had, by reason of the attachment of the 23rd of September, 1859, and subsequent proceedings, sustained an injury, for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the Respondent, under his decree, was to sell the Factory pledged to him, subject to the rights of Dwarka Doss under his prior mortgage. He had no right to invade or disturb the possession of the prior Mortgagee by placing Peons upon the property, in order to attach the Factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The [571] attachment must have been constructive. But under the new Code of procedure, which had come into force on the 1st of July, 1859, the proper course was to issue and publish a written notice under the 235th and 239th sections of Act, No. VIII. of 1859. For the actual seizure of the eight maunds of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the Respondent's mortgage. And that it was not part of the general property in the possession of the Neoghys, that Dwarka Doss had or claimed a lien upon it, the Respondent had had ample notice in his own suit, wherein Dwarka Doss had intervened as objector, and by the proceedings of the 12th of May, 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the Ameen of his lock upon the door, subjected Dwarka Doss to the additional wrong of having the contents of the godown, to which ultra the eight maunds of indigo the Respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought in the first instance to have given the Ameen access to the godown, and delivered the eight maunds of indigo, or that they ought to have acted according to the directions of the Ameen concerning the use of the two locks, supposing those directions to have been given to the Peons. The case cited by Mr.

Leith from Bingham's Reports, shows that in this country a Plaintiff, in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it [572] be said that in this case there is no evidence of the malicious character which the Plaintiff imputes to the trespass.

The plaint in this case was filed on the 25th of February, 1860. The damages claimed were all in the nature of special damages, and consisted of three items, viz., Rs. 14,000, "on account of loss of 70 maunds of indigo at Rs. 200 per maund"; Rs. 5545, on account of indigo which it was alleged Dwarka Doss was prevented from manufacturing from indigo plants; and Rs. 2250, on account of indigo which it was alleged he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the Plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether, if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo, was disposed of by the Courts below in a different way. The Principal Sudder Ameen held that, though the Plaintiff did probably, as stated by the European indigo Factors, sustain some trifling loss, owing to the storehouse [573] having remained locked up, this was due "to the refusal of his Agent to unlock the door on the Ameen's application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the Plaintiff." And the Sudder Court considered that no good proof had been furnished that the Plaintiff's Agents were ever prevented from having free access to the godown, for the purpose of turning and drying the indigo cakes; but that, on the other hand, the Plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his Agents, contumaciously obstruct the Ameen employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the Plaintiff ought not to have kept his lock on the godown; partly on the evidence given by the Ameen of his instructions to the Peons to open his lock, whenever the Plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the Plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the Dusserah vacation, he could neither follow up that objection nor make any further objection to [574] the acts of the Ameen until the holidays were over. Again, the case of *Bayliss v. Fisher* (7 Bingh., 153), already referred to, shows that even if the instructions said to have been given by the Ameen to the Peons were really given (as to which there is a conflict of evidence), the Plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the Plaintiff's suit has been improperly dismissed with costs, and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in India to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the Respondent that the suit was properly dismissed, inasmuch as the Appellant was by the form of his plaint limited to the three heads of special damage therein laid, and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion, that there was evidence in the action on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that if this had not been the case, the Plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but, substantially, it seeks damages generally, as consequent on the wrongful attachment of the Factory. The principle ordinarily applied to actions of tort is, that the Plaintiff is never precluded from [575] recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus in an action of slander for words actionable *per se*, when the Plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the gist of the action is not the special damage, but the unlawful attachment; and the Plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause for the assessment of damages in India, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for a Judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton v. Ennis* (4 Moore's P.C. Cases, 323), and to assess the damages themselves. It must be confessed that the Appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged, and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at Rs. 500.

Their Lordships have felt some difficulty about the costs of the Courts below, and those of this appeal. The costs of an action in India, particularly the [576] stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a Plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the Appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rs. 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the Appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the Appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that the decrees both of the Sudder Court and of the Civil Court of Mirzapore be reversed; that the Appellant be declared entitled to recover damages to the amount of Rs. 500; that the cause be sent back to the Sudder Court, with directions to enter judgment for the Plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases, and that each party do bear his own costs of this appeal.

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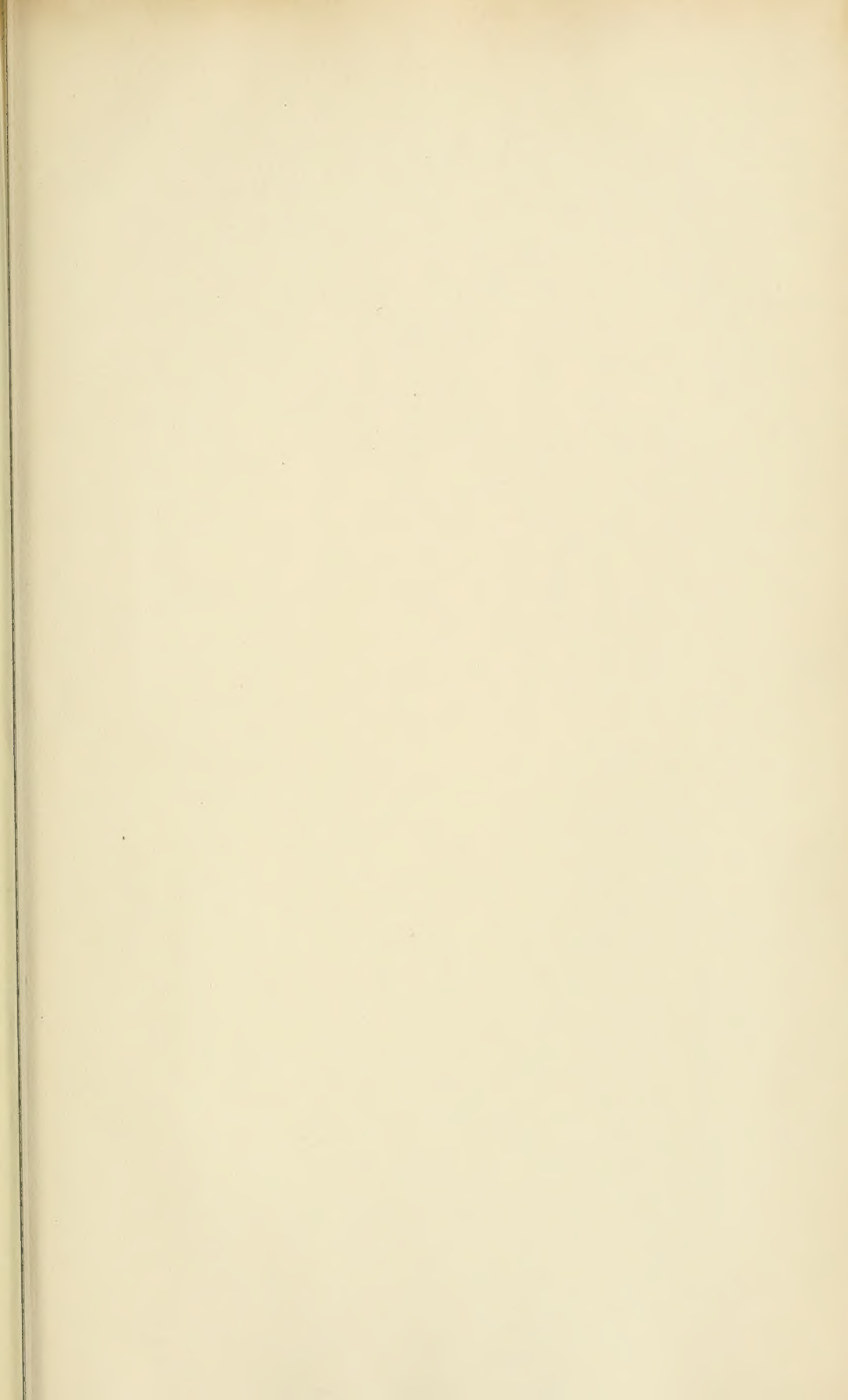
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